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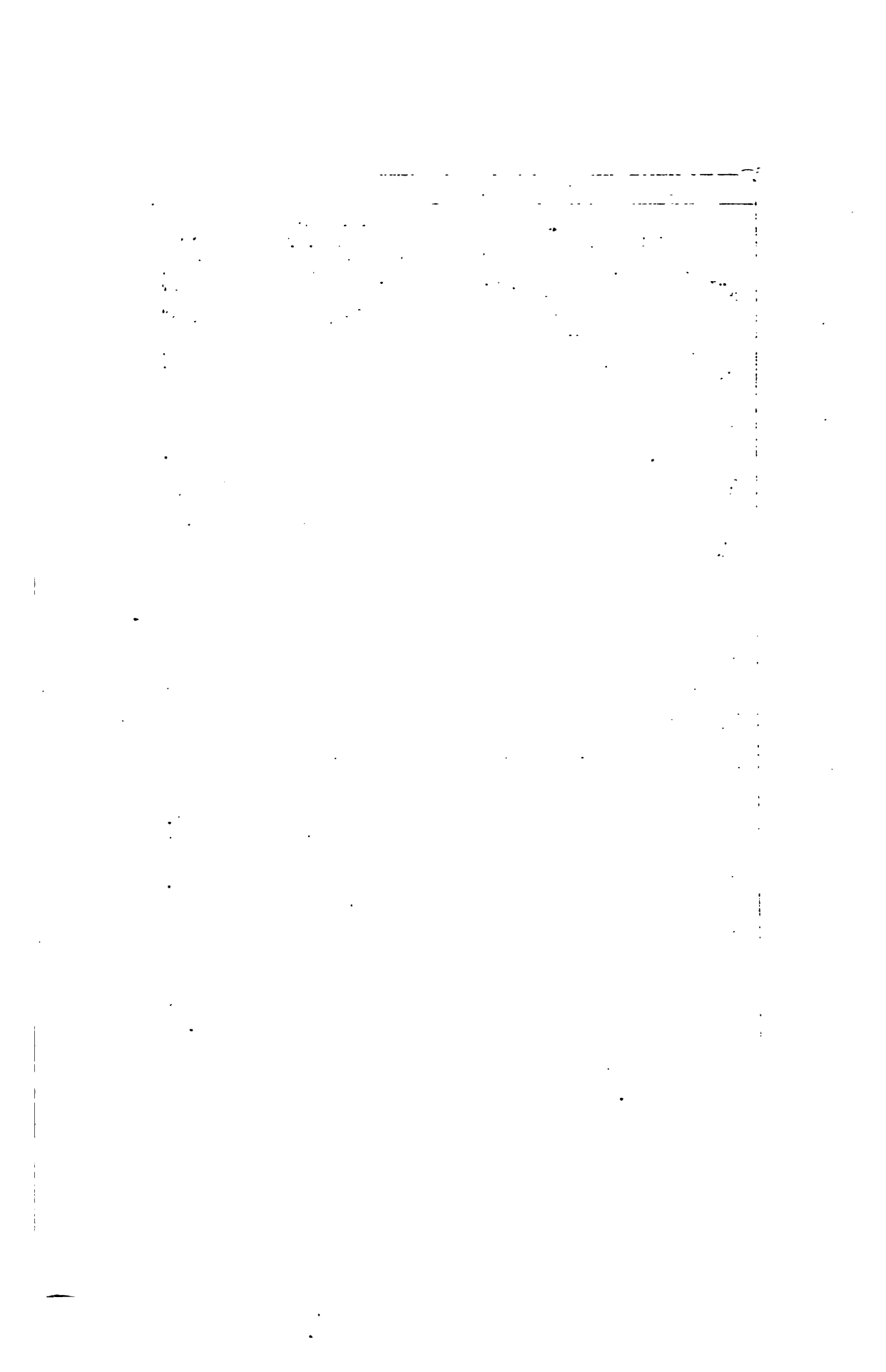
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PREFACE TO THE SIXTH EDITION.

THE last Edition of this work was published in the year 1877. Since that time a very considerable change has taken place both in the laws themselves and in their administration. The number of new statutes and new cases which have been incorporated in the text must have materially increased the bulk of the volumes, had not an endeavour been made to expunge superfluous matter and to abbreviate occasionally where such a course seemed possible. In furtherance of this end, also, a large number of decisions on repealed statutes which seemed still to be of value to the practitioner have been relegated to appendices in Volumes II. and III., and printed in smaller type. In the result, it will be found that the present work is only a few pages longer than the last Edition.

The merits of the work as a whole are so well-known and appreciated that any radical attempt to alter its design and scope would only produce disappointment; yet the Editors have found that some slight change in the disposition of the subjects of the various Books had become advisable in consequence of an alteration in the position of the chapters in the last Edition for which no sufficient reason seemed to be assigned.

The chapters are now arranged according to their subject-matter, and not according to the exigencies of symmetry in the size of each volume; although, as a matter of fact, it will be found that the three volumes of the

present Edition are not inconveniently different in size. The chapters relating to Perjury, Conspiracy, Libel, and Bigamy have therefore been placed among the offences affecting the Government, the Public Peace, and the Public Rights, and will be found in Vol. I.; while the law relating to offences against the Person will be found together with the chapter on Threats and Threatening Letters in Vol. III. The law relating to offences against Property will be found as before in Vol. II.

The Penal Servitude Act of 1891, which provides that, in every case where a sentence of Penal Servitude may be imposed, a term of not less than three years, or in lieu thereof, imprisonment for not more than two years, may be given, and which repeals sec. 2 of 27 & 28 Vict. c. 47, has enabled the Legislature to repeal so much of the provisions in the Consolidation Acts as relate to these limitations. This repeal has been effected by Statute Law Revision Acts passed, for the most part, while this work has been in the press. The words in the Consolidation Acts have therefore been retained in the text with a note calling attention to the fact that they have been repealed, but that the punishment remains in effect the same. The power to inflict the punishment of Solitary Confinement has also been repealed by the same Acts, that mode of punishment having for some years passed fallen into disuse.

A new departure has been taken in the introduction of notes affording (it is hoped) some guide to the sources from which information may be obtained as to the state of the law in America upon the particular subject treated of in the text. It cannot be doubted that, while the American lawyers and legislators have in the main derived their laws from English sources, yet English lawyers have constantly found that they may learn much from the expansion or moderation (as well as from the interpretation) of the law by the American Courts and Legislatures. The difficulties, however, which an Englishman has to encounter in dealing

with American statutes or cases are very great. The mere mass and number of them in the different States is enormous, and the conflict of statutes and decisions is very perplexing. Moreover, in dealing with the judgments of the American Courts, an English lawyer is under a great disadvantage, because it is almost impossible for him to ascertain and weigh accurately the authority of the decision which he is reading. The Editors have therefore thought that it would be impossible in a work like 'Russell on Crimes' to do more than indicate the sources from which interesting light may be obtained by the inquirer upon any topic under discussion; and to this end they have availed themselves in a large degree of Mr. Bishop's most ingenious and lucid book on the Criminal Law.¹ The American reader of 'Russell on Crimes' will doubtless not be content to rely upon the notes without referring to Mr. Bishop's book; and the Editors wish to warn their English readers that where that book is cited they should refer to the passage in Mr. Bishop's book, as well as to the cases in the note, before adopting any decided opinion upon the American Law. The high estimate which has been formed in America (as well as in England) of Mr. Bishop's book has made it an authority upon American Law; but resort must be had to the book itself before the reader of the notes to this Edition of 'Russell on Crimes' can be assured that he has apprehended Mr. Bishop's view upon the point in question. All that the Editors have attempted to do is to indicate some of the sources of information from which an American or English reader may derive assistance upon points where the English and American Law appear to be in any degree at variance. To have attempted more than this — to have incorporated the American Law with the text, or even to have discussed the American Law in detail in the notes — would have produced nothing but confusion, unless the

¹ *New Commentaries on the Criminal Law*, by J. P. Bishop, 8th Ed. : Chicago, T. H. Flood & Co., 1892.

whole scheme and character of the work were to be entirely altered.

The statutes and cases have been brought up to the end of the year 1895; and every care has been taken to make the Indexes as convenient and exhaustive as possible.

H. S.

A. P. P. K.

TEMPLE, *January*, 1896.

PREFACE TO THE FOURTH EDITION.

EDITED BY C. S. GREAVES, ESQ., Q.C.

IN preparing this Edition for the press, the system adopted by the Author has been followed as nearly as could be; and the statutes and cases have been introduced in a manner similar to that which the Author himself pursued in preparing the Second Edition; but although the Editor has used his best endeavours to keep the work within as narrow limits as were consistent with giving a full and correct statement of the statutes and cases, which the twenty-two years since the last Edition have produced, yet the number of those statutes and cases is so great as to render a third volume unavoidable. This the Editor extremely regrets, but he felt himself bound to adhere to the plan of the Author, and the more especially as that plan affords to the reader the fullest and most useful view of the enactments and decisions.

Great difficulty has been experienced in many instances in giving a faithful representation of the decisions. The marginal notes have been so rarely found to be warranted by the cases themselves, that they have generally been omitted; and the Editor has endeavoured, so far as the reports enabled him, to give such a statement of the facts, the decision, and the grounds of it wherever they appeared, as to enable the reader to understand what the decision, *as reported*, really is; but many cases are so loosely and inaccurately reported that this has been no easy task, and very probably the Editor has not always succeeded in his attempt. Nor can it be doubted that, in some instances, the reports themselves neither fully nor faithfully represent the facts or the decision.

.

As the work is confined to indictable offences, and does not treat of criminal procedure, the statutes relating to the summary conviction of offenders have not been introduced.

At the beginning of the First Volume a chapter has been introduced which contains certain general provisions applicable to many of the offences treated of in the work. This has been done in order to facilitate the reference to these provisions wherever it may be necessary.

The cases marked 'MSS. C. S. G.' are from the Editor's collection.

The Editor would be doing great injustice to himself if he were not to express the very deep sense he entertains of the great honour which was done to him by the very flattering manner in which his labours in the last Edition were appreciated, not only in Her Majesty's dominions, but also in the United States. He has endeavoured in this Edition to shew the sense he feels of the honour done to him by rendering it as complete and perfect as he was able.

It has been also a matter of great gratification that during the time this work has been passing through the press, the Editor has been able to lend his humble assistance towards the completion of the new Code of Criminal Law for the State of New York; for which he has received as flattering an acknowledgment as possible from the Commissioners, who have shewn so much ability in the preparation of that great work. The Editor cannot but express the hope that such mutual interchanges of goodwill in the endeavour to ameliorate the law, may exert a strong tendency to promote those feelings of amity which ought ever to subsist between the kindred nations of Great Britain and the United States; nor can he help thinking that they who, amid the din of arms, where generally the laws stand in abeyance, have sedulously devoted themselves to the amendment of their laws, must be deeply impressed with the truth contained in the beautiful lines, —

'Pax optima rerum

Quas homini novisse datum est; pax una triumphis
Innumeris potior.'

EXTRACT FROM THE
PREFACE TO THE SECOND EDITION.

'THE crime of high treason was not originally included in the plan of this work, on account of the great additional space which the proper discussion of that important subject would have occupied; and because prosecutions for that crime—happily not frequent—are always so conducted as to give sufficient time to consult the highest authorities.' These reasons, which were given in the Preface to the First Edition, have still been allowed to operate; and the crime of high treason is not, therefore, one of the subjects discussed in the following pages. The law upon all other indictable offences will, it is hoped, be there found in an appropriate arrangement; and a chapter or book upon the Law of Evidence in criminal prosecutions, which formed a part of the original plan of the work, has now been supplied by the kind assistance of my friend, Mr. E. Vaughan Williams, whose professional attainments abundantly assure the value of the addition.

WM. OLDNALL RUSSELL.

LINCOLN'S INN, *May*, 1826.

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A TREATISE

ON

CRIMES AND MISDEMEANORS.

BOOK THE FIRST.

OF PERSONS CAPABLE OF COMMITTING CRIMES, OF PRINCIPALS
AND ACCESSORIES, AND OF INDICTABLE OFFENCES.

CHAPTER THE FIRST.

GENERAL PROVISIONS.

Rules for Interpretation of Criminal Statutes.

By the Interpretation Act, 1889 (52 & 53 Vict. c. 63), which repeals 7 & 8 Geo. 4, c. 28, s. 14, 'In this Act and in every Act passed after the year one thousand eight hundred and fifty, whether before or after the commencement of this Act, unless the contrary intention appears, words importing the masculine gender shall include females, and words in the singular shall include the plural, and words in the plural shall include the singular. The same rules shall be observed in the construction of every enactment relating to an offence punishable on indictment or on summary conviction when the enactment is contained in an Act passed in or before the year one thousand eight hundred and fifty.' By sec. 2, 'In the construction of every enactment relating to an offence punishable on indictment or on summary conviction, whether contained in an Act passed before or after the commencement of this Act, the expression "person" shall, unless the contrary intention appears, include a body corporate.

'Where, under any Act, whether passed before or after the commencement of this Act, any forfeiture or penalty is payable to a party aggrieved, it shall be payable to a body corporate in every case where that body is the party aggrieved.'

The expression 'month' means calendar month. (a)

(a) 52 & 53 Vict. c. 63, s. 3. A person sentenced to a month's imprisonment is entitled to be discharged on the day in the next month immediately preceding the day

corresponding to the one on which his sentence takes effect. *Migotti v. Colvill*, 4 C. P. D. 233.

Vexatious Indictments Acts. (b)

No indictment for certain offences to be preferred without previous authorization. — By 22 & 23 Vict. c. 17, s. 1, no bill of indictment for any of the offences following; viz., —

Perjury, (c)
 Subornation of perjury,
 Conspiracy,
 Obtaining money or other property by false pretences,
 Keeping a gambling house,
 Keeping a disorderly house, and
 Any indecent assault,

shall be presented to or found by any grand jury, unless the prosecutor or other person presenting such indictment has been bound by recognizance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed to or detained in custody, or has been bound by recognizance to appear to answer to an indictment to be preferred against him for such offence, or unless such indictment for such offence, if charged to have been committed in England, be preferred by the direction or with the consent, in writing, of a judge of one of the superior courts of law at Westminster, or of Her Majesty's attorney-general or solicitor-general for England, or unless such indictment for such offence, if charged to have been committed in Ireland, be preferred by the direction or with the consent, in writing, of a judge of one of the superior courts of law in Dublin, or of Her Majesty's attorney-general or solicitor-general for Ireland, or (in the case of an indictment for perjury) by the direction of any court, judge, or public functionary authorized by an Act of the session holden in the fourteenth and fifteenth years of Her Majesty, chapter one hundred, to direct a prosecution for perjury.

Where prosecutor desires to prefer an indictment, justice to take his recognizance to prosecute. — Sec. 2 provides that where any charge or complaint shall be made before any one or more of Her Majesty's justices of the peace that any person has committed any of the offences aforesaid within the jurisdiction of such justice, and such justice shall refuse to commit (d) or to bail the person charged with such offence to be tried for the same, then in case the prosecutor shall desire to prefer an indictment respecting the said offence, it shall be lawful for the said justice, and he is hereby required to take the recognizance of such prosecutor to prosecute the said charge or complaint, and to transmit such recognizance, information, and depositions, if any, to the court in which such indictment ought to be preferred, in

(b) See *R. v. Heane*, 33 L. J. M. C. 115.

(c) By 32 & 33 Vict. c. 62 (The Debtors Act, 1869), s. 18, every misdemeanor under the second part of this Act shall be deemed to be an offence within and subject to the above Act, 22 & 23 Vict. c. 17; and when any person is charged with any such offence before any justice, he must take into consideration any evidence adduced before him tending to shew that the act charged was

not committed with a guilty intent. See vol. ii. By 44 & 45 Vict. c. 60, s. 6, 'Every libel or alleged libel and every offence under this Act shall be deemed to be an offence within and subject to the provisions' of 22 & 23 Vict. c. 17.

(d) Or dismisses the case for want of evidence. *R. v. Lord Mayor of London*, 16 Cox, C. C. 77.

the same manner as such justice would have done in case he had committed the person charged to be tried for such offence.^(e)

It seems that this section is confined to offences committed in England. ^(f)

It is a matter for the discretion of the judge to whom the application is made, under sec. 1, to decide what materials ought to be before him, and it is not necessary to summon the party accused, or to bring him before the judge in any way. Therefore, where some time after the trial of an action, upon which perjury was alleged to have been committed, the accusing party appeared before the judge who tried the action, and, producing a newspaper report of the trial, applied for a consent to a prosecution being commenced, and the judge wrote upon the newspaper report, 'I consent to a prosecution in this case,' it was held, that he had rightly exercised the jurisdiction given by the above section.^(g)

Where an indictment contained two counts, — one for obtaining a shawl by false pretences on the 26th September; and another for obtaining another shawl by false pretences on the 29th of the same month, — and the prisoner had been only committed for obtaining the shawl on the 26th of September, it was held, on a case reserved, that the second count ought to have been quashed.^(h)

Where three defendants were charged with a conspiracy before a justice and bound by recognizances to appear at the next session of the Central Criminal Court, to plead to such indictment as might be found against them in respect of such conspiracy; and the prosecutors and witnesses were in like manner bound to prosecute and give evidence; and at the next session of the court an indictment for conspiracy was found against them; but the trial was postponed, and the recognizances respited, till the next sessions; and before that session the solicitor-general directed an indictment to be preferred against another person for the same conspiracy; and at that session another indictment was found against all four defendants; it was held that the three first mentioned defendants were rightly tried, and convicted on the second indictment, as the 22 & 23 Vict. c. 17, had been sufficiently complied with, the second indictment being for the same conspiracy, with which those defendants had been charged before the magistrate; and that the indictment need not allege that they had been bound over by the magistrate.⁽ⁱ⁾

By 30 & 31 Vict. c. 35, after reciting that it is found that delay and inconvenience are frequently caused by the provisions contained in the first section of the Act 22 & 23 Vict. c. 17, in cases not within the mischief for remedy whereof the same Act was made and passed, and it is expedient to restrict the operation thereof, — it is enacted: —

Sec. 1. That the said provisions of the said first section of the said Act shall not extend or be applicable to prevent the present-

(e) The 22 & 23 Vict. c. 17, s. 1, does not apply to the offence of 'attempting to obtain money or other property by false pretences.' *R. v. Burton*, 13 Cox, C. C. 71. The Act applies to prosecutions under the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), see sec. 17, and to prosecutions under the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28 s. 13).

(f) *R. v. Heane*, 33 L. J. M. C. 115.

(g) *R. v. Bray*, 32 L. J. M. C. 11; 3 B. & S. 255.

(h) *R. v. Fuidge*, 9 Cox, C. C. 430; 33 L. J. M. C. 74; L. & C. 390; *R. v. Davies*, *ibid.* note.

(i) *R. v. Knowlden*, 9 Cox, C. C. 433; 33 L. J. M. C. 219.

ment to or finding by a grand jury of any bill of indictment containing a count or counts for any of the offences mentioned in the said Act, if such count or counts be such as may now be lawfully joined with the rest of such bill of indictment, and if the same count or counts be founded (in the opinion of the court in or before which the same bill of indictment be preferred) (*j*) upon the facts or evidence disclosed (*k*) in any examinations or depositions taken before a justice of the peace, in the presence of the person accused or proposed to be accused by such bill of indictment, and transmitted or delivered to such court in due course of law; and nothing in the said Act shall extend or be applicable to prevent the presentment to or finding by a grand jury of any bill of indictment, if such bill be presented to the grand jury with the consent of the court in or before which the same may be preferred.

Costs of unreasonable prosecution. — By sec. 2, whenever any bill of indictment shall be preferred to any grand jury under the provisions of the Act 22 & 23 Vict. c. 17, against any person who has not been committed to or detained in custody, or bound by recognizance to answer such indictment, and the person accused thereby shall be acquitted thereon, it shall be lawful for the court before which such indictment shall be tried, in its discretion to direct and order that the prosecutor or other person by or at whose instance such indictment shall have been preferred shall pay unto the accused person the just and reasonable costs, charges, and expenses of such accused person and his witnesses (if any) caused or occasioned by or consequent upon the preferring of such bill of indictment, to be taxed by the proper officer of the court; (*l*) and upon nonpayment of such costs, charges, and expenses within one calendar month after the date of such direction and order, it shall be lawful for any of the superior courts of law at Westminster, or any judge thereof, or for the justices and judges of the Central Criminal Court (if the bill of indictment has been preferred in that court), to issue against the person on whom such order is made such and the like writ or writs, process or processes, as may now be lawfully issued by any of the said superior courts for enforcing judgments thereof.

Offences committed near Boundaries of Counties and during a Journey or Voyage.

Some general provisions have been made with respect to offences committed near the boundaries of counties, and during a journey through several counties.

Offences committed on boundaries of counties may be tried in either county. — The 7 Geo. 4, c. 64, s. 12, for the more effectual prosecution of offences committed near the boundaries of counties, or partly in one county and partly in another, enacts, 'that where any felony

(*j*) The leave of the court is not a mere formality. See *R. v. Bradlaugh*, 15 Cox, C. C. 156.

(*k*) See *R. v. Bell*, 12 Cox, C. C. 37.

(*l*) As to the costs to be paid by the director of public prosecutions in such a case, see 42 & 43 Vict. c. 22, s. 7, and *Stubbs v. Director of Public Prosecutions*, 24 Q. B. D. 577.

or misdemeanor shall be committed on the boundary or boundaries of two or more counties, or within the distance of five hundred yards of any such boundary or boundaries, or shall be begun in one county and completed in another, every such felony or misdemeanor may be dealt with, inquired of, tried, determined, and punished in any of the said counties, in the same manner as if it had been actually and wholly committed therein.' (*m*)

Upon an indictment for manslaughter, found by the grand jury of the county of the city of Worcester, alleging the blow which caused the death to have been struck in the county of Worcester, it was objected that the words, 'begun in one county and completed in another,' did not apply to such a case, as the word 'completed' necessarily imported some active and continuing agency in the person committing the offence in the county where the felony was completed; but it was held that the above clause did extend to this case. (*n*)

On the trial of an indictment for robbery at the Kent assizes, the offence appeared to have been committed in Surrey, at a distance of about 320 yards from the boundary of Kent and Surrey, as measured by a direct line, but at considerably more than 500 yards by the nearest road; and Parke, B., held that the distance must be measured in the direct line, and therefore the prisoner was triable in Kent. (*o*)

The above section only applies to trials in counties, and does not extend to limited jurisdictions within counties. Where, therefore, a larceny was committed in the city of London, but within five hundred yards of the boundary of the county of Surrey and of the borough of Southwark, it was held that the offence could not be tried by the quarter sessions for the borough of Southwark. (*p*)

Alterations by the Boundary Act. — It may be observed, that an important alteration has been made in the boundaries of some counties by the Boundary Act, 2 & 3 Will. 4, c. 64, and the Municipal Reform Act, 5 & 6 Will. 4, c. 76 (*q*); so that if a felony be now committed in that part of the county of a town, which has been added to it by the Boundary Act and the Municipal Reform Act, it is triable within the county of the town. The prisoner was indicted for wounding with intent to do grievous bodily harm; the offence was committed at a place which was added to the borough of Haverfordwest, which is a county of itself, by the Boundary Act, and declared by the Municipal Reform Act to be part of the borough, the place in question not having been within the borough before the passing of those Acts; and it was held that the prisoner might be tried by a jury of the borough. (*r*)

Offences committed during a journey or voyage. — By the 7 Geo. 4, c. 64, s. 13, 'where any felony or misdemeanor shall be committed on any

(*m*) See *R. v. Ruck*, MSS. C. S. G., *post*, vol. II. *R. v. Mitchell*, 2 Q. B. 636, *post*, vol. II.

(*n*) *R. v. Jones*, Worcester Lent Ass. 1830, Jervis, K. C., MSS. C. S. G. Mr. Bellamy, the clerk of arraigns, had consulted Littledale, J., about this case, and he thought that the indictment ought to be preferred in the city, and it had been so preferred accordingly. C. S. G.

(*o*) *R. v. Wood*, 5 Jurist, 225; see *Moufflet v. Cole*, 42 L. J. Ex. 8.

(*p*) *R. v. Welsh*, R. & M. C. C. R. 175.

(*q*) Repealed by 45 & 46 Vict. c. 50; but see sec. 228. See also 31 & 32 Vict. c. 46; 48 & 49 Vict. c. 23.

(*r*) *R. v. Piller*, 7 C. & P. 337, Coleridge, J. In *R. v. the Justices of Gloucestershire*, 4 Ad. & E. 689, it was held that the effect of these statutes was to transfer the parts entirely and for all purposes out of the one county into the other.

person, or on or in respect of any property in or upon any coach, waggon, cart, or other carriage whatever employed in any journey, or shall be committed on any person, or on or in respect of any property on board any vessel whatever employed on any voyage or journey upon any navigable river, canal, or inland navigation, such felony or misdemeanor may be dealt with, inquired of, tried, determined, and punished in any county, through any part whereof such coach, waggon, cart, carriage, or vessel shall have passed, in the course of the journey or voyage during which such felony or misdemeanor shall have been committed, in the same manner as if it had been actually committed in such county; and in all cases where the side, centre, or other part of any highway, or the side, bank, centre, or other part of any such river, canal, or navigation shall constitute the boundary of any two counties, such felony or misdemeanor may be dealt with, inquired of, tried, determined, and punished in either of the said counties, through or adjoining to, or by the boundary of any part whereof such coach, waggon, cart, carriage, or vessel shall have passed, in the course of the journey or voyage, during which such felony or misdemeanor shall have been committed, in the same manner as if it had been actually committed in such county.'

This enactment is general, and applies to any carriage whatever employed in any journey. The prisoners were sent from the Great Northern station in Middlesex with a waggon to Woolwich in Kent, and the usual quantity of oats for the horses was given out to them, and put into the waggon in nosebags. The prisoners sold the oats at Woolwich, and it was held that they were triable in Middlesex; for the object of the statute was to enable a prosecutor, whose property is stolen from any carriage on a journey, to prosecute in any county through any part of which the carriage shall have passed in the course of that journey; because, in many cases, it might be quite impossible to ascertain at what part of the journey the offence was actually committed. (s)

The prisoner had acted as guard of a coach from Penrith in Cumberland to Kendal in Westmoreland, and was entrusted with a banker's parcel, containing bank-notes and two sovereigns; on changing horses at some distance from Penrith, he carried the parcel to a privy, and while there took out of it the sovereigns: and Parke, B., held that as the act of stealing was not 'in or upon the coach,' the case was not within the statute, and the felony having been committed in Westmoreland, the indictment ought to be preferred in that county. (t)

Larceny on a journey by railway. — On an indictment for larceny tried at Stafford, it appeared that the prosecutor travelled from Shrewsbury to Shifnal, and afterwards missed a dressing-case which had been in the carriage with him. The prisoner had accompanied the train, and had stated that he had found the dressing-case in a first-class carriage at Codsall, one of the stations on the line, and that he carried it to the engine and gave it to another prisoner, who opened it with a wrench, and on their return to Shrewsbury gave him some of the articles as his share. The part of the line from Shrewsbury to Shifnal is in Shropshire, but Codsall station is in Staffordshire. It was urged

(s) *R. v. Sharpe*, Dears. C. C. 415.

(t) *Sharpe's case*, 2 Lew. 233.

that the prisoner's statement showed that the larceny was not committed during the journey; for the removal of the dressing-case from the carriage did not constitute the larceny, according to the prisoner's statement, but it consisted in the distribution of the property at Shrewsbury; but Williams, J., held that there was evidence from which the jury might find that the dressing-case was abstracted during the journey; as the evidence, with the exception of the prisoner's statement, was consistent with either supposition. (u)

Detached parts of counties locally included in another county.—The 2 & 3 Vict. c. 82, s. 1, enacts, that 'it shall be lawful for any justice or justices of the peace acting for any county, to act as a justice or justices of the peace in all things whatsoever concerning or in any wise relating to any detached part of any other county, which is surrounded in whole or in part by the county for which such justice or justices acts or act; and that all acts of such justice or justices of the peace, and of any constable or other officer in obedience thereto, shall be as good, and all offenders in such detached part may be committed for trial, tried, convicted and sentenced, and judgment and execution may be had upon them in like manner as if such detached parts were to all intents and purposes part of the county for which such justice or justices acts or act; and all constables and other officers of such detached parts are hereby required to obey the warrants, orders, and acts of such justice or justices, and to perform their several duties in respect thereof, under the pains and penalties to which any constable or other officer may be liable for a neglect of duty.'

By sec. 3, 'The word "county" shall be taken to mean and include county, riding, division, and parts of a county having a separate commission of the peace.' (v)

It has been held that the grand jury of the county, which wholly surrounds a detached part of another county, may find an indictment for an offence committed in such detached part, and that the prisoner may be tried by a jury of such surrounding county. The prisoner was indicted in Dorsetshire for larceny in a parish of Somersetshire, entirely detached from it, and surrounded by Dorsetshire. He had been committed by a Dorsetshire magistrate to the gaol of that county. The indictment laid the offence to have been committed in the parish of Holwell, the same being a detached part of the county of Somerset, surrounded in the whole by the county of Dorset; the venue in the margin was Dorset. The indictment did not state that the prisoner was in Dorsetshire, or that he was committed by a Dorsetshire magistrate. Fitzherbert objected, first, that this should have appeared on the face of the indictment; and, secondly, that the grand jury of Dorsetshire could not find the bill, as there were no words in the statute giving any power to find the bill; and he referred to the 60 Geo. 3, c. 4, the 7 Geo. 4, c. 64, s. 12, and the 4 & 5 Wm. 4, c. 36, to shew that the word 'try' in a statute did not include the finding of a bill by the grand jury; but Rolfe, B., overruled the objection, saying that it would strike the Act out of the statute-book. (w)

(u) *R. v. Pierce*, 6 Cox, C. C. 117. See *R. v. French*, 8 Cox, C. C. 252, *post*, Book IV., ch. 13, as to an assault committed in a journey by railway.

(v) Sec. 2 provides for payment of expenses of prosecutions by the county to which the detached part belongs.

(w) *R. v. Loader*, *ex relatione* Mr. Fitz-

Outlying districts may be transferred from one county to another. — By the 3 & 4 Vict. c. 88, s. 2, justices of any two or more neighbouring counties in their sessions may from time to time agree that such parts of their several counties as to them shall seem fit, shall, for the purposes of the 2 & 3 Vict. c. 93, be considered as forming part of any other of the said counties; and 'whenever any such district shall be so transferred, for the purposes of the said Act, from one county to another, with the consent of the justices of both the last-mentioned counties, such district shall be considered, for the purposes of the said Act, as if it were detached from the county to which it belongs, and wholly surrounded by the county to which it is so transferred, and all the provisions contained herein, or in the said Act, or in the 2 & 3 Vict. c. 82, shall be taken to apply to such transferred districts.'

By the 21 & 22 Vict. c. 78, s. 2, the preceding provision 'shall extend to any part of a county which did not form part of such county before the passing of the 7 & 8 Vict. c. 61, in like manner as if the same had always formed part of such county.'

Detached parts of counties to be part of the county by which they are surrounded. — By the 7 & 8 Vict. c. 61, s. 1, 'every part of any county in England or Wales, which is detached from the main body of such county, shall be considered, for all purposes, as forming part of that county of which it is considered a part, for the purposes of the election of members to serve in Parliament as knights of the shire,' under the 2 & 3 Wm. 4, c. 64; provided that nothing herein contained shall alter the county, riding, or division to which any such detached part shall be deemed to belong for the purpose of holding inquests under the 6 & 7 Vict. c. 12. (x)

In certain counties of cities and towns prisoners may be committed, and tried at assizes held for adjoining county. — By the 14 & 15 Vict. c. 55, s. 19, 'whenever any justice or justices of the peace, or coroner, acting for any county of a city or county of a town corporate within which Her Majesty has not been pleased for five years next before the passing of this Act to direct a commission of Oyer and Terminer and gaol delivery to be executed, and until Her Majesty shall be pleased to direct a commission of Oyer and Terminer and gaol delivery to be executed within the same, shall commit for safe custody to the gaol or house of correction of such county of a city or town

herbert. S. C. Talf. Dick. Q. S. 188, where a *quære* is added to the decision by the learned editor; but with all respect to his opinion, it should seem that the decision is perfectly correct, as the object of the Act clearly was to render prisoners triable in the surrounding county, and to prevent expense, and the effect of a contrary decision would be that they never could be so tried in such county, except where an indictment had been found by a grand jury of the county to which the detached part belonged; which would greatly add both to the inconvenience and expense, which it was intended to avoid. It is difficult also to see how it can be correctly said that a person is 'tried in like manner as if such detached part

were to all intents and purposes part of the county for which such justice acts,' unless he is tried on an indictment found by the grand jury of such county; for that is the mode in which he would be tried if the part were to all intents part of that county. C. S. G.

(x) Sec. 2. The detached parts are to belong to the adjoining hundred, &c., or to form a separate hundred. Sec. 4. 'No judicial proceeding or deed or other instrument in writing shall be invalidated by reason of any error in stating the name of the county to which such detached portion originally belonged, instead of the county to which it will belong under this Act, or the converse.'

any person charged with any offence committed within the limits of such county of a city or town not triable at the court of quarter sessions of the said county of a city or county of a town, the commitment shall specify that such person is committed pursuant to this Act, and the recognizances to appear to prosecute and give evidence taken by such justice, justices, or coroner shall in all such cases be conditioned for appearance, prosecution, and giving evidence at the court of Oyer and Terminer and gaol delivery for the next adjoining county; (y) and the justice, justices, or coroner by whom persons charged as aforesaid may be committed, shall deliver or cause to be delivered to the proper officer of the court the several examinations, informations, evidence, recognizances, and inquisitions relative to such persons at the time and in the manner that would be required in case such persons had been committed to the gaol of such adjoining county by a justice or justices, or coroner, having authority so to commit, and the same proceedings shall and may be had thereupon, at the sessions of Oyer and Terminer or general gaol delivery for such adjoining county as in the case of persons charged with offences of the like nature committed within such county.'

The venue in the margin of an indictment was 'county of Norfolk, being the next adjoining county to the borough of Yarmouth;' the offence was committed in the parish of Gorleston, in Suffolk. The whole of that parish is within the jurisdiction of the borough of Great Yarmouth, and the prisoner had been committed by the borough magistrates to the house of correction at Great Yarmouth. It was objected that the prisoner could not be tried in Norfolk. Pollock, C. B.: 'The words of the statute are, that in such a case as this the prisoner shall be tried "in the next adjoining county." Here the next adjoining county was either Norfolk or Suffolk. The place in the borough where the offence was committed has nothing to do with it. This would very likely have been a good trial in Suffolk, but I think that it is also a good trial in Norfolk.' (z)

Trial of Offences committed on the Sea.

Offences to be tried in the places limited by commission. — The 28 Hen. 8, c. 15, s. 1, enacts that all treasons, felonies, robberies, murders, and confederacies, committed in or upon the sea, or in any haven, river, creek, or place, where the admiral has, or pretends to have, power, authority, or jurisdiction, shall be inquired, tried, &c., in such shires and places as shall be limited by the King's commission, as if any such offences had been committed upon the land. (a)

(y) Here follow some words repealed by the Statute Law Revision Act, 1875. As to the counties to which certain boroughs are to be deemed adjoining, see 45 & 46 Vict. c. 50, Sched. 6. As to preferring indictments in

adjoining counties, see 38 George III. c. 52, s. 2.

(z) *R. v. Gallant*, 1 F. & F. 517.¹

(a) The 28 Hen. 8, c. 15, s. 2, introduces 'manslaughters,' and uses the words

AMERICAN NOTE.

¹ It seems that in many States in America it has been held that a man may be tried in one State, where he has carried the

goods, when the taking has been in another State. *Bishop*, i. s. 141.

Concurrent jurisdiction of the common law and Admiralty.—In a case at the Admiralty session of a murder committed in a part of Milford Haven, where it was about three miles across, about seven or eight miles from the mouth of the river, or open sea, and about sixteen miles below any bridges over the river, a question was made whether the place where the murder was committed was to be considered as within the limits to which commissions granted under the 28 Hen. 8, c. 15, by law extend. Upon reference to the judges, they were unanimously of opinion that the trial was properly had. And it is said that during the discussion of the point the construction of this statute by Lord Hale (*b*) was much preferred to the doctrine of Lord Coke; (*c*) and that most, if not all, of the judges, seemed to think that the common law has a concurrent jurisdiction with the Admiralty in this haven, and in all other havens, creeks, and rivers in this realm. (*d*) It appeared to them that the 28 Hen. 8 applied to all great waters frequented by ships; that in such waters the admiral, in the time of Hen. 8, pretended jurisdiction; that by havens, &c., havens in England were meant to be included, though they are all within the body of some county; and that the mischief from the witnesses being seafaring men was likely to apply to all places frequented by ships. (*e*)

If a robbery be committed in creeks, harbours, ports, &c., in foreign countries, the Court of Admiralty indisputably has jurisdiction of it, and such offence is, consequently, piracy. (*f*)

High and low water-mark.¹—It is clear that upon the open sea-

'havens,' &c., without the qualification in the first section, where the admiral has jurisdiction. One of the mischiefs recited in the first section is, that the witnesses being commonly mariners and shipmen, depart without long tarrying or protraction of time. The statute is almost in terms with 27 Hen. 8, c. 4, except that it adds 'treasons' to the offences. See *R. v. Snape*, 2 East, P. C. 807; *R. v. Bayley*, R. & R. 1; *R. v. Amarow*, R. & R. 286. As to the admiral's jurisdiction, see 2 Hale, 12.

(*b*) 2 Hale, 16, 17.

(*c*) 3 Inst. 111. 4 Inst. 134.

(*d*) Bruce's case, 2 Leach, 1093. Russ. & Ry. 243. This was a case of *murder*. The stat. 15 Rich. 2, c. 3, gives the admiral jurisdiction to inquire of the death of a man, and of a mayhem done in great ships hovering in the main stream of great rivers, beneath the bridges of the same rivers nigh to the sea, and in none other places of the same rivers; which jurisdiction is only concurrent with, and not in exclusion of, the common law. 1 East, P. C. 368. It is most probable that pointz in the 15 Rich. 2, c. 3, means points and not bridges. In 'A description of the River Thames' (Longman,

1752), it is said that the Lord Mayor of London used to summon a jury four times a year 'to make inquisition after all offences committed on the Thames and Medway up the river as far as Staines Bridge, and down the river as far as the *points* of it next the sea,' and that 'the jurisdiction of the City of London in the river of Thames from Staines Bridge westward unto the *points* of the river next to the sea eastward, appeareth to belong to the City.' All this appears to be taken from old charters. In 1347 it appears that persons setting kiddels ultra Genland (Yantlett) versus mare were fined. P. 94, 95, 96. In later times Yendall or Yenlet seems from old charters to be the limit. P. 139. All this seems to show that pointz means points, not bridges.

(*e*) MS. Bayley, J.

(*f*) *R. v. Jemot*, Old Bailey, 28th Feb. 1812. MS. Jerv. Arch. 366, edit. 15. The newspaper note (Times, Feb. 29, 1812), calls the offence larceny. It took place from a British ship in a natural harbour at Cuba, and was tried at an Admiralty sessions at the Old Bailey. The prisoner was sentenced to death. *R. v. Carr*, 10 Q. B. D. 76, at p. 83.

AMERICAN NOTE.

¹ Nations hold possession of the ocean as far as a cannon ball will reach from the shore, which is estimated to be a marine league, or about three and a half miles.

It is suggested that the distance should, in reason, be greater, since the great improvements in gunnery. Bishop, i. s. 104.

shore the common law and the Admiralty have alternate jurisdiction between high and low water-mark; (g) but it is sometimes a matter of difficulty to fix the line of demarcation between the county and the high sea in harbours, or below the bridges in great rivers. The question is often more a matter of fact than of law, and determinable by local evidence; but some general rules upon the point are collected by Mr. East. He says that 'in general it is said that such parts of the rivers, arms, or creeks, are deemed to be within the bodies of counties *where persons can see from one side to the other*. Lord Hale, in his treatise *De jure maris*, says that the arm or branch of the sea which lies within the *fauces terræ*, where a man may *reasonably discern* between shore and shore, is, or at least may be, within the body of a county. Hawkins, however, considers the line more accurately confined, by other authorities, to such parts of the sea where a man, standing on the one side of the land, *may see what is done on the other*; and the reason assigned by Lord Coke in the Admiralty case (h) in support of the county coroner's jurisdiction, where a man is killed in such places, *because that the county may well know it*, seems rather to support the more limited construction. But at least, where there is any doubt, the jurisdiction of the common law ought to be preferred.' (i)

A bay within headlands may be within the Admiralty jurisdiction. — Where a murder was committed in Roundstone Bay, and it appeared that the place in question was within the county of Galway, and that the headlands bounding the bay were so situated that a man could see from the one to the other, and that the place in question would fall within a straight line drawn from the one headland to the other, and that in that part of the bay there were fifteen fathoms water, and that a ship of 120 tons could sail there; but there was no evidence of its having been frequented by shipping, or of any Admiralty process having ever been executed within it; it was held by the judges in Ireland that the murderer was rightly tried under an Admiralty commission. (j)

Penarth Roads case. — But upon an indictment for maliciously wounding in the county of Glamorgan, it appeared that the prisoners were Americans, and they and the person wounded were part of the crew of the American ship 'Gleaner,' which sailed from the docks of Cardiff to an anchorage in Penarth Roads, and the offence was committed shortly before she arrived at that anchorage, when the ship was three quarters of a mile from land, in a place never left dry by the tide; but she was within a quarter of a mile of the land which is left dry by the tide. The shore of the county of Glamorgan extends many miles up and down the Bristol Channel from the place where the offence was committed. The spot in question was in the Bristol Channel, between the Glamorganshire and Somersetshire coasts, and was about ten miles from the opposite coast of Somersetshire. Two islands, called the Flat and Steep Holmes, are outside the anchorage-ground, and farther from the shore than it is, but not lower down the

(g) 3 Inst. 113. 2 Hale, 17; and see 2 Hawk, c. 9, s. 14, as to the jurisdiction of the coroner in offences on the seashore. Anonymous, 1 Lewin, 242.

(h) 13 Co. 52.

(i) 2 East, P. C. c. 17, s. 10, p. 803, 804.

(j) R. v. Mannion, 2 Cox, C. C. 158.

Channel, being abreast of the anchorage-ground. When the offence was committed the ship was inside, and about two miles from, the Flat Holmes, and four or five miles from the Steep Holmes, and was within the Lavernock Point in Penarth Roads, but outside Penarth Head. Penarth Head and Lavernock Point form a bay. At Penarth Head persons can see from one to the other, and could see what a vessel was doing from one to the other, but could not see the people from one to the other. From where the ship was persons could see people at Lavernock, and see what they were doing if they took particular notice of them, and they could see the coast of Somersetshire on a clear day. The mouth of the Severn is at King's Road, higher up the Channel. The Holmes are part of the parish of St. Mary's, Cardiff, and taxes have been collected from the occupiers of Flat Holmes for St. Mary's parish. By an order of the Commissioners of Her Majesty's Treasury, the port of Cardiff has been fixed so as to include the spot in question. It was objected that the prisoners could not be tried in the county of Glamorgan, as there was no proof that the offence was committed in that county; but it was held that the offence was committed in that county. Cockburn, C. J.: 'The question is, whether the part of the sea on which the vessel was at the time when the offence was committed forms part of the body of the county of Glamorgan; and we are of opinion that it does. The sea in question is part of the Bristol Channel, both shores of which form part of England and Wales, of the county of Somerset on one side, and the county of Glamorgan on the other. We are of opinion that, looking at the local situation of this sea, it must be taken to belong to the counties respectively by the shores of which it is bounded; and the fact of the Holmes, between which and the shore of the county of Glamorgan the place in question is situated, having always been treated as part of the parish of Cardiff, and as part of the county of Glamorgan, is a strong illustration of the principle on which we proceed, namely, that the whole of this inland sea between the counties of Somerset and Glamorgan is to be considered as within the counties, by the shores of which its several parts are respectively bounded. We are, therefore, of opinion that the place in question is within the body of the county of Glamorgan.' (k)

Stealing at sea and bringing on shore. — Formerly the question, whether the fact was committed on the sea or within the body of a county, was of importance; for if it turned out that the goods were taken anywhere within the body of a county, the commissioners under the statute of Hen. 8 had no jurisdiction to inquire of it; and if it appeared that the goods were taken at sea, and afterwards brought on shore, the offender could not be indicted as for a larceny in that county into which they were carried, because the original felony was not a taking of which the common law takes cognizance. (l) And the 39 Geo. 3, c. 37, *infra*, relates only to offences committed on the high seas, and out of the body of any county. (m)

(k) *R. v. Cunningham*, Bell, C. C. 72.

(l) 2 East, P. C. c. 17, s. 12, p. 805.
3 Inst. 113. *R. v. Prowes*, 1 M. C. C. R.
349. *R. v. Madge*, 9 C. & P. 29.

(m) But as this Act and the 24 & 25
Vict. c. 96, s. 115, make a larceny on the

sea of the same nature as if it had been committed on land, and triable by jury, it should seem that the ground of the former decisions fails and therefore they ought to be considered as no longer binding.

Where a prisoner was indicted for stealing three chests of tea out of the 'Aurora,' of London, on the high seas, and it was proved that the larceny was committed while the vessel lay off Wampa, in a river, twenty or thirty miles from the sea, but there was no evidence as to the tide flowing, or otherwise, at the place where the vessel lay, it was held, from the circumstance that the tea was stolen on board the vessel, which had crossed the ocean, that there was sufficient evidence that the larceny was committed on the high seas. (n)

The 39 Geo. 3, c. 37, s. 1, provides, 'that all and every offence and offences, which, after the passing of this Act, shall be committed upon the high seas out of the body of any county of this realm, shall be, and they are hereby declared to be offences of the same nature respectively, and to be subject to the same punishments respectively, as if they had been committed upon the shore, and shall be inquired of, heard, tried, and determined and adjudged in the same manner as treasons, felonies, murders, and confederacies are directed to be by the same Act' (28 Hen. 8, c. 15, *ante*, p. 9).

The 46 Geo. 3, c. 54, enacts, that all treasons, piracies, felonies, robberies, murders, conspiracies, and other offences of what nature or kind soever, committed upon the sea, or in any haven, river, creek, or place, where the admiral or admirals have power, authority, or jurisdiction, may be inquired of, tried, &c., according to the common course of the laws of this realm used for offences committed upon the land within this realm, and not otherwise, in any of His Majesty's islands, plantations, colonies, dominions, forts, or factories, under and by virtue of the King's commission or commissions, under the Great Seal of Great Britain, to be directed to any such four or more discreet persons as the Lord Chancellor of Great Britain, Lord Keeper, or Commissioner for the custody of the Great Seal of Great Britain for the time being, shall from time to time think fit to appoint; and that the said commissioners so to be appointed, or any three of them, shall have such and the like powers and authorities for the trial of all such murders, &c., within any such island, &c., as any commissioners appointed according to the directions of the 28 Hen. 8, by any law or laws then in force would have for the trial of the said offences within this realm. And it further enacts, that all persons convicted of any of the said offences so to be tried, &c., shall be liable to the same pains, &c., as, by any laws then in force, persons convicted of the same would be liable to, in case the same were tried, &c., within this realm, by virtue of any commission according to the directions of the 28 Hen. 8. (o)

By the Territorial Waters Jurisdiction Act, 1878 (41 & 42 Vict. c. 73), s. 2, 'An offence committed by a person, whether he is or is not a subject of Her Majesty on the open sea within the territorial waters of Her Majesty's dominions, is an offence within the jurisdiction of the Admiral, although it may have been committed on board or by means of a foreign ship, and the person who committed such offence may be arrested, tried, and punished accordingly.'

By sec. 3, 'Proceedings for the trial & punishment of a person who

(n) *R. v. Allen*, R. & M. C. C. R. 494; (o) See 12 & 13 Vict. c. 96, *post*.
S. C., 7 C. & P. 664.

is not a subject of Her Majesty and who is charged with any such offence as is declared by this Act to be within the jurisdiction of the Admiral, shall not be instituted in any court of the United Kingdom, except with the consent of one of Her Majesty's principal Secretaries of State, and on his certificate that the institution of such proceedings is in his opinion expedient, and shall not be instituted in any of the dominions of Her Majesty out of the United Kingdom, except with the leave of the governor of the part of the dominions in which such proceedings are proposed to be instituted, and on his certificate that it is expedient that such proceedings should be instituted.'

By sec. 4, 'On the trial of any person who is not a subject of Her Majesty for an offence declared by this Act to be within the jurisdiction of the Admiral, it shall not be necessary to aver in any indictment or information on such trial that such consent or certificate of the Secretary of State or Governor, as is required by this Act, has been given; and the fact of the same having been given shall be presumed, unless disputed by the defendant at the trial; and the production of a document purporting to be signed by one of Her Majesty's principal Secretaries of State as respects the United Kingdom, and by the Governor as respects any other part of Her Majesty's dominions, and witnessing such consent and certificate, shall be sufficient evidence, for all the purposes of this Act, of the consent and certificate required by this Act.

'Proceedings before a justice of the peace or other magistrate, previous to the committal of an offender for trial, or to the determination of the justice or magistrate that the offender is to be put upon his trial, shall not be deemed proceedings for the trial of the offence committed by such offender, for the purposes of the said consent and certificate under this Act.'

By sec. 5, 'Nothing in this Act contained shall be construed to be in derogation of any rightful jurisdiction of Her Majesty, her heirs or successors, under the law of nations, or to affect or prejudice any jurisdiction conferred by Act of Parliament or now by law existing in relation to foreign ships, or in relation to persons on board such ships.'

By sec. 6, 'This Act shall not prejudice or affect the trial in manner heretofore in use of any act of piracy as defined by the law of nations, or affect or prejudice any law relating thereto; and where any act of piracy as defined by the law of nations is also any such offence as is declared by this Act to be within the jurisdiction of the Admiral, such offence may be tried in pursuance of this Act, or in pursuance of any other Act of Parliament, law, or custom relating thereto.'

By sec. 7, 'The jurisdiction of the Admiral' is defined as including 'the jurisdiction of the Admiralty of England and Ireland, or either of such jurisdictions as used in any Act of Parliament; and for the purpose of arresting any person charged with an offence declared by this Act to be within the jurisdiction of the Admiral, the territorial waters adjacent to the United Kingdom or any other part of Her Majesty's dominions shall be deemed to be within the jurisdiction of any judge, magistrate, or officer having power within such United Kingdom or other part of Her Majesty's dominions to issue warrants for arresting or to arrest persons charged with offences committed within the jurisdiction of such judge, magistrate, or officer.'

'The territorial waters of Her Majesty's dominions' is defined as meaning in reference to the sea 'such part of the sea adjacent to the coast of the United Kingdom or the coast of some other part of Her Majesty's dominions as is deemed by international law to be within the territorial sovereignty of Her Majesty; and for the purpose of any offence declared by this Act to be within the jurisdiction of the Admiral, any part of the open sea within one marine league of the coast measured from low water-mark, shall be deemed to be open sea within the territorial waters of Her Majesty's dominions.'

'Offence' is defined as 'an act, neglect, or default of such a description as would, if committed within the body of a county in England, be punishable on indictment according to the law of England for the time being in force.'

'Ship' includes every description of boat or other floating craft, and 'foreign ship' means every ship which is not a British ship. (r)

By 7 & 8 Geo. 4, c. 28, s. 12, 'All offences prosecuted in the High Court of Admiralty of England shall upon every first and subsequent conviction be subject to the same punishments, whether of death or otherwise, as if such offences had been committed upon the land.'

Each of the Consolidation Acts 24 & 25 Vict. c. 96, s. 115; c. 97, s. 72; c. 98, s. 50; c. 99, s. 36; and c. 100, s. 68, contains the following clause:—

'All indictable offences mentioned in this Act which shall be committed within the jurisdiction of the Admiralty of England or Ireland shall be deemed to be offences of the same nature and liable to the same punishments as if they had been committed upon the land in England or Ireland, and may be dealt with, inquired of, tried, and determined in any county or place in England or Ireland in which the offender shall be apprehended or be in custody, in the same manner in all respects as if they had been actually committed in that county or place; and in any indictment for any such offence, or for being an accessory to such an offence, the venue in the margin shall be the same as if the offence had been committed in such county or place, and the offence shall be averred to have been committed "on the high seas:" Provided that nothing herein contained shall alter or affect any of the laws relating to the government of Her Majesty's land or naval forces.'

These enactments were framed on the similar clauses contained in the 7 & 8 Geo. 4, c. 29, s. 77; 7 & 8 Geo. 4, c. 30, s. 43; 9 Geo. 4, c. 31, s. 32; 9 Geo. 4, c. 55, s. 74 (I.); 9 Geo. 4, c. 56, s. 55 (I.); and 10 Geo. 4, c. 34, s. 41 (I.); together with the 7 & 8 Vict. c. 2. Some of these enactments simply provide for the trial of offences committed within the jurisdiction of the Admiralty; whilst others provide, in addition, that the offences mentioned in the Act, which shall be committed

(r) This Act was passed in consequence of the decision in *R. v. Keyn* (*The Franconia*), 2 Ex. D. 63. In that case the prisoner, who was a foreigner and in command of a foreign ship, whilst passing within three miles of the English shore, ran down and sunk a British ship and drowned one of her passengers, under circumstances which

in English law would amount to manslaughter. He was tried at the Central Criminal Court, but on appeal it was held by the whole court that there was no power to try offences committed by foreigners on board foreign ships while within the three miles limit.

within the jurisdiction of the Admiralty, shall be deemed to be offences of the same nature, and liable to the same punishments, as if they had been committed upon the land in England or Ireland. It seems clear that, wherever an Act creates new offences, this is the proper enactment; for, though in the case of offences against the laws of nature and nations, such as murder or piracy committed on the seas, the general course of legislation has been simply to provide for their trial, and no doubt correctly, because, in the eye of the law of England they were offences of the same nature as if they had been committed on land in England, yet it may well be doubted whether that be sufficient in the case of newly created offences; and it is certainly much safer to have the provision with which this clause commences. The 39 Geo. 3, c. 37, s. 1, no doubt provides generally, that every offence committed upon the high seas shall be of the same nature, &c., as if it had been committed on shore, but it is by no means clear that that enactment applies to any offence created by a subsequent statute, and it was much better not to leave the matter open to any such question.

Under these clauses the Court of Quarter Sessions has authority to try any offender apprehended or in custody within their local jurisdiction for any offence committed on the sea, which they might have tried if it had been committed within that jurisdiction. A prisoner committed a larceny on board the British vessel *Candia* whilst on the high seas, and was apprehended within the borough and county of Southampton, and it was held that the Court of Quarter Sessions for that borough and county had authority to try him for that offence. (*s*)

A prisoner was charged at the Liverpool Assizes with the wilful murder of the captain of the hulk *Kent* in the Bonny River, Africa. It was proved that the *Kent* had been a sailing ship, and was registered as a British ship though not British built. She had been for eighteen months dismasted and used as a floating depot in the Bonny River for a line of steamers trading from Liverpool. She floated in the tideway of the river and hoisted the British ensign at the peak. The prisoner was proved to have seized the captain and thrown him overboard, and he was not seen again. Archibald, J., held that there was sufficient evidence that the *Kent* was a British ship to give the court jurisdiction, and that it was not necessary that the crime should be wholly completed on board such ship. (*t*)

As to the trial of a murder or manslaughter where the act causing death took place out of England or Ireland, &c., see 24 & 25 Vict. c. 100, ss. 9 and 10, noticed *post*, Murder.

As to the trial of an accessory to a felony committed within the jurisdiction of the Admiralty of England or Ireland, see 24 & 25 Vict. c. 94, s. 9.

The Central Criminal Court Act, 4 & 5 Will. 4, c. 36, s. 22, enacts, that 'it shall and may be lawful for the justices and judges of oyer and terminer, and gaol delivery to be named in, and appointed by the commissions to be issued under the authority of this Act, or any two

(*s*) *R. v. Peel*, 1 L. & C. 231; 32 L. J. M. C. 65.

(*t*) *R. v. Armstrong*, 13 Cox, C. C. 184. See this case, *post*.

or more of them, to inquire of, hear and determine any offence or offences committed, or alleged to have been committed on the high seas, and other places within the jurisdiction of the Admiralty of England, and to deliver the gaol of Newgate of any person or persons committed to, or detained therein for any offence or offences alleged to have been done and committed upon the high seas aforesaid, within the jurisdiction of the Admiralty of England; and all indictments found, and trials, and other proceedings had or taken by and before the said justices and judges of oyer and terminer and gaol delivery shall be valid and effectual to all intents and purposes whatsoever.'

An accessory before the fact to a felony committed on the high seas within the jurisdiction of the Admiralty, might be indicted and tried at the Central Criminal Court by virtue of the preceding section and the 7 Geo. 4, c. 64, s. 9 (now repealed), although the principal had not been 'committed to, or detained in,' the gaol of Newgate for his offence. (*u*)

The 7 & 8 Vict. c. 2, s. 1, reciting the 28 Hen. 8, c. 15, and that it is expedient that provision be made for the trial of persons charged with offences committed within the jurisdiction of the Admiralty, enacts 'that Her Majesty's justices of assize or others Her Majesty's commissioners by whom any Court shall be holden under any of Her Majesty's commissions of oyer and terminer or general gaol delivery shall have severally and jointly all the powers which by any Act are given to the commissioners named in any commission of oyer and terminer for the trying of offences committed within the jurisdiction of the Admiralty of England, and that it shall be lawful for the first-mentioned justices and commissioners, or any one or more of them, to inquire of, hear, and determine all offences alleged to have been committed on the high seas and other places within the jurisdiction of the Admiralty of England, and to deliver the gaol in every county and franchise within the limits of their several commissions of any person committed to or imprisoned therein for any offence alleged to have been committed upon the high seas and other places within the jurisdiction of the Admiralty of England; and all indictments found, and trials and other proceedings had, by and before the said justices and commissioners shall be valid.'

Sec. 2, 'in all indictments preferred before the said justices and commissioners under this Act the venue laid in the margin shall be the same as if the offence had been committed in the county where the trial is had; and all material facts which in other indictments would be averred to have taken place in the county where the trial is had shall in indictments prepared (*v*) and tried under this Act be averred to have taken place "on the high seas."'^(w)

(*u*) R. v. Wallace, 2 M. C. C. R. 200. C. & M. 200.

(*v*) *Quare*, preferred.

(*w*) Sec. 3 provided for the commitment of persons charged with offences committed within the jurisdiction of the Admiralty under the 7 Geo. 4, c. 88, but so much of that Act as related to the examination and commitment of such persons was repealed

by the 11 & 12 Vict. c. 42, s. 34, and 12 & 13 Vict. c. 69, s. 31, which was repealed by the 14 & 15 Vict. c. 93, s. 43, and the examination and commitment of such persons are now regulated by the 11 & 12 Vict. c. 42, and 14 & 15 Vict. c. 93. It seems, therefore, that sec. 3 of the 7 & 8 Vict. c. 2, is virtually repealed. Sec. 4 of the 7 & 8 Vict. c. 2, provides that the Act shall not affect

Where a larceny was alleged under this Act to have been committed 'on the high seas,' it was held that the indictment was sufficient, without adding 'within the jurisdiction of the Admiralty.' (x)

An indictment tried at the assizes under this statute for murder committed on the high seas, need not conclude *contra formam statuti*. (y)

By the Merchant Shipping Act, 17 & 18 Vict. c. 104, s. 267, 'All offences against property or person committed in or at any place either ashore or afloat out of Her Majesty's dominions by any master, seaman, or apprentice who, at the time when the offence is committed, is or within three months previously has been employed in any British ship (z) shall be deemed to be offences of the same nature respectively, and be liable to the same punishments respectively, and be inquired of, heard, tried, determined, and adjudged in the same manner and by the same Courts and in the same places as if such offences had been committed within the jurisdiction of the Admiralty of England;' 'and the costs and expenses of the prosecution of any such offence may be directed to be paid as in the case of costs and expenses of prosecutions for offences committed within the jurisdiction of the Admiralty of England.' By sec. 518, the court before which any misdemeanor under that Act 'is tried, may in England make the same allowances and order payment of the same costs and expenses as if such misdemeanor had been enumerated in the 7 Geo. 4, c. 64, or any other Act that may be passed for the like purpose; and may in any other part of Her Majesty's dominions make such allowances and order payment of such costs and expenses (if any) as are payable or allowable upon the trial of any misdemeanor under any existing Act or ordinance, or as may be payable or allowable under any Act or law for the time being in force therein.' (a)

To a count for murder since this statute, which alleged the murder to have been committed 'upon the high seas,' it was objected that it ought to have averred that the prisoners were on board a British ship, or that they were British subjects; and to counts alleging that the prisoner was master of a British ship afloat in the river Elbe, and that he there committed the murder, it was objected that these counts did not allege the murder to have been committed 'on the high seas.' But Wightman, J., thought the provision in the 7 & 8 Vict. c. 2, as to the high seas, only directory, and overruled the objections, and, as they were on the record, refused to reserve them. (b)

By the 18 & 19 Vict. c. 91, s. 21, 'if any person, being a British subject, charged with having committed any crime or offence on board any

the jurisdiction of the Central Criminal Court, or commissions under the 28 Hen. 8, c. 15.

(x) *R. v. Jones*, 1 Den. C. C. 101.

(y) *R. v. Serra*, 2 C. & K. 53. See 14 & 15 Vict. c. 100, s. 24, *post*, 36.

(z) By sec. 106, 'Whenever it is declared by this Act that a ship belonging to any person or body corporate, qualified according to this Act to be owners of British ships shall not be recognised as a British ship, such ship shall not be entitled to any benefits, privileges, advantages, or protection usually enjoyed by British ships and shall not be entitled to use the British flag

or assume the British national character, but so far as regards the payment of dues, the liability to pains and penalties, and the punishment of offences committed on board such ship or by any person belonging to her, such ship shall be dealt with in the same manner in all respects as if she were a recognised British ship.'

(a) Hunting seals in Behring Sea within a period prohibited by an Order in Council is a misdemeanor within this section. See 54 Vict. c. 19, re-enacted by 56 & 57 Vict. c. 23.

(b) *R. v. Menham*, 1 F. & F. 369.

British ship on the high seas or in any foreign port or harbour, or if any person, not being a British subject, charged with having committed any crime or offence on board any British ship on the high seas, is found within the jurisdiction of any court of justice in Her Majesty's dominions which would have had cognizance of such crime or offence if committed within the limits of its ordinary jurisdiction, such court shall have jurisdiction to hear and try the case as if such crime or offence had been committed within such limits.'

By 30 & 31 Vict. c. 124 (the Merchant Shipping Act, 1867), s. 11, if any British subject commits any crime or offence on board any British ship or on board any foreign ship to which he does not belong, any court of justice in Her Majesty's dominions which would have had cognizance of such crime or offence if committed on board a British ship within the limits of the ordinary jurisdiction of such court shall have jurisdiction to hear and determine the case as if the said crime or offence had been committed as last aforesaid.

A ship, public or private, on the high seas, is considered a part of the territory to which the ship belongs, and a foreigner committing an offence in it is amenable to the laws of such territory. Upon an indictment for wounding G. Smith, with intent to do him some grievous bodily harm, it was proved that the prisoner Lopez, a foreigner, being a sailor and one of the crew of the British ship Ontario, maliciously and unlawfully wounded Smith, also a foreigner and a sailor and one of the crew of the same ship, whilst on the high seas and in the same ship, on a voyage from London to the coast of East Africa. Lopez was tried and convicted at the Assizes at Exeter; and a case was reserved upon the question whether he was properly convicted of the offence committed on the high seas. (c) In another case, (d) upon an indictment for murder, tried at the Central Criminal Court, it appeared that the prisoner was a foreigner named Sattler and had committed a larceny in England, and then went with part of the stolen property to Hamburg. The owner of the property gave information to the London police, and the deceased, who was a detective officer of that force, and an English subject, went, and, with the assistance of the police of Hamburg, arrested Sattler there, and brought him against his will on board an English steamer trading between Hamburg and London, in order that he might be tried for the larceny. Hamburg is on the river Elbe, sixty miles from the sea; but the tide flows higher up than the place where the steamer was when Sattler was taken on board. The steamer left Hamburg on the 21st of November, Sattler being in irons, and on the 22nd, whilst on the high seas, he shot the deceased, who died of the wound. If the killing had been by an Englishman, in an English county, it would have been murder. The deceased had no warrant; and a case was reserved upon the question whether there was any jurisdiction to try Sattler at the Central Criminal Court. It was contended in both cases that there was no jurisdiction to try the prisoner under sec. 21 of the 18 & 19 Vict. c. 91:—Lopez was not 'found' within the jurisdiction of the Court at Exeter, but was brought into the jurisdiction in custody and against his will, having been 'found' in the ship. (e) The clause

(c) *R. v. Lopez*, D. & B. 525; 27 L. J. M. C. 48.

(d) *R. v. Sattler*, *ibid.*

(e) The case did not state how Lopez came into custody; but this was the assertion in the argument.

was intended to apply to cases where an offender, having escaped, was discovered afterwards within another jurisdiction. In *Sattler's* case, the original caption at Hamburg was unlawful, and he was illegally taken on board the steamer. There was no extradition treaty between Hamburg and this country, and the arrest at Hamburg was without any warrant or authority; and therefore it could not be said that he was 'found' within the jurisdiction of the Central Criminal Court. Secondly, in neither case had the prisoner committed any offence for which he was amenable to the English law. In none of the statutes, except the 18 & 19 Vict. c. 91, s. 21, were foreigners mentioned, and they were not to be included in them by implication. It was admitted that Lopez went on board the vessel voluntarily; but Sattler, as a foreigner, owed no allegiance to our laws; and as he did not enter into our jurisdiction voluntarily, no allegiance was created thereby. No allegiance could be created by bringing a foreigner forcibly and illegally from his own land. For the Crown it was contended:—First, that the word 'found' meant that a man might be tried at any place where he was at the time of the trial. Secondly, that it was a general principle that a ship, public or private, on the high seas, was, for the purpose of jurisdiction over crimes therein committed, a part of the territory of the country to which the ship belongs; and a person coming voluntarily or involuntarily on board an English ship was as much amenable to the criminal law of England as if he came voluntarily or involuntarily into an English county. Lord Campbell, C. J.: 'We are all of opinion that in both these cases the conviction must be sustained. In the case of Lopez, we have no doubt that the offence committed by the prisoner was, under the circumstances, an offence against the laws of England. The prisoner, a foreigner, was in an English ship; he was under the protection of English laws, and he therefore owed obedience to the English laws, and was guilty of an offence against those laws when he maliciously wounded another foreigner, one of the crew of the same ship, on the high seas. It is unnecessary to enter into a discussion of the authorities cited to prove that proposition,—they are quite overwhelming; and I am glad to find that in this respect the law of America and France is the same as our own. Then the only other question is, whether there was jurisdiction under the commission of oyer and terminer to try the prisoner at Exeter for that offence; and upon that point we entertain as little doubt. The Court at Exeter would not have had jurisdiction before the 18 & 19 Vict. c. 91, s. 21; but that statute is quite conclusive on the subject, and seems to have been passed for the purpose of removing any doubt that might arise. It provides that offences committed by foreigners in British vessels on the high seas may be tried by any Court within the jurisdiction of which the offender is found, if the offence is one which would have been cognizable by such Court, supposing it to have been committed within the limits of its ordinary jurisdiction. Here the offence, if committed within the county of Devon, would certainly have been triable at Exeter; and as the prisoner was found within that jurisdiction, it is the same as if the offence had been committed within the limits of that jurisdiction; and we therefore

think there was clearly jurisdiction in the Court at Exeter to try him there, and that he was legally convicted. With regard to the case of Sattler, we think it equally clear that, although the prisoner was a foreigner, the offence of which he was convicted was an offence against the laws of England. [Lord Campbell here stated the facts.] Then, here a crime is committed by the prisoner on board an English ship on the high seas, which would have been murder if the killing had been by an Englishman in an English county; and we are of opinion that, under these circumstances, whether the capture at Hamburg and the subsequent detention were lawful or unlawful, the prisoner was guilty of murder and an offence against the laws of England; for he was in an English ship, — part of the territory of England, — entitled to the protection of the English law, and he owed obedience to that law; and he committed the crime of murder, — that is to say, he shot the detective officer, not for the purpose of obtaining his liberation, but for revenge, and of malice prepense. Then comes the question, whether the Central Criminal Court had jurisdiction to try the prisoner for this offence; and it appears to us that the late Act was framed for the purpose of obviating, and does obviate, all doubt upon such a subject. A man is "found" wherever he is actually present, and the prisoner was "found" within the jurisdiction of the Central Criminal Court, and we are all of opinion that the Court had jurisdiction to try him. It was contended that the prisoner was not "found" within the jurisdiction, because he was brought within it against his will; but, upon the construction of the statute, we are all of a different opinion.' (f)

(f) *R. v. Lopez and R. v. Sattler, supra.* These cases were argued separately, but only one judgment delivered. All that these cases really decide is that the prisoners were properly tried under the 18 & 19 Vict. c. 91, s. 21, and it was quite unnecessary to decide whether they could have been tried under any other Act, and it is to be regretted that Lord Campbell should have said that they could not, as that dictum is clearly erroneous; and as the 18 & 19 Vict. c. 91, and 17 & 18 Vict. c. 104, apply only to merchant vessels, it is right to correct that error. In the argument in *R. v. Lopez*, Cockburn, C. J., said, 'There is a strong opinion that but for the difficulty as to laying the venue, a person committing an offence on the high seas in an English ship would have been amenable to punishment at the common law.' And that opinion is clearly right. The distinction is this: wherever a murder or other felony against the law of nature or nations was committed in England or on the narrow seas, it was triable by jury in the Court of King's Bench and courts of oyer and terminer and gaol delivery. But wherever a murder or such other felony was committed on the high seas, it could not be tried by a jury (because a jury by the common law could only take cognizance of felonies committed within the local jurisdiction from which they were summoned), but such matters and other felonies were always triable by the Court of Admiralty, which proceeded according to

the course of the civil law. To this proceeding there was the vital objection that it did not try by a jury, and either the accused must plainly confess his offence, or there must be two witnesses who saw the offence committed; and this led to the passing of the 28 Hen. 8, c. 15, as is plain from the preamble and 3 Inst. 112. Now, that Act in terms makes 'all treasons, felonies, robberies, murders, and confederacies' committed upon the sea, or in any haven, river, creek or place where the admiral has jurisdiction, triable by commissions issued under that Act, and as that Act did not create or alter any offence, but left the offences as they were before it passed, 3 Inst. 112, it is clear that all the offences mentioned in it were offences triable by the Court of Admiralty, and were by that Act made triable by a jury under the commissions issued under it. Then the 7 & 8 Vict. c. 2, s. 1, gave courts of oyer and terminer or general gaol delivery all the powers which were given by any Act to commissioners in any commission of oyer and terminer for trying offences committed within the jurisdiction of the Admiralty. So that it is clear that the courts of oyer and terminer and gaol delivery have now the same jurisdiction as commissioners under the 28 Hen. 8, c. 15, or as the Court of Admiralty before that Act passed. In other words, such murders and other felonies are now triable by the courts of oyer and terminer and gaol delivery. C. S. G.

To prove that a ship is a British ship, it is not necessary to produce the register or a copy thereof; it is sufficient to show orally that she belongs to British owners, and carries the British flag. (*g*)

The prisoner was convicted of manslaughter committed on board the *Gustav Adolph* on the high seas, at a point about five days' sail from Pernambuco, and about 200 miles from the nearest land; the ship was built at Kiel, in the duchy of Holstein, and sailed thence to London, and thence on the voyage in which the offence was committed. All the officers and crew were foreigners; the prisoner was the second mate, and the deceased the master. The ship was sailing under the English flag when the offence was committed. The crew were told before sailing that Mr. Rehder was sole owner. He was not born an Englishman. A certified copy of the register of the *Gustav Adolph* under the 17 & 18 Vict. c. 104 was put in, and admitted as *prima facie* evidence that the ship was a British ship. Certain letters were put in, which, it was urged, showed a partnership between Rehder and Ehlers, and it was urged that under the 17 & 18 Vict. c. 104, ss. 18, 38, and 103, the owner of a beneficial interest in a British ship must be qualified in the same way as the owner of a legal interest; that, even admitting that the registration of the ship in the name of Rehder was *prima facie* evidence that he was owner, it could be no evidence of Ehler's qualification, and therefore the letters proving Ehler's interest in the ship rebutted the *prima facie* evidence that she was a British ship. On a case reserved, it was held that there was *prima facie* evidence that she was a British ship; as there was evidence of a certificate of registry in London, wherein Rehder was described as the owner at that time resident in London, and the ship was sailing under the British flag; but that the *prima facie* proof was rebutted by the proof that Rehder was alien born; and that there was no presumption that letters of denization or naturalisation had been granted to him, by reason that he, being alien born, would have become liable to penalties under the Act for registering the ship as belonging to a British owner. (*h*)

The 'high seas' include any river where 'great ships go, where the tide ebbs and flows.' (*i*)

The prisoner, the master of an English ship, entered into a contract with the Chilian Government, whereby he agreed to convey to the port of Liverpool five persons who had been ordered by that Government to be transported. These persons were brought by force on board the ship, guarded by soldiers of that State, and conveyed by the prisoner, under the contract, and against their will, to Liverpool. At the time the prisoner received these persons on board, the ship was lying in the territorial waters of Chili. The prisoner having been convicted on these facts upon an indictment for false imprisonment and assault tried at Liverpool, it was held that the conviction could not be sustained for what was done within the Chilian waters. It must be assumed that in Chili the act of the Government towards its subjects was lawful; and, although an

(*g*) *R. v. Allen*, 10 Cox, C. C. 405; *R. v. Seberg*, 11 Cox, C. C. 520, 39 L. J. M. C. 133; L. R. 1 C. C. R. 264.

(*h*) *R. v. Bjornsen*, L. & C. 545; 34 L. J. M. C. 180.

(*i*) *R. v. Allen*, 1 Moo. C. C. 494; *R. v. Anderson*, L. R. 1 C. C. R. 161; 38 L. J. M. C. 12; *R. v. Carr*, 10 Q. B. D. 76.

English ship, in some respects, carries with her the laws of her country in the territorial waters of a foreign State, yet, in other respects, she is subject to the laws of that State, as to acts done to the subjects thereof. The Government could justify all that it did within its own territory, and it followed that the prisoner could justify all that he did there as agent for the Government, and under its authority. (j) But the conviction was sustained for that which was done out of the Chilian territory. It is clear that an English ship on the high sea, out of any foreign territory, is subject to the laws of England; and persons, whether foreign or English, on board such ship, are as much amenable to English law as they would be on English soil. Such being the law, if the act of the prisoner amounted to a false imprisonment he was liable to be convicted. Now, as the contract of the prisoner was to receive the five persons on board the ship and to take them, without their consent, over the sea to England, although he was justified in first receiving them in Chili, yet that justification ceased when he passed the line of Chilian jurisdiction, and after that it was a wrong which was intentionally planned and executed in pursuance of the contract, amounting in law to false imprisonment. It may be that transportation to England is lawful by the law of Chili, and that a Chilian ship might so lawfully transport Chilian subjects; but for an English ship the laws of Chili, out of that State, are powerless, and the lawfulness of the acts must be tried by English law. (k)

By the Sea Fisheries Act 1883 (46 & 47 Vict. c. 22), s. 18, 'For the purpose of giving jurisdiction to courts under this Act, a sea-fishing boat shall be deemed to be a ship within the meaning of any Act relating to offences committed on board a ship, and every court shall have the same jurisdiction over a foreign sea-fishing boat within the exclusive fishery limits of the British Islands and persons belonging thereto as such court would have if such boat were a British sea-fishing boat.'

By the last clause of sec. 1 of the 7 & 8 Vict. c. 2, the Court might 'order the payment of the costs and expenses of the prosecution of Admiralty offences in the manner prescribed by the 7 Geo. 4, c. 64, in the case of felonies tried in the Court of Admiralty;' and by the last clause in the 17 & 18 Vict. c. 104, s. 267, the costs of the prosecution of any such offence as is therein mentioned may be directed to be paid in the same manner as costs of prosecutions for offences committed within the jurisdiction of the Admiralty of England. (l) By the 45 & 46 Vict. c. 55, s. 9, 'Such costs and expenses of and incidental to any prosecution for a felony or misdemeanor as are by law payable out of any county or other local rate shall, when such felony or misdemeanor was committed within the jurisdiction of the Admiralty of England, be paid in the same manner and subject to the same regulations as if such felony or misdemeanor had been committed in the county in which the same is heard and determined,

(j) *Dobree v. Napier*, 2 Bingh. N. C. 781. It seems that vessels of war in the territorial limits of a foreign state are exempt from the jurisdiction of such state, see *Wheaton's International Law*, but see

Forbes v. Cochrane, 2 B. & C. 467, per Best, J.

(k) *R. v. Lesley*, Bell, C. C. 220.

(l) See *ante*, p. 18.

or when the same is heard and determined at the Central Criminal Court as if the same had been committed in the county of Middlesex, and all sums properly paid out of any county or other local rate in respect of the said costs and expenses shall be repaid out of moneys provided by Parliament.'

The 12 & 13 Vict. c. 96, provides that the prosecution and trial in the colonies of any treason, piracy, felony, robbery, murder, conspiracy or other offence of what nature or kind soever, committed upon the sea, or in any haven, river, creek or place where the admiral has jurisdiction, shall be in the same manner as if such offence had been committed upon any waters within the limits of such colony; (*ll*) and that the punishment of any such offence shall be the same as if it had been committed in England; (*m*) and that in cases of murder and manslaughter, where the death is in any colony, and the cause of the death elsewhere, the offence may be dealt with, tried, and punished as if it had been wholly committed in that colony; and that where the death is within the jurisdiction of the Admiralty, wherever the cause of death may have been, the offence shall be held for the purpose of the Act to have been wholly committed upon the sea. (*n*)

Offences committed by governors of colonies, &c. — By the stat. 11 & 12 Will. 3, c. 12, (*o*) and 42 Geo. 3, c. 85, offences committed by governors of colonies and others in the public service in places beyond seas, may be 'prosecuted or inquired of and heard and determined in His Majesty's Court of King's Bench here, in England, either upon an information exhibited by His Majesty's attorney-general, or upon an indictment found.' By sec. 2 of 11 & 12 Vict. c. 42, 'in all cases of crimes or offences committed on land beyond the seas for which an indictment may legally be preferred in any place within England or Wales,' any one or more of the justices for the place in which the person charged resides may issue a warrant to apprehend and have him brought before them to answer the charge, and be dealt with according to law. And by secs. 17 and 20 the justice or justices may bind over the witnesses to appear at the next 'court of oyer and terminer, or gaol delivery, &c.,' to give evidence. Held, that these provisions of 11 & 12 Vict. c. 42, applied to proceedings on charges under 11 & 12 Will. 3, c. 12, and 42 Geo. 3, c. 85, and that a magistrate of the county within which the accused person resided was bound to investigate such charges. The court of Queen's Bench, in trying offences under 11 & 12 Will. 3, c. 12, and 42 Geo. 3, c. 85, is included within the general words 'court of oyer and terminer' in sec. 20 of 11 & 12 Vict. c. 42. (*p*)

(*ll*) Sec. 1.

(*m*) Sec. 2.

(*n*) Sec. 3. Sec. 4 provides that the Act shall not affect the jurisdiction of the Courts of New South Wales and Van Diemen's Land. The 18 & 19 Vict. c. 91, s. 21, provides that nothing contained in that section

shall affect the 12 & 13 Vict. c. 96. This Act is extended to India by the 23 & 24 Vict. c. 88.

(*o*) Secs. 1 to 7 in Ruffhead's ed. of the stats. and secs. 13 and 15 of this stat. are repealed by 30 & 31 Vict. c. 59.

(*p*) *R. v. Eyre*, 11 Cox, C. C. 162.

Description of Documents and Money in an Indictment — Venue in same.

The 14 & 15 Vict. c. 100, enacts by sec. 5, that 'in any indictment for forging, uttering, (q) stealing, embezzling, destroying, or concealing, or for obtaining by false pretences, any instrument, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or fac-simile thereof, or otherwise describing the same or the value thereof.

Sec. 7. 'In all other cases wherever it shall be necessary to make any averment in any indictment as to any instrument, whether the same consists wholly or in part of writing, print, or figures, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or fac-simile of the whole or any part thereof.'

Sec. 18. 'In every indictment in which it shall be necessary to make any averment as to any money or any note of the Bank of *England* or any other bank, it shall be sufficient to describe such money or bank-note simply as money, without specifying any particular coin or bank-note; and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin or of any bank-note, although the particular species of coin of which such amount was composed, or the particular nature of the bank-note, shall not be proved, and in cases of embezzlement and obtaining money or bank-notes by false pretences, by proof that the offender embezzled or obtained any piece of coin or any bank-note, or any portion of the value thereof, although such piece of coin or bank-note may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, or to any other person, and such part shall have been returned accordingly.'

Sec. 23, 'It shall not be necessary to state any venue in the body of any indictment, but the county, city, or other jurisdiction named in the margin thereof shall be taken to be the venue for all the facts stated in the body of such indictment; provided that in cases where local description is or hereafter shall be required, such local description shall be given in the body of the indictment; and provided also, that where an indictment for an offence committed in the county of any city or town corporate shall be preferred at the assizes of the adjoining county, such county of the city or town shall be deemed the venue, and may either be stated in the margin of the indictment, with or without the name of the county in which the offender is to be tried, or be stated in the body of the indictment by way of venue.' (r)

(q) So much of this sec. as relates to forging or uttering any instrument is repealed by 24 & 25 Vict. c. 95. See 24 & 25 Vict. c. 98, ss. 42, 43, vol. ii.

(r) Before this enactment, a count for

misdemeanor containing no statement of venue, either by reference or otherwise, was bad at common law, after verdict, though a venue were stated in the margin in the usual way; for the statement in the margin only

Sec. 30. 'In the construction of this Act the word "indictment" shall be understood to include "information," "inquisition," and "presentment," as well as indictment, and also any "plea," "replication," or other pleading, and any nisi prius record; and the terms "finding of the indictment" shall be understood to include "the taking of an inquisition," "the exhibiting of an information," and "the making a presentment;" and wherever in this Act, in describing or referring to any person or party, matter or thing, any word importing the singular number or masculine gender is used, the same shall be understood to include and shall be applied to several persons and parties as well as one person or party, and females as well as males, and bodies corporate as well as individuals, and several matters and things as well as one matter or thing; and the word "property" shall be understood to include goods, chattels, money, valuable securities, and every other matter or thing, whether real or personal, upon or with respect to which any offence may be committed.'

Stating Names of Partners and Ownership of Property in Indictments.

Property of Partners.—The 7 Geo. 4, c. 64, s. 14, enacts, 'that in any indictment or information for any felony or misdemeanor wherein it shall be requisite to state the ownership of any property whatsoever, whether real or personal, which shall belong to or be in the possession of more than one person, whether such persons be partners in trade, joint-tenants, parceners, or tenants in common, it shall be sufficient to name one of such persons, and to state such property to belong to the person so named, and another or others, as the case may be, and whenever, in any indictment or information for any felony or misdemeanor, it shall be necessary to mention, for any purpose whatsoever, any partners, joint-tenants, parceners, or tenants in common, it shall be sufficient to describe them in the manner aforesaid; and this provision shall be construed to extend to all joint stock companies and trustees.' (s)

Where a Bible and hymn book had been given to a society of Wesleyans, at whose expense they had been bound, and they were laid in an indictment as the property of B. 'and others,' B. being both a trustee and a member of the society, it was held that the property was rightly laid. (t) So where the property in ore stolen from a mine was stated to be in S. Davey 'and others,' who were proved to be the adventurers in the mine, and it was objected that they were not partners, joint-tenant, or tenants in common, within the 7 Geo. 4, c. 64, s. 14, the objection was overruled. (u)

implied that the indictment was found by a grand jury, of the county named. *R. v. O'Connor*, 5 Q. B. 16. But since this section such a count is good.

(s) The Irish Act, 9 Geo. 4, c. 64, s. 28, is similar to this section.

(t) *R. v. Boulton*, 5 C. & P. 537. *Parka, J.*, S. C., MS. C. S. G.

(u) *R. v. Webb*, R. & M. C. C. R. 431, per Patteson, J., on the trial; but the point was mentioned to the judges afterwards, who gave no opinion upon it, deciding the case on another ground. See the case, vol. ii.

If an indictment allege property to belong to A. B. and others, and it appears that A. B. has only one partner, it is a variance. (*v*)

An indictment for attempting to obtain one thousand yards of silk by false pretences, alleged that the pretences were made to J. Baggally and others; by means whereof the prisoner did attempt to obtain from the said J. Baggally and others the silk in question, the property of the said J. Baggally and others, with intent to cheat the said J. Baggally and others of the same. J. Baggally and others were partners in trade, and the pretences were made to J. Baggally, but none of the partners were present when the pretences were made, nor did the pretences ever reach the ears of any of them. It was objected that there was a variance, as the evidence did not shew that the pretences were made to J. Baggally and others; but the objection was overruled, and, upon a case reserved, it was held the conviction was right. (*w*)

Property belonging to counties. — The 7 Geo. 4, c. 64, s. 15, with respect to the property of counties, ridings, and divisions, enacts, 'that in any indictment or information for any felony or misdemeanor committed in, upon, or with respect to any bridge, court, gaol, house of correction, infirmary, asylum, or other building erected or maintained, in whole or in part, at the expense of any county, riding, or division, or on or with respect to any goods or chattels whatsoever, provided for or at the expense of any county, riding, or division, to be used for making, altering, or repairing any bridge, or any highway at the ends thereof, or any court, or other such building as aforesaid, or to be used in or with any such court, or other building, it shall be sufficient to state any such property, real or personal, to belong to the inhabitants of such county, riding, or division; and it shall not be necessary to specify the names of any such inhabitants.'

On an indictment for stealing brass, the property of the inhabitants of the county of Gloucester, it appeared that some alterations had been made in the ball and concert room which formed part of the Shire Hall, and a brass chandelier, which hung from the roof of the room, was taken down, and laid aside in a room in the Shire Hall. The prisoner afterwards sold this chandelier as old brass. It was objected that the ball room was not within the term building in the preceding section, and that the chandelier was not a thing 'used in or with' such building at the time when it was stolen; but it was held that the room was clearly a building within the clause, and that the chandelier was also clearly within it. (*x*)

Guardians of poor. — The 5 & 6 Wm. 4, c. 69, an Act to facilitate the conveyance of workhouses and other property of parishes and unions, by sec. 7 provides that 'the guardians of the poor of every union already formed, or which hereafter shall be formed, by virtue

(*v*) *Hampton's case*, Greenw. Coll. St. 143, Denman, Com. Serj. See *Wright's case*, 1 Lewin, 288, Bayley, J. *R. v. Kealey*, 2 Den. 68; 20 L. J. M. C. 57.

(*w*) *R. v. Kealey*, 2 Den. C. C. 68.

(*x*) *R. v. Winbow*, 5 Cox, C. C. 346. The room is parcel of the entire building, which includes the two Courts, Grand Jury room, Counsel room, &c., and I have tried

prisoners in it. C. S. G. The prisoner was also held to be merely the servant of the inhabitants of the county. *Quære* whether this clause is anything more than declaratory of the common law, and whether an indictment is not sufficient in all cases which alleges any property to belong to the inhabitants of a county?

of the aforesaid Act, passed in the fourth and fifth years of his present Majesty, and of every parish placed under the control of a board of guardians by virtue of the said Act, shall respectively, from the day of their first meeting as a board, become, or be deemed to have become, and they and their successors in office shall for ever continue to be, for all the purposes of this Act, a corporation, by the name of the guardians of the poor of the union, (or of the parish of) in the county of ; and as such corporation the said guardians are hereby empowered to accept, take and hold, for the benefit of such union or parish, any buildings, lands, or hereditaments, goods, effects, or other property, and may use a common seal; and they are further empowered by that name to bring actions, to prefer indictments, and to sue and be sued, and to take or resist all other proceedings for or in relation to any such property, or any bonds, contracts, securities, or instruments, given or to be given to them in virtue of their office; and in every such action and indictment relating to any such property, it shall be sufficient to lay or state the property to be that of the guardians of the union, or of the parish of ; and in case of any addition to or separation of any parishes from any such union, under the authority of the said Act, passed in the fourth and fifth years of the reign of his present Majesty, the board of guardians for the time being shall (notwithstanding such alteration) have and enjoy the same corporate existence, property and privileges, as the board of guardians of the original union would have had and enjoyed had it remained unaltered.' (y)

By the 7 Geo. 4, c. 64, s. 16, 'in any indictment or information for any felony or misdemeanor committed upon or with respect to any workhouse, or poor-house, or on or with respect to any goods or chattels whatsoever, provided for the use of the poor of any parish or parishes, township or townships, hamlet or hamlets, place or places, or to be used in any workhouse or poor-house, in or belonging to the same, or by the master or mistress of such workhouse or poor-house, or by any workmen or servants employed therein, it shall be sufficient to state any such property to belong to the overseers of the poor (z) for the time being of such parish or parishes, township or townships, hamlet or hamlets, place or places, and it shall not be necessary to specify the names of all or any of such overseers; (a) and in any indictment or information for any felony or misdemeanor committed

(y) See vol. ii.: 'Post Office.' See 5 & 6 Vict. c. 57, s. 16.

(z) As to the description in an indictment against a collector or assistant overseer for embezzlement, &c., see 12 & 13 Vict. c. 103, s. 15, vol. ii.: 'Embezzlement.'

(a) The 55 Geo. 3, c. 137, s. 1, vests goods, furniture, apparel, &c., provided for the use of the poor in the overseers of the parish, &c., for the time being, and their successors, and enacts that in any indictment in respect of such goods, &c., the said goods, &c., shall be laid or described to be the property of the overseers of the poor for the time being of such parish, &c., without stating or specifying their names. It was held that an indictment for stealing goods

under this statute might state them to be the goods of the overseers of the poor for the time being of the parish of A., and that this sufficiently imported that they belonged at the time of the theft to the persons who were then the overseers. Thus, where the indictment stated that the prisoner, 6lbs. weight of pork of the goods and chattels of the overseers of the poor for the time being of the parish of K., feloniously did steal, &c., and a case was reserved on the question whether this was properly laid, the judges were of opinion that it sufficiently imported that the goods at the time of the theft were the property of the then overseers, and therefore held the conviction right. *R. v. Went*, MS. Bayley, J., and *R. & R.* 359.

on or with respect to any materials, tools, or implements provided for making, altering, or repairing any highway within any parish, township, hamlet or place, otherwise than by the trustees or commissioners of any turnpike road, it shall be sufficient to aver that any such things are the property of the surveyor or surveyors of the highways for the time being of such parish, township, hamlet or place, and it shall not be necessary to specify the name or names of any such surveyor or surveyors.

Turnpike trustees. — Sec. 17, with respect to the property under turnpike trusts, enacts 'that in any indictment or information for any felony or misdemeanor committed on or with respect to any house, building, gate, machine, lamp, board, stone, post, fence, or other thing erected or provided in pursuance of any Act of Parliament for making any turnpike road, or any of the conveniences or appurtenances thereunto respectively belonging, or any materials, tools, or implements provided for making, altering, or repairing any such road, it shall be sufficient to state any such property to belong to the trustees or commissioners of such road, and it shall not be necessary to specify the names of any of such trustees or commissioners.' (b)

Commissioners of Sewers. — Sec. 18, with respect to property under commissioners of sewers, enacts 'that in any indictment or information for any felony or misdemeanor committed on or with respect to any sewer or other matter within or under the view, cognizance, or management of any commissioners of sewers, it shall be sufficient to state any such property to belong to the commissioners of sewers within or under whose view, cognizance, or management, any such things shall be, and it shall not be necessary to specify the names of any of such commissioners.'

Joint-stock banks. — The 7 Geo. 4, c. 46, an Act for the better regulating of copartnerships of certain bankers in England, provides in what cases, and under what circumstances, copartnerships of more than six persons may carry on business in England; and by sec. 9, 'all indictments, informations, and prosecutions, by or on behalf of such copartnership, for any stealing or embezzlement of any money, goods, effects, bills, notes, securities, or other property of or belonging to such copartnership, or for any fraud, forgery, crime or offence committed against or with intent to injure or defraud such copartnership, shall and lawfully may be had, preferred, and carried on in the name of any one of the public officers, nominated as aforesaid, for the time being of such copartnership, and that in all indictments and informations to be had or preferred by or on behalf of such copartnership against any person or persons whomsoever, notwithstanding such person or persons may happen to be a member or members of such copartnership, it shall be lawful and sufficient to state the money, goods, effects, bills, notes, securities, or other property of such copartnership, to be the money, goods, effects, bills, notes, securities, or other property of any one of the public officers, nominated as aforesaid, for the time being of such copartnership, and that any forgery, fraud, crime, or other offence committed against, or with intent to injure or

(b) See 3 Geo. 4, c. 126, s. 60, by which the trustees or commissioners of a turnpike the property in certain things is vested in road.

defraud any such copartnership, shall and lawfully may in such indictment or indictments, notwithstanding as aforesaid, be laid or stated to have been committed against, or with intent to injure or defraud any one of the public officers, nominated as aforesaid, for the time being of such copartnership, and any offender or offenders may thereupon be lawfully convicted for any such forgery, fraud, crime, or offence; and that in all other allegations, indictments, informations, or other proceedings of any kind whatsoever, in which it otherwise might or would have been necessary to state the names of the persons composing such copartnership, it shall and may be lawful and sufficient to state the name of any one of the public officers, nominated as aforesaid, for the time being of such copartnership; and the death, resignation, removal, or any act of such public officer, shall not abate or prejudice any such action, suit, indictment, information, prosecution, or other proceeding, commenced against or by or on behalf of such copartnership, but the same may be continued, prosecuted, and carried on in the name of any other of the public officers of such copartnership for the time being.'

It is not imperative upon the banking companies constituted under this Act to prosecute in the name of one of their public officers; thus it has been held in a case of forgery that they were not bound to allege an intent to defraud one of their public officers, but might lay the intent to be to defraud one of the shareholders by name 'and others,' under the 1 Wm. 4, c. 66, s. 28. (c) And where, on an indictment for stealing certain brasses, the property of P. Williams and others, which belonged to a colliery which was worked by the Dudley and West Bromwich Bank, and no registration of that company as a joint-stock banking company or of the appointment of any manager or public officer thereof was proved, but it was stated by a witness that P. Williams was one of the partners or shareholders in the bank, and that there were more than twenty partners, and that it was a joint-stock banking company; it was objected that the property ought to have been laid in the public officer of the company under the 7 Geo. 4, c. 46, s. 9, and *Chaplain v. Milvain* (d) was relied upon; but, upon a case reserved, it was held that the 7 Geo. 4, c. 64, s. 14, which expressly extends to all joint-stock companies, and which was passed after the 7 Geo. 4, c. 46, was a sufficient authority for laying the property in one of the partners by name 'and others.' (e)

(c) *R. v. Beard*, 8 C. & P. 143, Coleridge, J. In *R. v. Burgess*, 7 C. & P. 488, Littleale, J., had expressed great doubts on the point; but in *R. v. James*, 7 C. & P. 553, Patteson, J., had expressed an opinion that either the one mode or the other might be adopted. And it should seem that there is no doubt that an indictment laying property to belong to one member of such a company by name, 'and others,' would be good, especially as the 7 Geo. 4, c. 64, s. 14, extends to 'all joint stock companies,' *ante*, p. 24. C. S. G.

(d) 5 Exch. R. 61, where it was held that in an action against a shareholder the company are bound to sue in the name of one of their officers.

(e) *R. v. Pritchard*, L. & C. 34; 30 L. J. M. C. 169. This decision is in accordance with my note to the third edition, and settles the doubt in *R. v. Carter*, 1 Den., C. C. 65, whether in forgery the intent may be laid to defraud one of the shareholders and others. In the course of the argument, Pollock, C. B., said: 'Suppose they are not registered, may anybody go and steal their property without being punished for it?' Blackburn, J., 'Granting all that you assume (i. e. that the company was carrying on their business legally), suppose more than six persons own a chattel, a horse for instance, and afterwards engage in business as bankers, would that alter the property in the horse?' In *Bonar v. Mitchell*, 5 Exch.

In an indictment for forgery it has been held sufficient to aver the intent to be to defraud R. B., 'then and there being one of the public officers for the time being of a certain copartnership of persons carrying on the trade and business of bankers in England, exceeding the number of six persons, and called the National Provincial Bank of England;' and that it is not necessary to aver that R. B. was nominated under the 7 Geo. 4, c. 46. (*f*)

The return made to the Stamp Office under the 7 Geo. 4, c. 46, is not the only mode of proving that a person is a public officer; that fact may be proved by other evidence. (*g*) An examined copy of the return is as good evidence as the return. (*h*)

The 7 Geo. 4, c. 46, was amended and continued by the 1 & 2 Vict. c. 96, and is further continued by the 3 & 4 Vict. c. 111, (*i*) and sec. 2 of that Act enacts, that 'If any person or persons, being a member or members of any banking copartnership within the meaning of the said Act, or of any other banking copartnership consisting of more than six persons, formed under or in pursuance of an Act passed in the third and fourth years of the reign of King William the Fourth, intituled "An Act for giving to the corporation of the governor and company of the Bank of England certain privileges for a limited period, under certain conditions," (*j*) shall commit any fraud, forgery, crime, or offence against or with intent to injure or defraud any such copartnership, such member or members shall be liable to indictment, information, prosecution, or other proceeding in the name of any of the officers for the time being of any such copartnership, in whose name any action or suit might be lawfully brought against any member or members of any such copartnership for every such fraud, forgery, crime, or offence, and may thereupon be lawfully convicted, as if such person or persons had not been or was or were not a member or members of such copartnership, any law, usage or custom to the contrary notwithstanding.'

R. 415, it was held that a plea that a company had not made a return to the Stamp Office in pursuance of the statute was bad; and Alderson, B., in answer to an argument that these companies were bound to observe the conditions imposed on them by the Act, said, 'according to such an argument it would be a good defence to a charge of larceny against a person for having stolen the company's goods, that they had not made any sufficient return as required by the statute. If the company were to make any single mistake in the course of twenty years, they would lose the right of suing in the mode given them by the Act;' and Pollock, C. B., thought that the penalty imposed by sec. 14, was intended to cure these omissions; and Alderson, B., said that it was clear that the section was only directory. C. S. G.

(*f*) *R. v. Beard, supra*. So it has been held in an action brought in the name of a public officer of such a company, that it is not necessary to allege in the declaration that he is a member of the company, that he is resident in England, or that he has been duly registered as required by sec. 4; but that it is sufficient to allege that he has

been 'duly nominated and appointed, and now is one of the public officers of the said company according to the force, form, and effect of the said Act of Parliament.' *Spiller v. Johnson*, 6 M. and W. 570. So it has been held sufficient to state in the declaration that the plaintiff is the manager of a certain joint-stock copartnership, established for the purpose of banking, and that he has been duly named and appointed as the nominal plaintiff on behalf of the copartnership under the provisions of the statute, without expressly stating that he has been named as manager, or that the copartnership has been established under the provisions of the Act. *Christie v. Peart*, 7 M. & W. 491.

(*g*) *Edwards v. Buchanan*, 8 B. & Ad. 788. *R. v. Beard, supra*. See *Bosanquet v. Woodford*, 5 Q. B. 310. *Prescott v. Buffery*, 1 C. B. 41. *Steward v. Dunn*, 12 M. & W. 655.

(*h*) *R. v. Carter*, 1 Den. C. C. 65. 1 C. & K. 741.

(*i*) By the 5 & 6 Vict. c. 85, the 1 & 2 Vict. c. 96, 'as extended by' the 3 & 4 Vict. c. 111, is made perpetual.

(*j*) Here follow some words repealed by the Statute Law Revision Act, 1874.

The prisoner was convicted of the embezzlement of three sums of money on an indictment, in which one class of counts described him as clerk of Teather and others, and another as clerk of Teather, 'one of the public officers of the Carlisle and Cumberland Banking Company.' The prisoner was employed as clerk by a banking company established under the 7 Geo. 4, c. 46. A return, as required by sec. 4, had been made, and was proved by a certificate under sec. 6; in this return the true name of the copartnership was stated to be 'The Carlisle and Cumberland Joint Stock Bank,' the names or firms of the banks established or to be established by the copartnership were stated to be 'Carlisle and Cumberland Bank' at Carlisle, at Wigton, and at Appleby, and Teather was described as a partner and one of the public officers. The manager of the bank proved that the usual and only name employed by the copartnership in their dealings was 'The Carlisle and Cumberland Banking Company,' and they were described by the same name in a bond of the prisoner to the company, which was in evidence. The prisoner at the time of the transaction was a shareholder or partner in the company. It was objected, 1, that there was a variance, as the return proved the true name to be different from that laid in the indictment, 2, that the indictment could only be in the name of an officer nominated as mentioned in the 7 Geo. 4, c. 46. (*k*) But, on a case reserved, the majority of the judges were of opinion that the company described in the register were the same that had appointed Teather, acting under the name of the Carlisle and Cumberland Banking Company to the world, and so admitted by the prisoner in his bond; and that there was no variance. (*l*)

Friendly Societies — By 38 & 39 Vict. c. 60 (the Friendly Societies Act, 1875), s. 16, sub-sec. 5, in all legal proceedings whatsoever concerning any such (*m*) property the same shall be stated to be the property of the trustees for the time being, in their proper names as trustees for the society or branch (as the case may be) without further description. By the Industrial and Provident Societies Act, 1893, (56 & 57 Vict. c. 39), s. 21, 'the registration of a society shall render it a body corporate by the name described in the acknowledgment of registry by which it may sue and be sued, with perpetual succession and a common seal, and with limited liability; and shall vest in the society all property for the time being vested in any person in trust for the society; and all legal proceedings pending by or against the trustees of any such society may be prosecuted by or against the society in its registered name without abatement.' (*n*) The following cases were decided under the repealed Friendly Societies Act: The indictment charged the prisoner with stealing a ten-pound promissory note, the property of W. Shildrick. Shildrick was treasurer of a friendly society at Cambridge. The prisoner was clerk and trustee of the same

(*k*) A third objection was, that the 1 & 2 Vict. c. 96, was not continued by the 3 & 4 Vict. c. 111, by reason of the erroneous recital in the latter Act; this objection was overruled on the ground that no other Act could be meant.

(*l*) *R. v. Atkinson*, 2 Moo. C. C. 278; C. & M. 525. No notice was taken of the second objection.

(*m*) All property belonging to the society.

(*n*) By 56 & 57 Vict. c. 39, s. 64, which provides for the summary punishment of offences against Industrial and Provident Societies, nothing in the section is to prevent the person being proceeded against by way of indictment unless he has previously been convicted of the same offence under this Act.

society. Scarr was also trustee. The rules of the society had been re-enrolled pursuant to the 10 Geo. 4, c. 56, as amended by the 4 & 5 Wm. 4, c. 40. (o) By a rule of the society it was provided that as soon as ten pounds more than was necessary for immediate use was in the box, it should be delivered to the trustees chosen for that purpose, who should dispose of it as the society should direct, agreeably to the 10 Geo. 4, c. 56, s. 13. It was the duty of the treasurer to receive from the stewards the money paid by the members, which the treasurer kept till twenty or thirty pounds were collected, when he proposed that a certain amount should be deposited in the savings' bank. The duty of the prisoner as clerk was to keep the books, and as trustee to deposit and take money from the savings' bank. Either of the trustees could draw out money if he brought the book. Upon a club night previous to the 16th of January it was settled that ten pounds should be paid into the bank; the prisoner did not wish to take it then; but it was arranged that the trustees should come to take the money on the following Saturday. On Saturday, the 16th of January, the prisoner went to the treasurer's house alone, and made a false statement, whereupon the treasurer gave him the promissory-note in question, and the jury found that the prisoner obtained the note from the treasurer with intent to steal it. It was objected, on behalf of the prisoner, that, as he was a trustee, the property in the note was vested either wholly or in part in him, and that it was not the sole property of the treasurer; it was answered, that by the 10 Geo. 4, c. 56, s. 21, all the effects of the society were vested in the treasurer or trustee for the time being, and were, for the purposes of suit, civil or criminal, to be the property of the treasurer or trustee for the time being, and that the meaning of this clause was to vest the property in one officer, and one only, whether he should be called treasurer or trustee, and that the treasurer in this case was that person. Upon a case reserved on the question whether the property was rightly laid in the treasurer, the judges were of opinion that the conviction was right, the treasurer, on the facts stated, being substantially the officer intended. (p) On an indictment for larceny as a bailee, and also for common larceny of the money of R. Carraway, it appeared that Carraway was the treasurer of a lodge of Odd Fellows, which was a friendly society duly enrolled, and the prisoner was one of its trustees. At a lodge meeting it was resolved that £40 should be sent to the bank of Messrs. Gurney, and that the prisoner should take it there. The £40 in gold and silver was taken from a box, which was in Carraway's keeping as treasurer, by a person who acted for him, and put into a bag and carried away by the prisoner, who dishonestly applied it to his own purposes. It was objected, that the money was not proved to be the money of Carraway, and that *R. v. Cain* (q) did not apply, because the 18 & 19 Vict. c. 63, s. 18, now repealed, vested the property in the trustees and not in the treasurer, and that, supposing Carraway had a special property in the money, that property ceased as soon as the money was paid into the hands of the prisoner. On a case reserved, it was held that the

(o) These Acts are repealed by the 18 & 19 Vict. c. 63.

(p) *R. v. Cain*, 2 Moo. C. C. 204. C. & M. 809.

(q) *Supra*.

conviction on the indictment in this form could not be sustained. In *R. v. Cain* the property was rightly laid in the treasurer under the 10 Geo. 4, c. 56; but in this case the money was not vested in the treasurer but in the trustees, of whom the prisoner was one, and he was specially appointed by a resolution of the society to take the money to the bank. It therefore could not be said that he stole the money, the property of the treasurer. As soon as the treasurer parted with the money he had nothing more to do with it. The prisoner might have been guilty of a breach of trust as against the other trustees, but it could not be said that he stole the money of the treasurer. (r) The prisoner was indicted for embezzling in 1842 money the property of H. W. Sitwell, and it was proved that the prisoner as clerk to the Rugby Savings' Bank had received and embezzled money which was the property of the trustees of the bank under the 9 Geo. 4, c. 92, s. 8. There was no rule or statute regulating the mode in which trustees should be appointed, or the mode in which resolutions of meetings should be entered. For the purpose of showing that Mr. Sitwell was trustee in 1842, Mr. Sitwell proved that from 1843 he had acted as trustee, but before 1843 he had only attended meetings of trustees, and when he had so attended he had signed the minute-book. The only entry to be found with his signature was for a meeting in 1835, and he stated that he had been requested by a person acting as a trustee to attend that meeting as a trustee lest there should be a deficiency of trustees, and that he had attended and signed the entry accordingly. The prisoner was at that meeting, and the heading of the page containing the resolutions was in his handwriting. Mr. Sitwell did not express by the signature that he was a trustee, or that he signed in that capacity. He did not do any act which trustees alone were capable of doing. All trustees and managers had an equal right to attend the meeting; there was nothing to show that a meeting of managers only, without any trustee, would have been invalid, and Mr. Sitwell, as rector of the parish, was *ex officio* a manager. Erle, J., held that there was evidence that Mr. Sitwell acted as trustee in 1835, and that that was some evidence, though very slight, that Mr. Sitwell was trustee in 1842; but, upon a case reserved, it was held that the evidence was insufficient. (s)

Savings' banks. — The 26 & 27 Vict. c. 87, which consolidates the laws relating to savings' banks, by sec. 10 vests the effects of such institutions in the trustee or trustees for the time being, and in all criminal proceedings the property may be stated to be that of the trustee or trustees for the time being, 'in his, her, or their proper name, without further description.'

The preceding clause is a re-enactment of the 9 Geo. 4, c. 92, s. 8, and where an indictment whilst that Act was in force alleged that the prisoner embezzled the property of W. T. and others, and it appeared that W. T. and others were trustees of a savings' bank; it was objected that these trustees were neither partners, joint tenants, parceners or tenants in common, within the 7 Geo. 4, c. 64, s. 14, and that the trustees ought to have been described by their names under

(r) *R. v. Loose*, Bell, C. C. 259.

(s) *R. v. Essex*, D. & B. 369.

the 9 Geo. 4, c. 92, s. 8; but Erle, J., held that the property was properly described; and that the term 'trustees' in the 7 Geo. 4, c. 64, s. 14, must be taken to refer to trustees of savings' banks, and that the 9 Geo. 4, c. 92, s. 8, did not take away the right to lay the property under the preceding Act. (*t*)

Loan societies. — By 3 & 4 Vict. c. 110, (*u*) (entitled an Act to amend the law relating to Loan Societies), s. 8, it is enacted, 'that all monies and securities for money, and all chattels whatsoever, belonging to any society, shall be vested in a trustee or trustees for the use and benefit of such society and the members thereof, their executors and administrators respectively, according to their several shares and interests therein, and after the death, resignation, or removal of any trustee or trustees shall vest in the surviving or succeeding trustee or trustees for the same estate and interest as the former trustee or trustees had therein, and subject to the same trusts, without any assignment or conveyance whatever, and also shall for all purposes of suit, as well criminal as civil, at law or in equity, in anywise concerning the same, be deemed to be the property of the person or persons appointed to the office of trustee or trustees of such society for the time being, in his or their proper name or names without further description; and such person or persons are hereby respectively authorized to bring or defend, or cause to be brought or defended, any suit, criminal as well as civil, at law or in equity, concerning the property or any claim of such society, and to sue and be sued, plead and be impleaded, in his or their proper name or names, as trustee or trustees of such society, without any other description, and no suit shall abate or be discontinued by the death of such person or persons, or his or their removal from the office of trustee or trustees, as aforesaid, but the same shall and may be proceeded in and by or against the succeeding trustee or trustees, and such succeeding trustee or trustees shall pay or receive like costs for the benefit of or to be reimbursed from the funds of such society as if the suit had been commenced in his or their name or names.'

Benefit building societies. — By 37 & 38 Vict. c. 42 (the Building Societies' Act, 1874), s. 9, every society upon receiving a certificate of incorporation under this Act becomes a body corporate by its registered name.

Trade unions. — By 34 & 35 Vict. c. 31 (the Trade Union Act, 1871), s. 8, all real and personal estate whatsoever belonging to any trade union registered under this Act shall be vested in the trustees for the time being of the trade union appointed as provided by this Act, for the use and benefit of such trade union and the members thereof, and the real or personal estate of any branch of a trade union shall be vested in the trustees of such branch, and be under the control of such trustees, their respective executors or administrators, according to their respective claims and interests, and upon the death or removal of any such trustees the same shall vest in the succeeding

(*t*) *R. v. Bull*, 1 Cox, C. C. 187. An anonymous case is cited in this case, where it is said that Wightman, J., held that the 7 Geo. 4, c. 64, s. 14, only applied to ordinary trustees, and therefore property could

not be laid in one churchwarden by name and others.

(*u*) This Act is made perpetual by 26 & 27 Vict. c. 56.

trustees for the same estate and interest as the former trustees had therein, and subject to the same trusts, without any conveyance or assignment whatsoever, save and except in the case of stocks and securities in the public funds of Great Britain and Ireland, which shall be transferred into the names of such new trustees; and in all actions, or suits, or indictments, or summary proceedings before any court of summary jurisdiction, touching or concerning any such property, the same shall be stated to be the property of the person or persons for the time being holding the said office of trustee, in their proper names, as trustees of such trade union, without any further description. By 39 & 40 Vict. c. 22, s. 3, the property of a registered trade union is vested in trustees, and may be stated to be their property in any indictment in their proper names as trustees of such trade union without further description. (*v*)

Custom House Property.—By 39 & 40 Vict. c. 36, s. 29, any moneys, chattels, or valuable securities, which may be received in the service of the Customs, may be stated in any indictment as the property of Her Majesty.

Property sent by post.—By the 1 Vict. c. 36, s. 40, letters, money, &c., sent by the post, may be laid as the property of the Postmaster-General.

The separate property of a married woman may be laid as her property, (*w*) and it is not necessary to describe it as her husband's, which must be done if the goods are his, but in her possession. (*x*) The goods of a *feme sole*, who has since married may be laid in her maiden name. (*y*)

What defects in indictments cured — Informal conclusions — How objections to be taken.

By the 14 & 15 Vict. c. 100, s. 24, 'no indictment (*z*) for any offence shall be held insufficient for want of the averment of any matter unnecessary to be proved, nor for the omission of the words "as appears by the record," or of the words "with force and arms," or of the words "against the peace," (*a*) nor for the insertion of the words "against the form of the statute," (*b*) instead of "against the form of the statutes," or *vice versa*, nor for that any person mentioned in the indictment is designated by a name of office, or other descriptive appellation, instead of his proper name, nor for omitting to state the time at which the offence was committed in any case where time is not of the essence of the offence, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding

(*v*) S. 9 provides for the carrying on of a prosecution in case of death or removal from office of a trustee. S. 12 provides that no person shall be proceeded against by indictment for any offence of which he shall have been previously summarily convicted under the Act.

(*w*) 45 & 46 Vict. c. 75, s. 12.

(*x*) 2 East, P. C. 652. *R. v. French*, Russ. & Ry. 491. *R. v. Wilford*, Russ. & Ry. 517.

(*y*) *R. v. Turner*, 1 Leach, 536.

(*z*) See the interpretation clause, s. 30, *ante*, p. 26.

(*a*) Before this Act an indictment for a common law felony must have contained a *contra pacem*, and so must have an indictment for stealing articles, the stealing of which was made felony by statute; *R. v. Cook*, M.S., Bayley, J., and R. & R. 176.

(*b*) See cases before this Act. *Phipoe's case*, 1795. 2 East, P. C. c. 16, s. 37, pp. 599, 601. *Morgan's case*, 2 East, P. C. c. 16, s. 37, p. 601.

of the indictment, or on an impossible day, or on a day that never happened, nor for want of a proper or perfect venue, *nor for want of a proper or formal conclusion, nor for want of or imperfection in the addition of any defendant, nor for want of the statement of the value or price of any matter or thing, or the amount of damage, injury, or spoil, in any case where the value or price, or the amount of damage, injury, or spoil, is not of the essence of the offence.*' (c)

An indictment for an indecent exposure of the person in the sight of A. and B., and divers of the liege subjects of the queen, concluded 'to the great scandal of the said liege subjects,' &c., and it was objected that it was bad because it did not conclude *ad commune nocumentum*; but it was held, on a case reserved, that the 14 & 15 Vict. c. 100, s. 24, rendered that conclusion unnecessary. (d)

Sec. 25. 'Every objection to any indictment (e) for any formal defect apparent on the face thereof shall be taken, by demurrer or motion to quash such indictment, before the jury shall be sworn, and not afterwards; and every court before which any such objection shall be taken for any formal defect may, if it be thought necessary, cause the indictment to be forthwith amended in such particular by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared.' (f)

The 7 Geo. 4, c. 64, s. 20, (g) professing to have for its object that the punishment of offenders might be less frequently interrupted in consequence of technical niceties, enacted 'that no judgment upon any indictment or information for any felony or misdemeanor, whether after verdict or outlawry, or by confession, default, or otherwise, shall be stayed or reversed,' upon certain grounds, which are all repeated in the 14 & 15 Vict. c. 100, s. 24. Unfortunately, however, that clause did not prevent these defects from being available on demurrer; but this mischief is now remedied by the section just mentioned, under which these defects are no longer available in any stage of the proceedings. (h)

(c) The words in italics are new; the rest is from the 7 Geo. 4, c. 64, s. 20 (now repealed), which, after the words 'perfect venue,' added 'where the Court shall appear by the indictment or information to have had jurisdiction over the offence;' which were advisedly omitted. It would seem that the words 'want of a proper or formal conclusion,' were introduced to render any conclusion perfectly unnecessary and immaterial. Where a count for misdemeanor charged, without any statement of venue, that certain persons unlawfully and tumultuously assembled, and committed certain alleged offences, and then added, with a statement of venue, that the defendants did unlawfully aid, abet, &c., the said persons to continue such unlawful assemblings, and other offences, it seems to have been thought that such count was bad; because it did not state a proper venue to the offence alleged to have been committed by the first-mentioned persons; but it was held to be cured by the 7 Geo. 4, c. 64, s. 20, because it consisted only in 'the want of a proper or perfect venue,' and the Court appeared by the in-

dictment to have had jurisdiction. *R. v. O'Connor*, 5 Q. B. 16. See *R. v. Albert*, 5 Q. B. 37 S. P. *R. v. Stowell*, 5 Q. B. 44. *R. v. Hunt*, 10 Q. B. 925, indictments removed by *certiorari* from the Central Criminal Court.

(d) *R. v. Holmes*, Dears. C. C. 207; 22 L. J. M. C. 122.

(e) See the interpretation clause, sec. 30, *ante*, p. 26.

(f) By the common law many formal defects were amendable (see 1 Chitt. C. L. 297, and the cases there cited), and it has been the long-accustomed practice for the Grand Jury to consent, at the time they are sworn, that the Court should amend matters of form. This clause, therefore, rather revives an old than creates a new power. See also *R. v. Chapple*, 17 Cox, 455.

(g) This section is repealed by 36 & 37 Vict. c. 91.

(h) The conclusion to a count in an indictment 'against the form of the statute' is now no longer necessary. *Castro v. R.*, 6 Ap. Cas. 229. See also *R. v. Mayor of Poole*, 19 Q. B. D. 602, note at p. 683.

The 7 Geo. 4, c. 64, s. 21, enacts, 'that no judgment after verdict upon any indictment or information for any felony or misdemeanor shall be stayed or reversed for want of a similiter, nor by reason that the jury process has been awarded to a wrong officer upon an insufficient suggestion, nor for any misnomer or misdescription of the officer returning such process, or of any of the jurors, nor because any person has served upon the jury who has not been returned as a juror by the sheriff or other officer; and that where the offence charged has been created by any statute, or subjected to a greater degree of punishment, or excluded from the benefit of clergy by any statute, the indictment or information shall after verdict be held sufficient to warrant the punishment prescribed by the statute, if it describe the offence in the words of the statute.' (i)

It was held that an indictment for false pretences must state the property obtained to belong to some person, and that, notwithstanding the preceding section, it was bad if it omitted to do so. (j) But this omission is cured by the 24 & 25 Vict. c. 96, s. 88. The prisoner was tried and convicted upon an indictment which alleged that he was guilty of corrupt practices, against the form, &c. It was proved at the trial that he had promised money to two voters. After verdict, it was objected that the indictment did not sufficiently describe the offence; it was held by Lord Coleridge, C. J., and Field and Mathew, JJ. (Denman and Day, JJ. dissenting), that the defect (if any) was cured by the verdict; by four judges, that the indictment was defective and might have been quashed before verdict; and by Field, J., that the indictment was sufficient by reason of 26 & 27 Vict. c. 29, s. 6, and 46 & 47 Vict. c. 51, s. 53. (k)

Pleas in Abatement.

The 7 Geo. 4, c. 64, s. 19, 'for preventing abuses from dilatory pleas,' enacts that no indictment or information shall be abated by reason of any dilatory plea of misnomer or of want of addition, or of wrong addition of the party offering such plea; if the court shall be satisfied by affidavit or otherwise of the truth of such plea; but in such case the court shall forthwith cause the indictment or information to be amended according to the truth, and shall call upon such party to plead thereto, and shall proceed as if no such dilatory plea had been pleaded. (l)

Pleas of Autrefois Acquit and Autrefois Convict.

Where a man is indicted for an offence and acquitted, he cannot be again indicted for the same offence, provided the first indictment

(i) See *R. v. Goldsmith*, 12 Cox, C. C. 479, 42 L. J. M. C. 94, *post*, vol. 2.

(j) *R. v. Norton*, 8 C. & P. 196; *R. v. Martin*, 8 A. & E. 481; vol. 2, *R. v. Bullock*, Dears. C. C. 653; *Sill v. R.*, 1 E. & B. 553; 22 L. J. M. C. 41.

(k) *R. v. Stroulger*, 17 Q. B. D. 327.

(l) See 14 & 15 Vict. c. 100, s. 24, *ante*, p. 36; and see sec. 1 of this Act, *noticed post*, as to the power to amend.

were such that he could have been lawfully convicted on it. If so indicted a second time, he may plead *autrefois acquit*.

So a man may plead *autrefois convict* if he be indicted for an offence for which he has been previously convicted and sentenced by a proper and lawful judgment.¹

The indictment charged the prisoners with burglariously breaking and entering the dwelling-house of M. Nevill and A. Nevill, *with intent to steal* their goods, and they pleaded a plea of *autrefois acquit* upon a former indictment, which charged them with burglariously breaking and entering the dwelling-house of M. Nevill and A. Nevill, *and stealing* goods of M. Nevill, goods of A. Nevill, and goods of one S. Gibbs. The plea concluded with averring that the burglary was the same identical burglary. To this plea there was a demurrer, which was argued before all the judges of England; and their opinion was afterwards delivered by Buller, J. The learned judge said, that it had been contended on behalf of the prisoners, that as the dwelling-house in which, and the time when, the burglary was charged to have been committed were precisely the same both in the indictment for the burglary *and stealing* the goods, on which they were acquitted, and in the indictment for the burglary *with intent to steal* the goods, which was then depending, the offence charged in both was, in contemplation of law, the same offence, and that of course the acquittal on the former indictment was a bar to all further proceedings on the latter. He then proceeded, 'It is quite clear, that at the time the felony was committed, there was only one act done, namely, the breaking of the dwelling-house. But this fact alone will not decide this case, for burglary is of two sorts: first, breaking and entering a dwelling-house in the night time, *and stealing goods therein*; secondly, breaking and entering a dwelling-house in the night time, *with intent to commit a felony*, although the meditated felony be not in fact committed. The circumstance of *breaking and entering* the house is common and essential to both the species of this offence; but it does not of itself constitute the crime in either of them; for it is necessary to the completion of burglary that there should not only be a breaking and entering, but the breaking and entering must be accompanied with a felony actually committed, or intended to be committed; and these two offences are so distinct in their nature, that evidence of one of them will not support an indictment for the other. (m) In the present case, therefore,

(m) It is well established that an indictment for breaking and entering, &c., and stealing goods, will not be supported by evidence of a breaking and entering, &c., with intent to steal them. But it has been supposed that an indictment for breaking and entering, &c., with intent to steal, would be supported by evidence of breaking and entering, &c., and an actual stealing (vol. ii. Burglary). If this be so, the report of the judgment delivered by Buller, J., as

here given, states the point too largely; as it seems to go to the extent of saying that evidence of a breaking and entering, and a felony actually committed, will not support an indictment for a breaking and entering, &c., and a felony intended to be committed. In 2 East, P. C. c. 15, s. 29, p. 520, the learned author observes upon this case, and says, '*Quære*, whether the definition of the crime be not solely resolvable into the breaking, &c., with an intent to commit felony;

AMERICAN NOTE.

¹ By the Constitution of the United States "no person shall be subject for the same offence to be twice put in jeopardy of life or limb." This, although not binding upon the

States, is generally accepted by them. In South Carolina, however, a person is only protected where he has been acquitted by a jury. See Bishop, Vol. i. ss. 981, 982.

evidence of the breaking and entering with intent to steal, was rightly held not to be sufficient to support the indictment charging the prisoner with having broken and entered the house, and stolen the goods stated in the first indictment; and if crimes are so distinct, that evidence of the one will not support the other, it is as inconsistent with reason as it is repugnant to the rules of law, to say that they are so far the same that an acquittal of the one shall be a bar to prosecution for the other.'

The learned judge then observed upon the cases which had been cited on behalf of the prisoners, in support of the proposition contended for by their counsel; namely, *Turner's case* (n) and the case of *Jones*. (o) In *Turner's case* it was agreed that the prisoner, having been formerly indicted for burglary, in breaking the house of a Mr. Tryon, and stealing his goods, and acquitted, could not be indicted again for the same burglary, in breaking his house, and stealing therein the money of one Hill (a servant of Mr. Tryon), but that he might be indicted for felony in stealing the money of Hill. Upon this case Buller, J., observed: 'The decision was not a solemn judgment, for the prisoner was not indicted a second time for the burglary: it was merely a direction from the judges to the officer of the Court how to draw the second indictment for the larceny; and it proceeded upon a mistake, as I shall presently show. If the judges in that case exercised a little lenity before the indictment, which might more properly have been done after conviction, much censure could not fall on them. But they proceeded on the ground that *Turner* having been indicted for burglary in breaking the house of Mr. Tryon, and stealing his goods, and acquitted thereof, could not be again indicted for the same burglary for breaking the house, though he might be indicted for stealing the money of Hill, for which he had not been indicted before; and he was indicted accordingly. The judges, therefore, must have conceived that the *breaking the house* and the *stealing the goods* were two distinct offences; and that breaking the house only constituted the crime of burglary; which is a manifest mistake, for the burglary consisted in breaking the house and stealing the goods; and if stealing the goods of Hill was a distinct felony from that of stealing the goods of Tryon, which it was admitted to be, the burglaries could not be the same.'

With respect to the case of *Jones* and *Bever*, the learned judge said, that it proceeded entirely upon the decision in *Turner's case*; and that, the foundation failing, the superstructure could not stand. (p)

The learned judge then referred to several authorities, (q) and of which the actual commission is such a strong presumptive evidence that the law has adopted it, and admits it to be equivalent to a charge of the intent in an indictment. And therefore an indictment charging the breaking, &c., to be with intent to steal, is said to be supported by proof of actual stealing; though certainly not *vice versa*.

(n) Kel. 30.

(o) Kel. 52.

(p) *R. v. Jones*, Kel. 52. The prisoners were indicted for burglariously breaking and entering the dwelling-house of Lord Corn-

bury, and stealing his goods therein; and, being acquitted, were afterwards indicted for the same burglary, in breaking and entering Lord Cornbury's house, and stealing the goods of a Mr. Nunnesy; and it was agreed that, as they had been before acquitted, they could not be indicted again for the same burglary, but that they might be indicted for the felony in stealing the goods of Mr. Nunnesy, precisely as had before been done in *Turner's case*.

(q) 2 Hawk. P. C. c. 35, s. 3. *Fost.* 361, 362. *R. v. Pedley*, 1 Leach, 242.

continued, 'These cases establish the principle, that unless the first indictment were such as the prisoner might have been convicted upon it by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second. Now, to apply the principle to the present case: the first indictment was for burglariously breaking and entering the house of Miss Nevill, and *stealing the goods* mentioned; but it appeared that the prisoners broke and entered the house *with intent to steal*, for, in fact, no larceny was committed, and therefore they could not be convicted on that indictment. But they have not been tried for burglariously breaking and entering the house of the Miss Nevills *with intent to steal*; which is the charge in the present indictment, and therefore their lives have never been in jeopardy for this offence. For this reason, the judges are all of opinion that the plea is bad; that there must be judgment for the prosecutor upon the demurrer; and that the prisoners must take their trials on the present indictment.' And the prisoners were accordingly tried and convicted.(r)

In the preceding case the property in the goods was laid differently in the two indictments. The first, upon which the prisoners had been acquitted, stated some of the goods stolen to belong to M. Nevill, others to A. Nevill, and others to S. Gibbs; and the second indictment stated the goods intended to be stolen to belong to M. and A. Nevill only. And it is said that Buller, J., in delivering the opinion of the judges on the case, observed that the property in the goods was differently described in the two indictments, and said that this might afford another objection to the plea; but that he had not entered into the consideration of the circumstance, as the case did not require it.(s) The ancient doctrine, that a person indicted and acquitted for breaking and entering a dwelling-house in the night, and there stealing the goods of one person, could not be afterwards indicted for the same breaking and entering, and stealing the goods of another person, appears to have been overruled in this case, when the authorities by which it was supposed to have been established were denied to be law.(t) It may be mentioned, also, that the 7 & 8 Geo. 4, c. 28, s. 4, enacts that 'no plea setting forth any attainder shall be pleaded in bar of any indictment, unless the attainder be for the same offence as that charged in the indictment.'

In a later case, the doctrine was recognized that a plea of *autrefois acquit* is no bar, unless the facts charged in the second indictment would have warranted a conviction upon the first. To an indictment for keeping a gaming-house in the time of Geo. 4, the defendant pleaded that at a sessions, in 4 Geo. 4, he was indicted, for that he, on the 18th of January, 57 Geo. 3, and on divers other days between that day and the taking of that inquisition, kept a gaming-house, against the peace of our said lord the king; that he was tried and acquitted, and that the offence in both indictments was the same. To this there was a demurrer, and it was urged that the *contra pacem* in the first indictment tied up the prosecutor to the proof of an offence in

(r) *R. v. Vandercomb*, 2 Leach, 708; 2 East, P. C. c. 15, s. 29, p. 519.

(s) 2 East, P. C. c. 15, s. 29, p. 519, note (b).

(t) *Fiz.*, Turner's case, and Jones's case, *ante*, p. 40.

the time of George 3; for George 3 being the only king named in that indictment, 'our said lord the king,' in that indictment, must have referred to him, and then the defendant could not have been punished on that indictment for keeping the house in the time of King George the 4th. And the demurrer was held good. (u)

It seems that an acquittal of an offence charged as a larceny cannot be pleaded in bar to an indictment for the same offence charged as a false pretence, for the defendant was not in jeopardy for the misdemeanor on the trial for the larceny, and the acquittal of the larceny may have proceeded on the ground that the offence did not amount to a felony. (v)

Where a man has been acquitted generally upon an indictment for murder, *autrefois acquit* is a good plea to an indictment for the manslaughter of the same person; and *è converso* where a man has been acquitted on an indictment for manslaughter, he shall not be indicted for the same death as murder; the fact being the same, and the difference only in the degree. (w) And upon similar grounds it should seem, that one who had been convicted upon an indictment for manslaughter, and had his clergy allowed, might have pleaded *autrefois convict* to an indictment, charging the same death upon him as a murder. (x) And it is clear that *autrefois convict* of manslaughter, and clergy thereupon allowed, was a good bar in an appeal of murder. (y) An *autrefois acquit*, or *autrefois attain*, upon an indictment for murder, was a good plea to an indictment charging the same death as petit treason. (z)

As a final determination in a Court having competent jurisdiction is conclusive in all Courts of concurrent jurisdiction, it has been held that a party who has killed another in a foreign county, and been there prosecuted, tried, and acquitted, may avail himself of such acquittal in answer to any charge against him in this country for the same offence. (a)

In a case where the prisoner had been tried for murder, and convicted of manslaughter, and had received the benefit of clergy, and was

(u) *R. v. Taylor*, 3 B. & C. 502.

(v) *R. v. Henderson*, 2 M. C. C. R. 192. C. & M. 328. It will be noticed that the 24 & 25 Vict. c. 96, s. 88, only prevents an acquittal on an indictment for false pretences if the offence turns out to be larceny. See also 14 & 15 Vict. c. 100, s. 12.

(w) *R. v. Holcroft*, 4 Co., 46 b, 2; Hale, 246.

(z) The only objection would be, that he could not have been convicted of murder upon the former indictment; and though this might be said equally where the party has been acquitted upon a former indictment for manslaughter, the plea in the latter case is clearly proper, upon the ground that if the party was not guilty even of manslaughter, he cannot be charged with having caused the death with the circumstances of aggravation necessary to constitute murder. The point arose in *R. v. Tancock*, 13 Cox, C. C. 217, where the prisoner, having been convicted of manslaughter, pleaded *autrefois convict* to a charge of murder on the coroner's

inquisition. Denman, J., held that the depositions clearly only disclosed evidence of manslaughter, and so held the plea proved.

(y) *R. v. Wigges*, 4 Co. 45.

(z) 2 Hale, 246, 252; Fost. 329. As to the general doctrine of these pleas, and that they can only avail where the first indictment was valid, see 1 Chit. Crim. L. 452, *et seq.* And *R. v. Clarke*, 1 B. & B. 473.

(a) *R. v. Hutchinson*, 3 Kebl. 785, cited in *Beak v. Thyrrwhit*, 1 Show. 6; Bull. N. P. 245; 3 Mod. 194; 1 Leach, 135, note (a). The defendant, being apprehended in England, and committed to Newgate, was brought into K. B. by *habeas corpus*, where he produced an exemplification of the record of his acquittal in Portugal: but the King (Car. 2), being willing to have him tried here for the same offence, referred the point to the consideration of the Judges; who all agreed that, as the party had been already acquitted of the charge by the law of Portugal, he could not be tried for it again in England.

subsequently tried for murder, and convicted of manslaughter in killing another individual (who died after the first trial) by the same act which caused the death of the first; the judges were unanimously of opinion, that the former allowance of clergy protected the prisoner against any punishment upon the second verdict; and that if the prisoner were to be called up for judgment, he might rely upon such allowance as a bar. (b)

If a prisoner could have been legally convicted upon an indictment upon any evidence that might have been adduced, his acquittal on that indictment may be successfully pleaded to a second indictment, and it is immaterial whether the proper evidence was adduced at the first trial or not. A plea of *autrefois acquit* must only set forth the record of one acquittal; if it were to set forth two, it would be bad, for duplicity, but it seems that the Court would take care that the prisoner should not be prejudiced by pleading one acquittal instead of the other. To an indictment for the murder of a child, described in different counts as Charles William, William, &c., the prisoner pleaded that at a former delivery of the gaol of Newgate he had been indicted, tried, and acquitted of the murder of Charles William Beadle, and the plea averred that the child was as well known by the name of Charles William Beadle as by any of the several names and descriptions of Charles William, &c., as he was in and by the present indictment described: and this averment was traversed by the replication. The prisoner's counsel asked if they might add to this plea, that the prisoner was acquitted on the coroner's inquisition, in which the deceased was described as Charles William Sheen. Burrough, J., 'If the prisoner, by his plea, insists on two records, his plea would be double, (c) but if in the course of the case it shall appear that he ought to have pleaded his acquittal on the inquisition, I will take care that he shall not be prejudiced.' For the prisoner a register was put in, in which the baptism of the deceased, who was about four months old, was entered 'Charles William, the son of Lydia Beadle;' a witness proved the identity of the child, and that his mother was an unmarried woman, named Lydia Beadle, whom the prisoner had married after the birth of the deceased, and stated that the deceased was always called William or Billy, but that she should have known him by the name of Charles William Beadle; and if any one had inquired for him by that name she would have known who was meant. The prisoner's father stated that the child's name was Charles William Sheen, but that he had

(b) *R. v. Jennings*, East. T. 1819. R. & R. 388. The act which occasioned the death of the two individuals (two children) was one and the same. The general effect of the allowance of clergy, after the 8 Eliz. c. 4, was to discharge all offences precedent within clergy; but not such as were not entitled to the benefit of clergy. But by the 6 Geo. 4, c. 25, s. 4, the allowance of the benefit of clergy to any person who was convicted of any felony, did not render the person to whom such benefit was allowed punishable for any other felony, by him

or her committed, before the time of such allowance.

(c) But see *Ashford v. Thornton*, 1 B. & Ald. 423, where a plea by the defendant contained an averment of an acquittal both on an indictment for murder and on an indictment for a rape, as well as an allegation of an alibi, and divers other facts tending to prove the defendant's innocence. See also 2 Hawk. P. C. c. 23, s. 128, where it is said that there seems to be no doubt that a prisoner may plead as many pleas as he like, unless they be repugnant to each other; and see *ibid.* s. 137, and c. 34. C. S. G.

never heard him called so. Burrough, J., (in summing up) 'The question on this issue is, whether the deceased was as well known by the name of Charles William Beadle as by any of the names and descriptions in the present indictment; and I ought to say that if the prisoner could have been convicted on the former indictment, he must be acquitted now. And whether at the former trial the proper evidence was adduced before the jury or not, is immaterial; for if by any possible evidence that could have been produced, he could have been convicted on that indictment, he is now entitled to be acquitted. The first evidence we have is the register; and, looking at that, would not every one have called the child Charles William Beadle? And it is proved by one of the witnesses that she should have known him by that name. It cannot be necessary that all the world should know the child by that name; because children of so tender an age are hardly known at all, and are generally called by a Christian name only. If, however, you should think that the name of the deceased was Charles William Sheen, I wish you would inform me of it by your verdict, because it is agreed, that as that is the name in the coroner's inquisition, the prisoner should derive the same advantage from the course he has taken, as if he had pleaded his acquittal on that inquisition. My Brother Littledale suggests to me, that if a legacy had been left to this child by the name of Charles William Beadle, he would have taken it upon this evidence; and if this evidence of the child's name had been given at the former trial, I think the prisoner should have been convicted. The case of *R. v. Clark* (d) has been cited, but in that case there was an entire absence of evidence as to the surname of the deceased. If you think that in the present case the name of the deceased was either Charles William Beadle or Charles William Sheen, or if you think that he was known at all by these names, you ought to find a verdict for the prisoner.' (e)

If the means of death charged in two indictments be such as would be supported by the same evidence, a plea to the one that the prisoner was acquitted on the other is good. Therefore, to an indictment for murder, by giving the deceased oil of vitriol, and forcing him to take it into his mouth and throat, it is a good plea that the prisoner had been acquitted on an indictment for giving the deceased poison, that is, oil of vitriol, and forcing him to take, drink, and swallow it down. (f)

An acquittal for murder by poison cannot be pleaded in bar to an indictment for feloniously administering poison with intent to murder; for, although the 14 & 15 Vict. c. 100, s. 9, empowers the jury to convict of an attempt to commit a murder on the trial of an indictment for murder, that would only be a misdemeanor, and a totally different offence from the statutory felony of administering poison with intent to murder. (g)

(d) *R. & R.* 358, *post*.

(e) *R. v. Sheen*, 2 C. & P. 634, Burrough and Littledale, JJ. In this case the counsel for the Crown replied *ore tenus*, reading the replication from the back of his brief, and the prisoner's counsel joined issue *ore tenus*; the court awarded a *venire* returnable *instantly*, and the sheriff having made his return forthwith, and the jury hav-

ing been sworn, the counsel for the prisoner opened his case in support of the plea, and called his witnesses; the counsel for the Crown afterwards addressed the jury and called witnesses, and the counsel for the prisoner replied.

(f) *R. v. Clarke*, 1 B. & B. 473.

(g) *R. v. Connell*, 6 Cox, C. C. 178.

An acquittal on a coroner's inquisition for murder of an infant, is a bar to an indictment for concealing the birth of the same child. (*h*)

Formerly by the 7 Will. 4 & 1 Vict. c. 85, s. 11, on the trial of any person, for any felony whatever, where the crime charged included an assault against the person, it was lawful for the jury to acquit of the felony and to find a verdict of assault against the person indicted; but that section is repealed by the 14 & 15 Vict. c. 100, s. 10, so that now, on an indictment for the assault, the acquittal on the previous charge of felony could not be pleaded. (*i*)

A previous summary conviction for assault before Justices under the 24 & 25 Vict. c. 100, s. 42 (*j*) is not a bar to a subsequent indictment for manslaughter upon the death of the man assaulted consequent upon the same assault (*k*); notwithstanding the provisions of the Summary Jurisdiction Act, 1879, 42 & 43 Vict. c. 49, s. 27 (3); (*l*) but a person who has been summarily convicted for an assault, but has been discharged on giving security for his future good behaviour, cannot afterwards be convicted on indictment for the same assault. (*m*)

On an indictment for stealing two pair of boots, the property of Rowland B., who was the son of John B., to whom the boots really belonged, the mistake in the ownership was discovered, and an acquittal taken, and a fresh bill describing the boots as the property of John B. having been found, the prisoner pleaded *autrefois acquit* to it; and on the trial of this plea Rowland B. proved that the boots were the property of his father, and that he had worked in the shop till one o'clock, when he succeeded his father in charge of the stall, from whence the boots were stolen while he was in charge, his father returning home; he was fourteen years old, and lived with and worked for his father, who supported him, but paid him no wages; it was contended that Rowland B. was a bailee of the goods, and therefore they were properly described as his property in the first indictment. Secondly. That the indictment might have been amended under the 14 & 15 Vict. c. 100, s. 1, and therefore the prisoner might have been convicted on the first indictment. But these points were overruled, and the jury found that the goods were the property of John B., and the same as those

(*h*) *R. v. Ryland*, Glouc. Sum. Ass. 1845, Atcherley, Serjeant, after consulting Tindal, C. J. MSS. C. S. G.

(*i*) *R. v. Dingley*, 4 F. & F. 99.

(*j*) See this sect. *post*, Common Assaults, Book 3, ch. 10, s. 1.

(*k*) *R. v. Morris*, 36 L. J. M. C. 84; L. R. 1 C. C. R. 90, *et per* Kelly, C. B., *diss.* De Salvi's case [reported among the cases tried at the Central Criminal Court, sess. 1857, vol. 46, p. 884] is clearly distinguishable. There the prisoner was indicted for the murder of one Robertson, and pleaded a plea of *autrefois acquit*, the acquittal having been upon an indictment for wounding, with intent to kill. It was clear that this acquittal might have been pronounced upon the ground of the jury having negatived the intent to kill, and yet that the prisoner might well be guilty of the murder, without an intent to kill the individual murdered, as if he had shot at another man, but un-

intentionally killed Robertson. The plea, therefore, of *autrefois acquit* was in that case properly overruled; *Martin, B.* 'I agree that *R. v. De Salvi* is not in point. The prisoner there had been acquitted of an assault with intent to murder, but convicted of an assault with intent to do grievous bodily harm, and was afterwards indicted for murder upon the death of the person assaulted, and it was there held by the Lord Chief Baron Pollock that murder might be committed without any intent to kill, and that if a man intended to maim and caused death, and it could be made out most distinctly that he did not mean to kill, yet if he did those acts for the purpose of accomplishing that limited object, and they were calculated to produce death, and death ensued, that was murder, although the man did not intend to kill.'

(*l*) *R. v. Friel*, 17 Cox, C. C. 325.

(*m*) *R. v. Miles*, 24 Q. B. D. 423.

described in the first indictment as the property of Rowland B.; and upon a case reserved, it was held that the son was not a bailee, but a servant, and that the goods remained all the time in the father's possession; and that the first indictment must be considered in the state in which it was, and not in that in which it might have been, and consequently the prisoner had been acquitted upon an indictment, upon which she never was in peril of a conviction. (n)

To an indictment against one prisoner only for receiving stolen goods a plea of *autrefois acquit*, upon an indictment against him and four others, on which one was convicted and the three others and himself acquitted, is good upon demurrer. To an indictment against Dann for receiving stolen goods, he pleaded that at a previous assizes, an indictment was found against two persons for stealing the said goods, and against Whitehead, Dann, and two others, for receiving the said goods, and that the two principals and Whitehead were found guilty, but Dann and the other receivers acquitted; to this plea there was a demurrer, and after consideration the following judgment, which had been prepared by Gaselee, J., was delivered at the next assizes. (o) 'The plea of *autrefois acquit* is grounded upon an ancient maxim of the common law of England, that no one ought to be brought into jeopardy of his life twice for the same offence. A great deal of learning is to be found upon the subject in 2 *Hawk. P. C.* c. 35, and *Starkie on Criminal Pleading*, p. 316, and many other books. Upon the result of all the authorities the question is, whether the prisoner could have been convicted on the former indictment, for, if he could, he must be acquitted on the second; and the law is very correctly stated to the jury by Burrough, J., in the case of *R. v. Sheen*. (p) It is argued for the prosecution, that an acquittal of a joint felony is not a bar to an indictment for a several felony. However that might be, if it clearly appeared upon the record that several felonies had been committed, in some of which the prisoner Dann had been jointly, and in another separately concerned, it does not appear that the present indictment is confined to any offence committed by the prisoner separately, nor is it so. Upon it he is liable to be convicted of an offence committed, separately or jointly with any other person, and consequently with Whitehead. The plea alleges that the charge in the former indictment against Whitehead and the prisoner and the other three, is the same offence as that charged in the former indictment, and this is admitted by the demurrer. The argument that the prisoner could not be convicted upon the former indictment is not true. The result of that indictment shows that it was not necessary to convict all the parties charged by that indictment. The prisoner might have been convicted either with Whitehead, or without him; nay, if the judge had called upon the prosecutor to elect against whom he would proceed (whether he did so or not the learned judge was not at liberty to consider, as nothing respecting it appears upon record), and he had elected to proceed against the prisoner, he might have been convicted

(n) *R. v. Green*, D. & B. 113.

(o) The case was postponed in order to consult the other judges, but they declined giving any opinion on it, as no judgment

had been given, and the case might come before some of them upon error.

(p) See note (c) p. 44.

alone, which shows he had been in jeopardy; and if the plea of *autrefois acquit* is not a bar, he may now be convicted of the very offence committed jointly with Whitehead, and of which Whitehead has been convicted. A replication that the charges were not the same might possibly, upon evidence, have placed the case in a very different point of view. As the record now stands, the learned judge is bound to adjudge the plea to be good, and that the prisoner be discharged.' (q)

The prisoner was charged with a larceny at common law, and also with receiving 'the goods aforesaid.' He was acquitted on the ground that the goods were a fixture, and therefore incapable of being stolen at common law. He was then indicted under 24 & 25 Vict. c. 96, s. 31, for stealing the fixture, and also with receiving the same. He pleaded *autrefois acquit*, but it was held that the plea was bad, since the prisoner was never in jeopardy on the first indictment either for stealing or receiving. (r)

So an acquittal upon an indictment under 24 & 25 Vict. c. 97, s. 35, and 24 & 25 Vict. 7, c. 100 s. 32, charging the prisoners with the felony of obstructing a railway with intent to endanger the safety of the passengers, was held to be no bar to a subsequent indictment under ss. 36 and 34, of the same statutes respectively, preferred on the same facts, charging them with the misdemeanor of endangering the safety of passengers by an unlawful act, since they could not be convicted of this misdemeanor on the first indictment. (s)

Where a defendant had been acquitted upon an indictment for perjury, alleged to have been committed in an affidavit, the jurat of which was not set out, and he was again indicted for perjury committed in the same affidavit, and the jurat set out, it was held that a plea of the former acquittal was good; for in the first indictment the offence was sufficiently charged without setting out the jurat. (t)

Where an insolvent debtor had been acquitted upon an indictment for omitting certain goods out of his schedule, and was again indicted for omitting those goods and some others out of his schedule; it was held that a plea of *autrefois acquit* was not, in strictness, a good defence to the whole of the second indictment: the prisoner might have fraudulently omitted out of his schedule the goods mentioned in the last indictment, which were not mentioned in the first, and in point of law a prosecutor might prefer separate indictments for each such omission; but excepting under very particular circumstances such a course ought not to be pursued. (u)

Where a prisoner was indicted for a simple burglary in the house of a person, for whose murder he had been acquitted, Parke, B., said, 'The charge in the indictment does not affect the life of the prisoner, as there is no allegation that the burglary was accompanied by violence. If he had been indicted for burglary with violence, as he might have been convicted of manslaughter, or even assault, on the indictment for murder, on which he was acquitted altogether, in my opinion that acquittal would have been an answer to the allegation of violence, if it had been inserted in the present indictment.' (v)

(q) *R. v. Dann*, R. & M. C. C. R. 424.
See *R. v. Barnett*, vol. ii.

(r) *R. v. O'Brien*, 15 Cox, C. C. 29.

(s) *R. v. Gilmore*, 15 Cox, C. C. 85.

(t) *R. v. Emden*, 9 East, 437. See this case, *post*, tit. *Perjury*.

(u) *R. v. Champneys*, 2 M. & Rob. 26; 2 Lew. 52, Patteson, J.

(v) *R. v. Gould*, 9 C. & P. 364, Tindal, C. J., and Parke, B.

The acquittal on an indictment charging the prisoner as a principal, was no defence to an indictment charging him as accessory before the fact. Plant was indicted and tried for the murder of her child, and Birchenough for having been present, aiding and abetting her in the said murder. She was found guilty, he was acquitted. They were arraigned on a second indictment, in which she was charged with the murder, he as an accessory before the fact; he pleaded *autrefois acquit*, referring to his acquittal on the former indictment. The prosecutor demurred; Lord Denman, C. J., thought the plea bad, and directed the prisoner to plead to the indictment, which he did, and was found guilty; and upon a case reserved, the judges were of opinion that the plea of *autrefois acquit* was properly overruled. (w)

Where several chattels are stolen at the same time, and a prisoner has been acquitted of stealing one of them, this acquittal is no bar to indictment for stealing another of them; for 'it hath happened that a man acquitted for stealing the horse hath yet been arraigned and convicted for stealing the saddle, though both were done at the same time.' (x) Where a prisoner was acquitted of uttering a forged note, it was held that he might be afterwards tried for uttering another forged note at the same time when he had uttered the former one. (y) So where the prisoner had been convicted of stealing one pig, it was held that he might be tried for stealing another pig at the same time and place. (z)

Wherever the indictment whereon a man is acquitted is so far erroneous (either for want of substance in setting out the crime, or the authority in the Court before which it was taken, as where sessions were held on a day, to which they had not been adjourned), (a) that no good judgment could have been given upon it against the prisoner, the acquittal is no bar to a subsequent indictment, because in judgment of law the prisoner was never in danger upon it: for the law will presume, *prima facie*, that the judge would not have given a judgment, which would have been liable to be reversed. (b) But if there be no error in the indictment, but only in the process, it seems agreed that the acquittal will be a good bar to a subsequent prosecu-

(w) *R. v. Birchenough*, R. & M. C. C. R. 477; 7 C. & P. 575. This case overruled 1 Hale, 626; 2 Hale, 224; Foster, 361; 2 Hawk. P. C. c. 35. s. 11; Kely. 25. It was decided before the passing of 24 & 25 Vict. c. 94, s. 1, noticed *post*.

(x) 1 Hale, 246.

(y) *Anon.*, Wood, B., cited C. & M. 611.

(z) *R. v. Brettell*, MSS. C. S. G., C. & M. 609, Cresswell, J.: but, as the prisoner was undergoing his sentence for the stealing of the other pig, Cresswell, J., thought the second indictment should be abandoned, and that course was adopted. These authorities show that Erle, J., fell into an error when he said,

in *R. v. Bond*, 1 Den. C. C. 517, 'I do not think it necessary, in a plea of *autrefois convict*, to allege the identity of the specific chattel charged to be taken. Suppose the first charge to be taking a coat; the second to be taking a pocket-book; *autrefois convict* pleaded; parol evidence showing that the pocket-book was in the pocket of the coat; I think that would support the plea; because it would show a previous conviction for the same act of taking.'¹

(a) *R. v. Bowman*, 6 C. & P. 337.

(b) 2 Hawk. P. C. c. 35, s. 8. *R. v. Turner*, R. & M. C. C. 239. Vaux's case, 4 Rep. 44.

AMERICAN NOTE.

¹ In America, if the two pigs had different owners, a man might be convicted of a larceny with respect to each pig; but not so if they belonged to the same owner. Indeed it should seem that if the articles stolen

were stolen at one time though belonging to different owners, the charge would be one and indivisible. (See Bishop, vol. i. ss. 1061, 1062, 1063, 1064, and the cases cited by him.)

tion, the best reason whereof seems to be, that such error is salved by appearance. (c) And if one upon an insufficient indictment for felony has judgment this judgment is a bar to a new indictment unless it be reversed on error. (d) If also a man be convicted either by verdict or by confession on an insufficient indictment, and no judgment given thereon, he may be again indicted. (e)

Where two indictments for rape were precisely in the same words, and there had been an acquittal upon one, and that acquittal was pleaded to the second; the first indictment was put in, and it was contended, on behalf of the prisoners, that it was evidence that the offence charged in the second was the same as that charged in the first; but it was answered, on the part of the Crown, that it was no evidence at all, for if the same prisoners had committed several rapes on the same woman on the same day (which was the fact here) each indictment would be in the same terms. So if a man stole twenty sheep from the same person at different times on the same day, or wounded the same person several times on the same day, each indictment would be in the same words; and of this opinion was the learned judge, (f) and this opinion has been since confirmed. (g) In the same case the commitment of the prisoners for a rape upon the prosecutrix was tendered in evidence on the part of the prisoners, and objected to on the ground that it had no bearing on the issue, as a commitment might be for one crime, and any number of indictments might afterwards be preferred for different crimes, and the learned judge was strongly of opinion that it was not admissible. (h)

(c) 2 Hawk. P. C. ibid.

(d) Vaux's case, 4 Rep. 44; 2 Hale, P. C. 248; and see R. v. Haughton, 1 E. & B. 501.

(e) Ibid.

(f) R. v. Parry, 7 C. & P. 886, 2 Moo. C. C. R. 9. S. C. Bolland, B. But he left the case to the jury, reserving the point, which, however, was not decided by the judges; see R. v. Martin, 8 Ad. & Ell. 483.

(g) Per Lord Denman, C. J., R. v. Martin, 8 Ad. & Ell. 482.

(h) R. v. Parry, *supra*, note (f). The commitment was, however, received subject to the opinion of the judges. The jury found that the offences were the same, notwithstanding the learned judge told them that he thought there was no evidence to show that they were so; and upon a case reserved, the judges held that they could not direct the verdict to be set aside, but they did not decide any other point. A plea of *autrefois acquit* may be pleaded *ore tenus*, R. v. Bowman, 6 C. & P. 337; R. v. Champneys, *ante*, p. 47; R. v. Coogan, 1 Leach, 448; which means that the prisoner may state the plea, but he must do so in the proper form, the difference being that it may either be put upon parchment by the prisoner, or he may dictate it *ore tenus*, and it may be taken down by the clerk of arraigns, and put upon parchment by him. Per Patteson, J., R. v. Bowman, *supra*. The Court will not reject an informal plea of *autrefois acquit*, pleaded by a prisoner, but

will assign counsel to put it into a formal shape, 2 Hale, 241, and postpone the trial to give time for its preparation, R. v. Chamberlain, 6 C. & P. 93, and if the record of the previous acquittal is not made up, the Court will postpone the trial to enable the prisoner to apply for a mandamus to make up the record, R. v. Bowman, 6 C. & P. 101; which mandamus the Queen's Bench will grant, although it be the record of a sessions improperly held; for the prisoner has a right to have the record of the proceedings correctly made up to make what use of it he can. R. v. Justices of Middlesex, 5 B. & Ad. 1113. The prisoner is not entitled as of right to a copy of the indictment, in order to draw up his plea, but the Court will order the indictment to be read over slowly in order that it may be taken down, R. v. Parry, *supra*: but the counsel for the Crown may give a copy of the indictment to save time, *ibid*. If a prisoner has pleaded 'not guilty' to two indictments, and is tried and acquitted on one, the Court may grant the prisoner leave to withdraw his plea of 'not guilty' on the other, and plead *autrefois acquit*, *ibid*. But perhaps such leave might not be necessary, as it is conceived that a plea would be good, alleging that after the pleading 'not guilty' the defendant had been acquitted. See R. v. Taylor, 3 B. & C. 612, and the precedent of the plea in that case, 4 Ch. Cr. L. 567. It was once held that the prisoner must plead 'not guilty' to the felony at the same time as

*Traversing or Postponing Trial.*¹

By 14 & 15 Vict. c. 100, s. 27, no person prosecuted shall be entitled to traverse or postpone the trial of any indictment found against him

he pleaded *autrefois acquit*, *R. v. Vandercomb*, 1 Leach, 712, note (a), and see *R. v. Welsh*, R. & M. C. C. R. 175, but in subsequent cases the plea of *autrefois acquit* has been pleaded alone. *R. v. Sheen*, *ante*, p. 44; *R. v. Parry*, *supra*: *R. v. Birchenough*, *ante*, p. 48; *R. v. Welch*, Carr. Supp. 56, and see 2 Hawk. P. C. c. 23, s. 128. And the prisoner may afterwards plead 'not guilty' to the felony, if the jury find the plea against him, or it be held bad upon demurrer. *R. v. Birchenough*, *supra*, 2 Hawk. P. C. c. 23, s. 128. In misdemeanors *autrefois acquit* alone can be pleaded, as if the judgment be against the defendant it is final. *R. v. Taylor*, 3 B. & C. 502. The plea must formerly have set out the former indictment in order that it might appear to the Court that it was valid on the face of it. *R. v. Wildey*, 1 M. & S. 182. It must also have averred that the prisoner was acquitted by verdict, and that he had judgment *quod eat inde sine die*, *ibid.*, and it must have concluded with a voucher of the record, *ibid.*; it must also have averred the identity of the offences charged in the two indictments, and if the name of a person were different in the two indictments, it must have averred that the person was as well known by the one name as the other. *R. v. Sheen*, *supra*, 2 Hawk. P. C. c. 35, s. 3. *R. v. Austin*, 2 Cox, C. C. 59. *R. v. Hedgcock*, 4 Ch. Cr. Law, 530, Kingston, Ass. 1825. For precedents of such pleas, see 4 Ch. Cr. L. 528, *et seq.*; *R. v. Sheen*, *supra*; *R. v. Dann*, *supra*; *R. v. Clarke*, *supra*. The Crown might either traverse or demur to the plea, and this might be done *ore tenus*. *R. v. Sheen*, *supra*; *R. v. Parry*, *supra*. See 4 Ch. Cr. L. 529, 530, 532, precedents of demurrers and joinders in demurrers to such pleas. See a plea of *autrefois acquit*, pleaded *puis darrein continuance*, 4 Ch. Cr. L. 567. But now by the 14 & 15 Vict. c. 100, s. 28, 'in any plea of *autrefois convict* or *autrefois acquit* it shall be sufficient for any defendant to state that he has been lawfully convicted or acquitted (as the case may be) of the said offence charged in the indictment. As to the forms of pleas under this section, see Greaves' Campb. Acta, p. 88. It should seem that the Crown can only traverse a plea pleaded under this section. The jury to try an issue raised on a plea of *autrefois acquit*, may be either the jury already in the box, *R. v. Parry*, *supra*, or a venire returnable *instantly* may be awarded to the sheriff. *R. v. Sheen*, *supra*; *R. v. Scott*, 1 Leach, 401.

Where the prisoner pleads *autrefois acquit* and 'not guilty' at the same time, the jury cannot be charged to try both the issues at the same time; but must first be charged with the issue on *autrefois acquit*, and if that be found against the prisoner, then with the issue on 'not guilty.' *R. v. Roche*, 1 Leach, 134. Where any allegation in the pleas was traversed on the part of the Crown, the prisoner began, as the affirmative lay upon him. *R. v. Sheen*, *supra*; *R. v. Parry*, 7 C. & P. 836. And where a plea is pleaded under the 14 & 15 Vict. c. 100, s. 28, it is clear the prisoner must begin. [As to the mode of proof of former acquittal, see vol. 3, Evidence.] In felony, if the plea be decided in favor of the prisoner, the judgment is *quod eat inde sine die*, 2 Hale, 391. *R. v. Dann*, *supra*. If the plea be decided against the prisoner, and he has pleaded 'not guilty' at the same time with it, the trial on the merits immediately proceeds. *R. v. Vandercomb*, *supra*. If *autrefois acquit* has been pleaded without 'not guilty,' and the plea is determined against the prisoner, the prisoner then pleads to the felony, and the trial proceeds in the ordinary course. *R. v. Birchenough*, *ante*, p. 48; *R. v. Coogan*, 1 Leach, 448. [In misdemeanors the judgment is final, *R. v. Goddard*, 2 Ld. Raym. 922; 2 Hale, 256.] The general rule, as we have seen, is that the acquittal pleaded must have been for the same felony, and it is clear that an acquittal of one felony is no bar to an indictment for another in substance different, whether committed at the same time or not as that of which the prisoner was acquitted; and therefore if a man commit a burglary, and steal the goods of A. and B., and be indicted for the burglary and stealing the goods of A., and be acquitted, he cannot plead such an acquittal to an indictment for stealing the goods of B., 2 Hawk. P. C. c. 35, s. 5, or to an indictment for burglary with intent to steal the goods of A., *R. v. Vandercomb*, *supra*; or, it should seem, to an indictment for burglary and stealing the goods of B., *ibid.* An acquittal of a man as accessory before or after is no bar to an indictment against him as a principal, 2 Hawk. P. C. c. 35, s. 12; nor is an acquittal as principal any bar to an indictment as accessory after, 2 Hawk. P. C. c. 35, s. 11, 2 Hale, 244. It is said to have been held that an acquittal of a man as accessory to one principal will not save him from being arraigned as accessory to another in the same fact. 2 Hawk. P. C. c. 35,

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¹ See Bishop, i. s. 354.

at any session of the peace, session of oyer and terminer, or session of gaol delivery: provided always that if the court, upon the applica-

a. 13. But it is presumed this would only apply where the acquittal of the principal necessarily caused the acquittal of the accessory, see *R. v. Woolford*, 1 M. & Rob. 384, *post*, and not where the accessory might be convicted on a count for a substantive felony, although the principal were acquitted. See *R. v. Pulham*, 9 C. & P. 280. We have seen that an acquittal upon a charge of jointly receiving with others is a good bar to an indictment against one of the prisoners alone. *R. v. Dann*, *supra*. It is said to be a general rule that a bar in action of an inferior nature will not bar another of a superior nature. 2 Hawk. P. C. c. 35, s. 5. [See *R. v. Morris*, L. R. 1 C. C. R. 90; 36 L. J. M. C. 84.] Therefore an acquittal of a misdemeanor would not be a bar to an indictment for a felony, or, *vice versa*, an acquittal of a felony be a bar to an indictment for a misdemeanor. But see now the 14 & 15 Vict. c. 100, s. 12, as to an acquittal of a misdemeanor. [Where upon the trial the offence turns out to be a felony, see *post*; and see 24 & 25 Vict. c. 96, s. 88, where upon a trial for obtaining money by false pretences a larceny is proved. And see 24 & 25 Vict. c. 96, s. 72, as to indictments for embezzlements; and see 24 & 25 Vict. c. 96, ss. 91, 94, as to indictments for receiving stolen goods. See also 14 & 15 Vict. c. 100, s. 9, as to a person not being acquitted where on a trial for a felony or misdemeanor, an attempt only to commit the offence is proved; and see 24 & 25 Vict. c. 96, s. 41, as to indictments for robbery.] Yet it seems that an acquittal on an indictment for murder was a bar to an indictment for petit treason, because both offences were in substance the same. 2 Hawk. P. C. c. 35, s. 5; 2 Hale, 246. So an acquittal of murder is a good bar to an indictment for manslaughter, 2 Hale, 246; and so an acquittal of manslaughter is a good bar to an indictment for murder, for the offences only differ in degree, and the fact is the same. 2 Hale, 246; *Holcroft's case*, 4 Rep. 46 b. Where a prisoner is indicted for a compound offence, as burglary, robbery, murder, &c., and altogether acquitted, it should seem that such acquittal is a good bar to every felony included in such compound offence, of which he might have been convicted on the trial of such compound offence; thus an acquittal on a burglary charging a stealing of goods would be a good bar to an indictment for stealing the same goods, for on the indictment for burglary he might have been acquitted of the burglary and convicted of the larceny only; and although it is said, 2 Hale, 246, that if a man be 'indicted for burglary and acquitted, yet he may be indicted for the larceny, for they are several offences, though committed at the same time;' yet this must be intended of an indictment for burglary

with intent to steal the goods, as is evident from the words which follow; 'and burglary may be where there is no larceny, and larceny may be where there is no burglary.' And so long as a party indicted for a felony, including an assault, might be convicted on such an indictment of an assault under the 1 Vict. c. 85, s. 11 (repealed by 14 & 15 Vict. c. 100, s. 10), an acquittal on such an indictment was held a good bar to an indictment for the same assault. *R. v. Gould*, 9 C. & P. 364; *R. v. Bird*, 2 Den. C. C. 94. So, whilst the 1 Vict. c. 85, s. 11, was in force, an acquittal or conviction of a common assault before two justices of the peace under the 9 Geo. 4, c. 31, s. 27, was held to be a bar to an indictment for feloniously wounding with intent to maim, &c., in the same transaction. *R. v. Walker*, 2 M. & Rob. 446, *Coltman, J.* Where, on an indictment for a rape, the evidence failed to support that offence, *Pollock, C. B.*, directed an acquittal, though under the 1 Vict. c. 85, s. 11, there might have been a conviction of an assault; and said that this acquittal would not support a plea of *autrefois acquit* to an indictment for an assault with intent to commit a rape. *R. v. Gisson*, 2 C. & K. 781. And on an indictment for feloniously stabbing with intent to do grievous bodily harm, the evidence to prove the felony being insufficient, and it appearing to be a mere question of assault, *Pollock, C. B.*, directed an acquittal, and said, 'It had better be inquired of in another tribunal.' *R. v. Goadby*, 2 C. & K. 782 note (a). This and the preceding case seem very questionable. Generally speaking, an acquittal in one county can only be pleaded in the same county, because all indictments are local, and if the first were laid in an improper county, the defendant could not be found guilty upon it, 2 Hawk. P. C. c. 35, s. 3; 2 Hale, 245; and if the first indictment were laid in the proper county the second must be an improper one, and therefore the defendant, not being liable to be found guilty upon it, is not put to plead *autrefois acquit*. 2 Hawk. P. C. c. 85, s. 3. But there seem to be many exceptions to this rule. Thus, where a man steals goods in one county, and carries them into another, as he may be indicted in either, it seems but reasonable that he should plead the acquittal in one county in bar to a subsequent indictment in the other county, 2 Hawk. P. C. c. 35, s. 4; but this point does not seem settled; and *Lord Hale*, 2 P. C. 245, says, it seems that an acquittal in the county into which the goods are carried is no bar, because it may be the goods were never brought into that county, and so the felony may not have been in question; but this reason rather tends to show that an acquittal in the county where the goods were stolen would be a bar to an indictment in the county into which they

tion of the person so indicted or otherwise, shall be of opinion that he ought to be allowed a further time, either to prepare for his defence or otherwise, such court may adjourn the trial of such person to the next subsequent session, upon such terms as to bail or otherwise as to such court shall seem meet, and may respite the recognizances of the prosecutor and witnesses accordingly, in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence at such subsequent session without entering into any fresh recognizance for that purpose. A person committed for felony can insist on being indicted at the sessions or assizes to which he is committed if the witnesses for the Crown are ready. (*i*) If, however, it appears upon oath that the witnesses for the Crown cannot then be produced, he may be committed to the next assizes or sessions without being released on bail, (*j*) and the judge has power again to postpone the trial if there is material evidence for the Crown which cannot then be produced; (*k*) but it seems that the presentment of a bill to the grand jury cannot be postponed on the ground that there are other charges which may be brought against the prisoner. (*l*) A trial has been postponed on the

were carried, for in such case the felony must have been in question. If A. rob B. in the county of C., and carry the goods into D., though he cannot be indicted of robbery in D., yet he may of larceny, and if acquitted, that acquittal of larceny is no bar to an indictment for robbery in C., because it is another offence. 2 Hale, 245. So if A. commit a burglary in the county of B., and carry the goods into C., if he be acquitted of larceny in C. he may be indicted for the burglary in B., *ibid.* Where an acquittal pleaded in a foreign county has been allowed, as in 41 Ass. 9, it must be intended of an indictment removed out of that county where the prisoner was first indicted. 2 Hale, 245. The correct rule appears to be that an acquittal in any court whatsoever, which has jurisdiction over the case, is a good bar to any subsequent prosecution for the same crime. 2 Hawk. c. 35, s. 10. And therefore an acquittal for murder at a grand session in Wales may be pleaded to an indictment for the same murder in England, *ibid.* So an acquittal of murder before a court of competent jurisdiction in a foreign country is a good bar to an indictment for the same murder in this country. *R. v. Roche*, 1 Leach, 184; *R. v. Hutchinson*, 3 Keb. 785, cited in *Beak v. Thyrrwhit*, 3 Mod. 194, 1 Show. 6. And it should seem that in all those cases where offences are made triable in two or more counties, as each county has jurisdiction, an acquittal in one would be a good bar to an indictment in the other county. The acquittal, in order to be a bar, must be by verdict on a trial. 2 Hale, 246; 2 Hawk. P. C. c. 35, s. 6. A

discharge, therefore, by the jury on a coroner's inquest is no bar. 2 Hale, 246. But an acquittal through the misdirection of a judge is a good bar, *ibid.* So if a court upon a special verdict erroneously adjudge it to be no felony, as long as this judgment is unreversed, the prisoner may plead it in bar to another indictment, *ibid.*; but if the judgment be reversed the party may be indicted *de novo*, *ibid.*, *R. v. Drury*, 3 C. & K. 193; 18 L. J. M. C. 189, for a judgment reversed is the same as no judgment. This note is by Mr. Greaves, except the parts within brackets. [A jury sworn and charged with a prisoner may be discharged without giving a verdict if a necessity requires it.¹ The judge at the trial is to decide whether such necessity has arisen, and his decision is not subject to review. Such a discharge is not a bar to a subsequent trial of the prisoner for the same offence, either upon the same or a fresh indictment, *Winsor v. R.* 35 L. J. M. C. 161, 121; *L. R. 1 Q. B.* 239; *ib.* 390, Ex. Ch. This was an indictment for murder.] In a recent capital case in which a juryman during the course of the trial separated himself from his fellows and mingled with the outside public, Kennedy, J., directed the jury to be discharged, and a fresh jury being subsequently empanelled, the prisoner was tried and convicted. *R. v. Macrae*, Northampton Assizes, Dec. 1892.²

(*i*) 31 Car. II. c. 2, s. 6.

(*j*) *R. v. Chapman*, 8 C. & P. 558.

(*k*) *R. v. Bowen*, 9 C. & P. 509, and see *R. v. Dripps*, 13 Cox, C. C. 25.

(*l*) *R. v. Heeson*, 14 Cox, C. C. 40.

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¹ See Bishop, i. ss. 1034, 1035.

² The same course seems to be adopted in America, see Bishop, i. s. 1038.

ground that infection might be conveyed to the public by bringing into court witnesses for the Crown who were themselves able to travel, but came from an infected place. (m)

Amendment of Indictment at the Trial.

The 9 Geo. 4, c. 15, after reciting that 'great expense is often incurred, and delay or failure of justice takes place at trials, by reason of variances between writings produced in evidence and the recital or setting forth thereof upon the record on which the trial is had, in matters not material to the merits of the case, and such record cannot now in any case be amended at the trial, and in some cases cannot be amended at any time,' enacts that 'it shall and may be lawful for every court of record holding plea in civil actions, any judge sitting at nisi prius, and any court of oyer and terminer and general gaol delivery in England, Wales, the town of Berwick-upon-Tweed, and Ireland, if such court or judge shall see fit so to do, to cause the record on which any trial may be pending before any such judge or court in any civil action, or in any indictment or information for any misdemeanor, when any variance shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record whereon the trial is pending, to be forthwith amended in such particular by some officer of the court, on payment of such costs (if any) to the other party as such judge or court shall think reasonable, and thereupon the trial shall proceed as if no such variance had appeared; and in case such trial shall be had at nisi prius, the order for the amendment shall be indorsed on the postea, and returned together with the record; and thereupon the papers, rolls, and other records of the court from which such record issued shall be amended accordingly.'

It was held in two cases that amendments ought to be made very sparingly under this statute. (n) But where an indictment for perjury alleged that the defendant produced an affidavit *entitled* in the Court of Chancery, and in the suit therein at the suit of E. J. Christian, and in the suit therein at the suit of the *Commissioners* of Charitable Donations and Bequests in Ireland, and the affidavit when produced was entitled 'In Chancery between the *Commissioner* of Charitable Donations and Bequests in Ireland,' &c., Lord Denman, C. J., ordered the record to be amended by striking out the word 'entitled.' (o) And where an indictment for perjury stated that the defendant made an affidavit in which (amongst other things) he swore that an officer, who had arrested him, was appointed 'at the special instance and *part* of the said plaintiff,' and the affidavit itself stated that the officer was appointed 'at the special instance and *peril* of the said plaintiff,' it was held that the indictment might be amended, no assignment of perjury being made upon that averment. (p) The same indictment set out another part of the affidavit (on which also there was no

(m) *R. v. Taylor*, 15 Cox, C. C. 8. No objection seems to have been taken by the prisoner to the postponement.

(n) *R. Cooke*, 7 C. & P. 559, Patteson, J.,

and Littledale, J. *R. v. Hewins*, 9 C. & P. 786, Coleridge, J.; *Jelf v. Oriel*, 4 C. & P. 22.

(o) *R. v. Christian*, C. & M. 388.

(p) *R. v. Newton*, 1 C. & K. 469.

assignment of perjury) thus: the officer 'went round to the door of the back kitchen of the deponent's said dwelling-house, which is the *only outer door* of the same,' and in the affidavit itself the words were 'the *only other* outer door,' and it was held that this variance might be amended. (g)

The 11 & 12 Vict. c. 46, s. 4, recites that 'a failure of justice frequently takes place in criminal trials by reason of variances between writings produced in evidence and the recital or setting forth thereof in the indictment or information, and the same cannot now be amended at the trial, except in cases of midemeanor,' and enacts 'that it shall and may be lawful for any court of oyer and terminer and general gaol delivery, if such court shall see fit so to do, to cause the indictment or information for any offence whatever, when any variance or variances shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof in the indictment or information whereon the trial is pending, to be forthwith amended in such particular or particulars by some officer of the court, and after such amendment the trial shall proceed in the same manner in all respects, both with regard to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance or variances had appeared.'

By the 12 and 13 Vict. c. 45, s. 10, 'every court of general or quarter sessions of the peace, on the trial of any offence within its jurisdiction, whenever any variance or variances shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof in the indictment, shall have the same power in all respects to cause the indictment to be amended which is given to courts of oyer and terminer and general gaol delivery with regard to offences tried before such last-mentioned courts by virtue of an Act (11 & 12 Vict. c. 46, *supra*), and after such amendment the trial shall proceed in the same manner in all respects, both with regard to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance or variances had appeared.'

The 14 and 15 Vict. c. 100, reciting that 'offenders frequently escape conviction on their trials by reason of the technical strictness of criminal proceedings in matters not material to the merits of the case: and whereas such technical strictness may safely be relaxed in many instances, so as to ensure the punishment of the guilty, without depriving the accused of any just means of defence:' enacts, by sec. 1, that 'whenever on the trial of any indictment (r) for any felony or misdemeanor there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof, in the name of any county, riding, division, city, borough, town corporate, parish, township, or place mentioned or described in any such indictment, or in the name or description of any person or persons, or body politic or corporate, therein stated or alleged to be the owner or owners of any property, real or personal, which shall form the subject of any offence charged therein, or in the name or description of any person or persons, body politic or corporate, therein stated or alleged to be injured or damaged or intended to be injured or

(g) *R. v. Newton, supra.*

(r) See the interpretation clause, s. 30, *ante*, p. 26.

damaged by the commission of such offence, or in the Christian name or surname, or both Christian name and surname, or other description whatsoever, of any person or persons whomsoever therein named or described, or in the name or description of any matter or thing whatsoever therein named or described, or in the ownership of any property named or described therein, it shall and may be lawful for the court before which the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence on such merits, to order such indictment to be amended, according to the proof, by some officer of the court or other person, both in that part of the indictment where such variance occurs and in every other part of the indictment which it may become necessary to amend, on such terms, as to postponing the trial to be had before the same or another jury, as such court shall think reasonable; and after any such amendment the trial shall proceed, whenever the same shall be proceeded with, in the same manner in all respects, and with the same consequences, both with respect to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance had occurred; and in case such trial shall be had *at nisi prius* the order for the amendment shall be endorsed on the *postea*, and returned together with the record, and thereupon such papers, rolls, or other records of the court from which such record issued as it may be necessary to amend shall be amended accordingly by the proper officer, and in all other cases the order for the amendment shall either be endorsed on the indictment or shall be engrossed on parchment, and filed, together with the indictment, among the records of the court: Provided that in all such cases where the trial shall be so postponed as aforesaid it shall be lawful for such court to respite the recognizances of the prosecutor and witnesses, and of the defendant, and his surety or sureties, if any, accordingly, in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence respectively, and the defendant shall be bound to attend to be tried, at the time and place to which such trial shall be postponed, without entering into any fresh recognizances for that purpose, in such and the same manner as if they were originally bound by their recognizances to appear and prosecute or give evidence at the time and place to which such trial shall have been so postponed: Provided also, that where any such trial shall be to be had before another jury the Crown and the defendant shall respectively be entitled to the same challenges as they were respectively entitled to before the first jury was sworn.'

Sec. 2. 'Every verdict and judgment which shall be given after the making of any amendment under the provisions of this Act shall be of the same force and effect in all respects as if the indictment had originally been in the same form in which it was after such amendment was made.'

Sec. 3. 'If it shall become necessary at any time, for any purpose whatsoever, to draw up a formal record in any case where any amendment shall have been made under the provisions of this Act, such record shall be drawn up in the form in which the indictment was after such amendment was made, without taking any notice of the fact of such amendment having been made.'

By sec. 30, 'the word "indictment" shall be understood to include "information," "inquisition," and "presentment," as well as indictment, and also any "plea," "replication," or other pleading, and any *ulsi prius* record.'

On a comparison of these several enactments, it will be seen that the 9 Geo. 4, c. 15, empowered any judge at *nisi prius*, or any court of oyer and terminer and general gaol delivery, to amend any variance, in cases of *misdemeanor* only, between *any matter in writing or in print* and the recital or setting forth thereof upon the record. The 11 & 12 Vict. c. 46, s. 4, empowered any court of oyer and terminer and general gaol delivery to amend any variance in *any offence whatever* between *any matter in writing or in print* and the recital or setting forth thereof on the record. The 12 & 13 Vict. c. 45, s. 10, gave the same power of amendment to every court of general or quarter sessions, on the trial of any offence within its jurisdiction, as was given by the 11 & 12 Vict. c. 46, to courts of oyer and terminer and general gaol delivery. Lastly, the 14 and 15 Vict. c. 100, empowers every court on the trial of *any felony or misdemeanor* to amend any of the variances therein included, whether there be any writing to amend by or not.

In considering whether a variance should be amended under these statutes the court will have to determine the following questions: First, whether the variance be in one of the matters included in these statutes; secondly, whether it be 'not material to the merits of the case;' and lastly, if it be not material to the merits of the case, whether the defendant may be prejudiced by the amendment in his defence on such merits. (s)

With regard to the 'merits of the case,' these terms, as applied to all criminal cases, obviously mean the substantial truth and justice of the case with reference to the guilt or innocence of the prisoner. When we say that a prisoner has been acquitted upon the merits, we mean that the jury have heard and considered all the evidence adduced with reference to the guilt or innocence of the prisoner of the offence charged, and have acquitted him on the ground that the charge was not proved. It would be a perversion of language to say that a prisoner had been acquitted on the merits, when he was acquitted on the ground of some trifling variance or technical objection. It is to be observed also that a matter may well constitute some part of the merits of a case, and yet a variance as to such matter may not be material to the merits of the case within the meaning of this Act. Thus, on a trial for stealing an animal, the proof of the animal as described constitutes a part of the merits of the case, and yet the description of it as a ewe instead of a lamb may not be in the least degree material to the merits of the case, as the animal may be of such an age that it may be doubtful whether the one or the other appellation be more correct. (t)

(s) The last Act only specifies the 2nd and 3rd particulars, but it is obvious that any court would take them into its consideration in determining whether an amendment ought to be made under the previous statutes.

(t) In the *Pacific Steam Navigation Co. v. Lewis*, 16 M. & W. 783, Pollock, C. B.,

said, that 'not material to the merits' means not material to the *real question between the parties*; Parke, B., 'By the term "merits of the case," I understand the *substantial merits of the case*;' and Rolfe, B., 'The words "not material to the merits" mean not material to the *real merits of the case*.'

It is also to be observed that the amendment may be made, unless the defendant may be 'prejudiced thereby *in his defence upon such merits.*' A prejudice therefore to the defence is not sufficient; it must be a prejudice to *the defence upon the merits.* Indeed, wherever any variance occurs, an amendment may be said to prejudice the defence; for if it were not made, the prisoner would be acquitted. The prejudice, therefore, which is to prevent an amendment, is confined to a prejudice to the defence upon the merits, which clearly means a substantial and not a formal or technical defence to the charge.

We have seen that in two cases under the 9 Geo. 4, c. 15, it was held that amendments in criminal cases ought to be sparingly made; (u) but it must be remembered that those cases occurred at a time when the power of amendment may be considered as having been on its trial, and the legislature had not then spoken in the clear language in favour of amendments, either in civil or criminal cases, which it has since used, and therefore these cases can no longer be considered as any authority. It has been well laid down by a learned judge, that a statute like the 14 & 15 Vict. c. 100, should have a wide construction, and should not be interpreted in favor of technical strictness, (v) and there are very strong reasons why a liberal construction should be made on such a statute.

Instances where amendments allowed. — A judge on the trial of an indictment for perjury has power to amend the description of an Act of Parliament in the indictment. (w) An indictment alleged that the prisoner committed perjury on the trial of an indictment for setting fire to a certain *barn*; but the record was of an indictment for setting fire to a certain *stack of barley*, and it was held that the words "stack of corn" might be inserted instead of barn, as this was one of the very cases for which the statute was passed. (x)

Where the indictment stated that the prisoner had committed perjury at the hearing of a summons before the magistrates charging a woman with being drunk, whereas the summons was really for being drunk and disorderly, Lush, J., ruled that he had power, under the 14 & 15 Vict. c. 100, s. 1, to amend the indictment by adding the words "and disorderly." (y)

An indictment alleged that the prisoner stole nineteen shillings and sixpence. The Court ordered it to be amended at the trial by describing the property stolen to be a sovereign, subject to the question whether the Court had power so to do. The jury found the prisoner guilty of stealing a sovereign:—Held, that the Court had power to order the amendment to be made as a variance between the statement and the proof in the descrip-

(u) *Ante*, p. 53.

(v) Per Byles, J., *R. v. Welton*, 9 Cox, C. C. 297, *post*. In *St. Losky v. Green*, 9 C. B. (N. S.) 370, Byles, J., said, 'Various statutes have from time to time for more than 500 years been passed, from the 14 Edw. 3, c. 6, downwards, to facilitate amendments, but the strict and almost perverse construction which the judges put upon them rendered them nearly abortive.

But now a totally different principle prevails; every amendment is to be made which is necessary for determining the real question in controversy between the parties.'

(w) *R. v. Westley*, 29 L. J. M. C. 35, Bell, C. C. 193.

(x) *R. v. Neville*, 6 Cox, C. C. 69, Williams, J.

(y) *R. v. Tymms*, 11 Cox, C. C. 645.

tion of a thing named in the indictment, under 14 & 15 Vict. c. 100, s. 1. (z)

Where an indictment against two bankrupts alleged that they embezzled a part of their personal estate to the value of £10, to wit, certain bank notes and certain moneys, and it rather seemed that the money converted was foreign money; it was held that the statement under the *videlicet* was material, as the indictment would have been bad without a description of the property, and that 'moneys' meant English moneys; and the court refused to amend the indictment. (a) An indictment alleged that Saunders stole a bushel of a certain mixture consisting of oats and peas, and that Robinson received the goods aforesaid so as aforesaid feloniously stolen, and Saunders proved that he stole pure oats and peas, and then mixed them, and afterwards sold them to Robinson, and it was held that there was a variance, as the one prisoner did not steal a mixture and the other did not receive a mixture which had been stolen, and an amendment was refused. (b)

Where goods were laid as the property of M. Archard, who was a carman, and the clerk of the London Dock Company had delivered the goods by mistake to the prisoner, who had been sent by Archard for other goods; it was held that the indictment was properly amended by inserting the London Dock Company for M. Archard. (c)

So where the prisoner was charged with throwing Annie Welton into the water with intent to murder her, and there was no proof of the name of the child, it was held that the indictment might be amended by striking out Annie Welton and inserting 'a certain female child whose name is to the jurors unknown.' (d)

Perjury was assigned to have been committed on the hearing of a complaint for trespass in pursuit of game alleged to have been committed in a close in the parish of T., in the borough of T., before certain justices assigned to keep the peace in and for the said county, and acting in and for the borough of T., in the said county. It appeared in evidence that the justices were justices for the borough of T. only, and were not justices for the county. The indictment was amended at the trial by striking out the words 'the said county,' so as to make the averment be that they were justices assigned to keep the peace in and for, and acting in and for, the borough of T., in the said county. Held, that the amendment was properly made as a variance in the

(z) *R. v. Gumble*, 42 L. J. M. C. 7, L. R. 2 C. C. R. 1.

(a) *R. v. Davison*, 7 Cox, C. C. 158, Alderson, B., and Coleridge, J. Alderson, B., is reported to have said, 'Neither my learned brother nor myself think that the statute allowing amendments applied to such a case as this.' But the marginal note is that the averment was 'such as the court in its discretion would decline to amend.' The case seems to be one in which an amendment clearly might have been made.

(b) *R. v. Robinson*, 4 F. & F. 43, Pollock, C. B. The marginal note states that, 'there being no evidence but that of the thief,

the judge would not amend;' but the body of the report contains no such point. Pollock, C. B., had refused to take a verdict of guilty, as there was no sufficient corroboration of Saunders. This case must not be taken as any authority against amending the description of stolen property. All it amounts to is that the judge did not think fit to amend on the uncorroborated evidence of the thief.

(c) *R. v. Vincent*, 2 Den. C. C. 464, 21 L. J. M. C. 109.

(d) *R. v. Welton*, 9 Cox, C. C. 297, Byles, J.

description of a person described in the indictment under 14 & 15 Vict. c. 100, s. 1. (e)

An indictment alleged that a footway led from a turnpike-road into the town of Gravesend, but the highway was a carriage-way from the turnpike-road to the top of Orme House Hill, and from thence to Gravesend it was a footway, and the nuisance alleged was between the top of Orme House Hill and Gravesend; it was held that the indictment might be amended by substituting a description of a footway running from Orme House Hill to Gravesend, as this appeared to be the very sort of case for which the legislature meant to provide (f). Where an indictment for the non-repair of a highway charged the inhabitants of the whole township of Dukinfield with the liability to repair, and it was objected that by the Stalybridge Improvement Act, 9 Geo. 4, c. 26, the inhabitants of that portion of the township which lies within the limits of the town of Stalybridge were exempted from liability to repair highways within the parts of the township not within these limits, except as to a certain road, not the subject of this indictment; Keating, J., whilst expressing a doubt as to his power to amend, decided that the indictment should be taken as amended, so as to comprise only the inhabitants of the parts of the township lying beyond the limits of the town of Stalybridge. (g)

An indictment for bigamy alleged that the prisoner was apprehended in the county of Gloucester, and this not being proved, it was held that it might be amended by alleging that the prisoner was in custody in that county. (h)

One count charged Winch with stealing the property of E. Robinson and others; another count charged Chaplin with the substantive felony of receiving the aforesaid goods. Winch pleaded guilty, and on the trial of Chaplin the felonious receiving was proved, but the names of the prosecutors were not proved; and it was held that the count for receiving might be amended by stating the goods to be the property of persons unknown. (i)

An amendment will not be made where the effect will be to change the offence charged to another offence. On an indictment for abusing a girl above the age of ten and under the age of twelve years, it was proved that the girl was under ten years of age, and it was held that the indictment could not be amended. (j) So where on an indictment for forging an undertaking for the payment of money, the instrument turned out not to be of that character, but, if it were a forgery at all, it was a forgery at common law; it was held that there was no power

(e) *R. v. Western*, 37 L. J. M. C. 81; L. R. 1 C. C. R. 122.

(f) *R. v. Sturge*, 3 E. & B. 734; 23 L. J. M. C. 172.

(g) *R. v. Dukinfield*, 4 B. & S. 158. There was a conviction, but it was held wrong on the facts; but in the argument it was taken for granted that the variance might be amended.

(h) *R. v. Smith*, 1 F. & F. 86. It seems that this was an unnecessary amendment, see *post*.

(i) *R. v. Winch*, 6 Cox, C. C. 523, Platt, B. The first count charged Winch

with stealing the goods of Robinson and others, and Chaplin with receiving the said goods so feloniously stolen, and a difficulty was started as to amending the charge against Chaplin, as Winch had admitted the goods to be those of Robinson and others; but this difficulty was avoided by amending the count for the substantive felony.

(j) *R. v. Shott*, 3 C. & K. 206, Maule, J. By the Act in force at the time of this decision, to abuse a girl under ten was a felony, and to abuse a girl between ten and twelve was a misdemeanor.

to amend the indictment by striking out the word "feloniously." (*k*) Where a count charged the prisoners with assaulting a gamekeeper who attempted to apprehend them whilst committing an offence against the 9 Geo. 4, c. 69, s. 1, and it turned out that the prisoners were attempting to take tame pheasants; Pollock C. B., refused to allow the indictment to be amended by alleging an assault in resisting their apprehension whilst the prisoners were committing an indictable offence. (*l*)

An amendment ought not to be made if the indictment would thereby be liable to be objected to on demurrer, though it would be good after verdict; as the prisoner would be deprived of his right to demur to it. (*m*)

In an indictment for obtaining money by false pretences it is necessary to allege that the obtaining was 'with intent to defraud,' and when those words are omitted in the indictment, it cannot be amended by inserting them. (*n*)

An indictment alleged that the prisoner pretended that he had served a certain order of affiliation on J. Bell; but the evidence was that the prisoner had said that he had left the order with the landlady at the Chesterfield Arms, where Bell lodged, he being out; and it was held that there was a variance; for the allegation in the indictment meant a personal service of the order; and that this variance was not amendable under the 14 & 15 Vict. c. 100, s. 1, as it was not a variance in the name or description of any matter or thing named or described in the indictment. (*o*) But where an indictment alleged that the prisoners pretended that a certain vessel called the Castenet was in Penarth Roads, and the evidence failed to show that the prisoners pretended that the vessel was the Castenet, it was held that the indictment might be amended by striking out those words. (*p*)

Where an indictment alleged that the prisoner endeavoured to conceal the birth of her child by placing it in and among a heap of carrots, and the proof was that the body was placed on the back of the heap, so that the middle of the heap by its height hid the body; it was held that, under the 14 & 15 Vict. c. 100, s. 1, there was no jurisdiction to amend the variance. (*q*)

Time and place for amending. — Whether an amendment should be made or not is for the judge, and no question should be left

(*k*) *R. v. Wright*, 2 F. & F. 320, Hill, J. It must be remembered that the challenges and the swearing of the jurors differ in felony and misdemeanor.

(*l*) *R. v. Garnham*, 8 Cox, C. C. 451. See this case, *post*. It does not appear upon what ground the amendment was refused.

(*m*) *R. v. Lallement*, 6 Cox, C. C. 204, Jervis, C. J., and Alderson, B. In this case the indictment alleged that the prisoner shot at a person unknown with intent to murder him, and the amendment proposed was to insert "with intent to murder" in the words of the 1 Vict. c. 85, s. 2, but the court thought that it might be a question whether the indictment would not then be demurrable for generality; and that the amendment ought

to be made in such a manner as that the indictment should not be in any way defective.

(*n*) *R. v. James*, 12 Cox, C. C. 127, Lush, J.

(*o*) *R. v. Bailey*, MSS. C. S. G.; S. C. 6 Cox, C. C. 29, Greaves, Q. C., after consulting Platt, B.

(*p*) *R. v. Barois*, 5 Cox, C. C. 559, Wightman, J., who does not appear to have been satisfied that the amendment was properly made; as he left the case to the jury on another count, in order to relieve the case from any difficulty as to the amendment.

(*q*) *Anonymous*, 6 Cox, C. C. 391, Crompton, J., who gave no reason for the decision.

to the jury as to any fact which may arise as to the propriety of making it. (r)

An indictment for night-poaching described the land as in the occupation of George William Frederick Charles, Duke of Cambridge, but none of the witnesses was able to prove all the Christian names of the Duke; one witness, however, swore that George William were two of the Christian names of the Duke, but he believed the Duke had some other Christian names, but he could not say what they were. The sessions refused to amend the indictment by striking out the names Frederick Charles; and, on a case reserved on the question whether the sessions were bound to amend the indictment by striking out the names Frederick Charles, it was held that they were not bound to do so, as it was in their discretion whether they would amend or not; that the sessions 'were right in not making an amendment in the manner prayed; but that they would have been wrong if they had been applied to to strike out the Christian names altogether, leaving the prosecutor described as the Duke of Cambridge, and had refused to do so.' (s) As no amendment was made it was held that the prisoners ought to have been acquitted. (t)

The amendment must be made by the court before which the trial takes place; (u) unless the record has been removed into the Court of Queen's Bench and the trial is at nisi prius; and in that case the judge, with the consent of counsel, may reserve for the court above the question whether the amendment ought to have been made, with leave to enter a verdict for the Crown if the amendment ought to have been made. (v)

As a general rule, the proper course when the counsel for the prosecution wishes for an amendment, is for him to ask for it before he closes his case, and then if the amendment is allowed, the counsel for the prisoner addresses the jury on the indictment so amended. (w) But where the prisoners were charged with stealing rabbits, the property of Edward Critchley, and the rabbits turned out to be the property of John Critchley and another, but the mistake was not discovered until the prisoner's counsel had addressed the jury; it was held that the indictment ought to be amended (x), and it seems that an amendment may be made at any time before the verdict, but not afterwards. (y)

Any one familiar with criminal trials must have met with cases where variances have not been discovered until just before the verdict is given. By the statute the amendment may be made 'on the trial,' and the trial is clearly continuing until the verdict is given.

(r) See *Bartlett v. Smith*, 11 M. & W. 483, Major Campbell's Case there cited by Parke, B., and an Anonymous case, *ibid.* *Boyle v. Wiseman*, 11 Exch. 360. *R. v. Hill*, 2 Den. C. C. 254.

(s) Per Parke, B.

(t) *R. v. Frost*, Dears. C. C. 474.

(u) *R. v. Harris*, Dears. C. C. 344. *R. v. Frost*, Dears. C. C. 474.

(v) *R. v. Sturges*, 3 E. & B. 734. And see *R. v. Dukinfield*, 4 B. & S. 158.

(w) *R. v. Rymes*, 3 C. & K. 326.

(x) *R. v. Fullarton*, 6 Cox, C. C. 194, Monahan, C. J., and Lefroy, C. J.

(y) Per Parke, B., *R. v. Frost*, Dears. C. C. 474. Per Crompton, J., *ibid.* See, per Alderson, B., *Brashier v. Jackson*, 6 M. & W. 549. *R. v. Larkin*, Dears. C. C. 365, 28 L. J. M. C. 125. *R. v. Oliver*, 13 Cox, C. C. 588.

Where the indictment as it originally stood was proved at the trial, but as amended it was not, the Court quashed the conviction. (z)

On trial for misdemeanor no acquittal if offence a felony.

By 14 & 15 Vict. c. 100, s. 12, if upon the trial of any person for any misdemeanor it shall appear that the facts given in evidence amount in law to a felony, such person shall not by reason thereof be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for felony on the same facts, unless the court before which such trial may be had shall think fit, in its discretion, to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for felony, in which case such person may be dealt with in all respects as if he had not been put upon his trial for such misdemeanor. (a)

Since the passing of the above statute, the doctrine of merger has become of less importance. How far, apart from the statute, a conviction for a misdemeanor would be a bar to a conviction for a felony upon the same facts, is a matter of some doubt. The question is much discussed in *R. v. Morris*, ante, p. 45.²

On trial for misdemeanor or felony no acquittal where only attempt to commit offence proved.³

Attempts to commit offences. — By the 14 & 15 Vict. c. 100, s. 9,⁴ 'if on the trial of any person charged with any felony or misdemeanor it shall appear to the jury upon the evidence that the defendant did not complete the offence charged, but that he was guilty only of an attempt to commit the same, such person shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to commit the same, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for attempting to commit the particular felony or misdemeanor charged in the

(z) *R. v. Barnes*, 35 L. J. M. C. 204; L. R. 1 C. C. R. 45. *R. v. Pritchard*, L. & C. 34. *R. v. Webster*, L. & C. 77.

(a) See 24 & 25 Vict. c. 96, s. 88, noticed

vol. ii. False Pretences, by which a person indicted for obtaining money by false pretences shall not be acquitted if the facts amount to a larceny.¹

AMERICAN NOTES.

¹ Most American States have similar provisions, Bishop, i. ss. 789, 805. In many States, convictions for a misdemeanor on an indictment for felony are allowed.

² In America it seems to be the rule that "where one offence is a necessary element in and constitutes an essential part of another offence, and both are in fact but one transaction, a conviction or acquittal of one is a bar to the prosecution of the other;" but it would seem not to be so where the offence first

proceeded against is the lesser offence of the two. See Bishop, i. s. 1058 (1) (2) (3).

³ In America if an act is in itself sufficient to produce an intended crime but the crime is prevented by some external circumstance, it would seem that an offence has been committed. *S. v. Wilson*, 30 Conn. 500; *P. v. Lawton*, 56 Barb. 126.

⁴ Most American States have similar provisions, Bishop, i. ss. 789, 805, 809.

said indictment; and no person so tried as herein lastly mentioned shall be liable to be afterwards prosecuted for an attempt to commit the felony or misdemeanor for which he was so tried.' (b)

Under this clause the defendant can only be convicted of the attempt to commit the very offence with which he is charged. Upon an indictment for breaking and entering the house of M. Fowler, and stealing therein eight spoons, one dress, &c., it appeared that the prisoner broke and entered the house, but that all the articles mentioned in the indictment had been stolen from the house before the time when the prisoner so broke and entered it; there were, however, other goods of the prosecutor's in the house at that time; and it was held that the prisoner could not be convicted of an attempt under this clause; for such an attempt must be to do that which if successful would amount to the felony or misdemeanor charged in the indictment; and here the attempt could not have succeeded, as the things which the indictment charged the prisoner with stealing had been previously removed. (c)

H. was indicted for rape, and W. for aiding and abetting; both were acquitted of felony, but H. was found guilty of attempting to commit the rape, and W. of aiding H. in the attempt: held, that W. was properly convicted. (d)

Judgment on record of Queen's Bench may be pronounced during the Sittings or Assizes.

The 11 Geo. 4 & 1 Will. 4, c. 70, s. 9, enacts, that upon all trials for felonies or misdemeanors upon any record of the Court of King's Bench, judgment may be pronounced during the sittings or assizes by the judge before whom the verdict shall be taken, as well upon the person who shall have suffered judgment by

(b) See *R. v. Wyatt*, 39 L. J. M. C. 83. The above section probably would be held to apply to felonies at common law as well as to felonies created by statute; see the note to *R. v. Bain*, L. & C. 129.

(c) *R. v. M'Pherson*, 1 D. & B. 197, 26 L. J. M. C. 134. The prisoner might have been convicted on an indictment charging an attempt to steal the goods without specifying them (*R. v. Johnson*, 34 L. J. M. C. 24). *R. v. Collins*, L. & C. 471, where it was held that a man who put his hand into an empty pocket could not be convicted of an attempt to steal, has been expressly over-

ruled by *R. v. Brown*, 24 Q. B. D. 357, and *R. v. Ring*, 17 Cox, 491, and it would seem that *R. v. M'Pherson* also would not now be upheld;¹ but the judgment of the Court in *R. v. Brown*, is very unsatisfactory, and it may be doubted how far it would be upheld on reconsideration. See an article in the *Law Quarterly Review*, April, 1894. The jury cannot convict under this section of an attempt which is made felony by statute, but only of an attempt which is a misdemeanor, *R. v. Connell*, 6 Cox, 178.

(d) *R. v. Hapgood*, 11 Cox, C. C. 471, L. R. 1 C. C. R. 221.

AMERICAN NOTE.

¹ "Attempts" have been defined in Mr. Bishop's book as follows: "Where the non-consummation of the intended criminal result is caused by an obstruction in the way, or by the want of the thing to be operated upon, if such impediment is of a nature to be unknown to the offender, who used what seemed appropriate means, the punishable attempt is committed." s. 752 (2) or (3). "Whenever the laws make criminal one step toward the accomplishment of an unlaw-

ful object done with the intent or purpose of accomplishing it, a person taking that step with that intent or purpose, and himself capable of doing every act on his part to accomplish that object, cannot protect himself from responsibility by showing that by reason of some fact unknown to him at the time of his criminal attempt it could not be fully carried into effect in the particular instance." Citing *C. v. Jacobs*, 9 Allen, 274.

default or confession, upon the same record, as upon those who shall be tried and convicted, whether such persons be present or not in court, excepting only where the prosecution shall be by information filed by leave of the Court of King's Bench, or such cases of informations filed by his Majesty's attorney-general, wherein the attorney-general shall pray that the judgment may be postponed; and the judgment so pronounced shall be indorsed upon the record of nisi prius, and afterwards entered upon the record in court, and shall be of the same force and effect as a judgment of the court, unless the court shall, within six days after the commencement of the ensuing term, grant a rule to show cause why a new trial should not be had or the judgment amended; and it shall be lawful for the judge before whom the trial shall be had either to issue an immediate order or warrant for committing the defendant in execution, or to respite the execution of the judgment, upon such terms as he shall think fit, until the sixth day of the ensuing term; and in case imprisonment shall be part of the sentence, to order the period of imprisonment to commence on the day on which the party shall be actually taken to and confined in prison. (e)

Judgment of Death.

By 4 Geo. 4, c. 48, 'Whereas it is expedient that in all cases of felony not within the benefit of clergy, except murder, the court before which the offender or offenders shall be convicted shall be authorized to abstain from pronouncing judgment of death, whenever such court shall be of opinion that under the particular circumstances of any case, the offender or offenders is or are a fit and proper subject or fit and proper subjects to be recommended for the royal mercy;' enacts, that from and after the passing of this Act, whenever any persons shall be convicted of any felony, except murder, and shall by law be excluded the benefit of clergy in respect thereof, and the court before which such offender shall be convicted shall be of opinion that, under the particular circumstances of the case, such offender is a fit and proper subject to be recommended for the royal mercy, it shall and may be lawful for such court, if it shall think fit so to do, to direct the proper officer then being present in court to require and ask, whereupon such officer shall require and ask if such offender hath or knoweth anything to say, why judgment of death should not be recorded against such offender; and in case such offender shall not allege any matter or thing sufficient in law to arrest or bar such judgment, the court shall and may and is hereby authorized to abstain from pronouncing judgment of death upon such offender; and, instead of pronouncing such judgment, to order the same to be entered of record, and thereupon such proper officer as aforesaid shall and may and is hereby authorized to enter judgment of death on record against such offender, in the usual and accustomed form, and in such and the same manner as is now used, and as if judgment of death

(e) See *R. v. Cox*, 4 C. & P. 538; *R. v. Lloyd*, 4 B. & Ad. 135. See sec. 7 of the Act as to trial at bar; *R. v. Castro*, L. R. 9 Q. B. 350, 357, 43 L. J. Q. B. 105. As to the practice to be pursued upon a special verdict in criminal cases, see *R. v. Dudley*, 14 Q. B. D. 560.

had actually been pronounced in open court against such offender, by the court before which such offender shall have been convicted.

'Benefit of clergy,' was originally claimed by clerks in holy orders as an exemption from the jurisdiction of the ordinary lay tribunals. Gradually it was claimed by all males able to read and write, and finally it was extended to all persons. It exempted them from the punishment of death. Subsequently many statutes were passed depriving persons committing certain offences of the benefit of clergy, and finally the plea of benefit of clergy was abolished by 7 & 8 Geo. 4, c. 28, s. 6.¹

By sec. 2. A record of every such judgment, so entered as aforesaid, shall have the like effect to all intents and purposes, and be followed by all the same consequences, as if such judgment had actually been pronounced in open court, and the offender had been reprieved by the court.

See 24 & 25 Vict. c. 100, s. 2, as to sentence of death for murder.

By 7 & 8 Geo. 4, c. 28, s. 7, no person convicted of felony shall suffer death unless it be for some felony which was excluded from the benefit of clergy before or on the first day of the present session of Parliament, or which hath been or shall be made punishable with death by some statute passed after that day.

The 1 Vict. c. 84, s. 1, recites the 1 Will. 4, c. 66; the 2 & 3 Will. 4, c. 59, s. 19; 2 & 3 Will. 4, c. 123; 2 & 3 Will. 4, c. 125, s. 64; 5 & 6 Will. 4, c. 45, s. 12; 5 & 6 Will. 4, c. 51, s. 5; and enacts, 'that if any person shall after the commencement of this Act be convicted of any of the offences hereinbefore mentioned, such person shall not suffer death, or have sentence of death awarded against him or her for the same, but shall be liable, at the discretion of the court, to be transported (*f*) beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years nor less than two years.' (*g*)

The Acts recited in sec. 2 of 1 Vict. c. 84, are repealed by the 8 & 9 Vict. c. 84, and 24 & 25 Vict. c. 95.

Punishment for certain Offences.

Punishment for felonies for which no special punishment is otherwise provided. — By the 7 & 8 Geo. 4, c. 28, s. 8, 'every person convicted of any felony, for which no punishment hath been or hereafter may be specially provided, shall be deemed to be punishable under this Act, and shall be liable, at the discretion of the Court, to be trans-

(*f*) Now penal servitude.

(*g*) This sect. is in part repealed by 24 & 25 Vict. c. 95. The 37 & 38 Vict. c. 35, repeals this Act (1 Vict. c. 84), in part, namely — so much as relates to the punishment of offences formerly punishable under the Acts

11 G. 4 & 1 W. 4, c. 66; 5 & 6 W. 4, c. 45, or 3 & 4 W. 4, c. 51, — also, except as to Scotland, so much as relates to the punishment of offences formerly unpunishable under the Acts 2 & 3 W. 4, c. 123, or 3 & 4 W. 4, c. 44.

AMERICAN NOTE.

¹ "Benefit of clergy" has generally been abolished in America, but it seems not entirely, see Bishop, Vol. i. s. 938.

ported (*h*) beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years.' (*i*)

By sec. 9, 'where any person shall be convicted of any offence punishable under this Act, for which imprisonment may be awarded, it shall be lawful for the Court to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for the whole or any portion or portions of such imprisonment, or of such imprisonment with hard labour, as to the Court in its discretion shall seem meet.'

But by the 1 Vict. c. 90, s. 5, 'it shall not be lawful for any Court to direct that any offender shall be kept in solitary confinement for any longer period than one month at a time, or than three months in the space of one year.'

Where a prisoner is sentenced to solitary confinement under these clauses the sentence should specify the time at which such confinement is to commence as well as the term for which it is to last.

As to hard labour, solitary confinement, whipping, &c., see *post*.

Punishments of misdemeanors. — With regard to the punishment of misdemeanors, it may be laid down as a general rule that all those offences less than felony, which exist at common law, and have not been regulated by any particular statute, are within the discretion of the Court to punish. (*j*) Fine and imprisonment appear to be the most ordinary judgments in cases of misdemeanor; but a fine cannot in general be imposed on a married woman, as she has nothing to pay the fine with. (*k*) The pillory was also a common punishment in these cases; but it was abolished by the 1 Vict. c. 23 and the 56 Geo. 3, c. 128; which by sec. 2 empowers the Court to pass such sentence of fine or imprisonment, or of both, in lieu of a sentence of pillory, as to the Court shall seem proper. Whipping also was ordinarily awarded in former times, but of later years it seems never to have been adjudged. In all cases of misdemeanor, in addition to any punishment that may be awarded, the Court may require the defendant to find sureties to keep the peace and be of good behaviour, (*l*) and even a married woman may be required to find such sureties. (*m*) But she cannot herself be bound by recognizance, because being a feme covert she cannot enter into it. (*n*)

*Punishment after previous Conviction, and of form of Indictment
and Proceeding thereon.*

Larceny after a conviction for felony. — By 24 & 25 Vict. c. 96 (entitled an Act to consolidate the Statute Law of England and Ireland

(*h*) Now penal servitude for not less than three years.

(*i*) There was also a power to order a male to be whipped, but this has been repealed by the Statute Law Revision Act, 1888.

(*j*) 1 Ch. Cr. L. 710. *R. v. Thomas*, C. T. H. 278.

(*k*) *R. v. Thomas*, *supra*. Since the Divorce Acts, Married Women Property Acts, this does not always apply.

(*l*) *R. v. Dunn*, 12 Q. B. 1026. *R. v. Hart*, 30 How. St. Tr. 1181; and see the clause in the Acts of 1861.

(*m*) *R. v. Thomas*, *supra*.

(*n*) *Lee v. Lady Baltinglas*, Styles, 475. *Bennet v. Watson*, 3 M. & S. 1. *Elsy v. Mawdit*, Styles, 226. *Anonymous*, Styles, 321. In 1 Ch. C. L. 100, the reason given is that the recognizance of a married woman cannot be estreated.

relating to larceny and other similar offences). Sec. 7. 'Whosoever shall commit the offence of simple larceny after a previous conviction for felony, *whether such conviction shall have taken place upon an indictment, or under the provisions of the Act 18 & 19 Vict. c. 126*, shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding ten years and not less than three years, (o) or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.' (p)

Larceny after conviction of an indictable misdemeanor.—Sec. 8. 'Whosoever shall commit the offence of simple larceny, or any offence hereby made punishable like simple larceny (q) after having been previously convicted of any indictable misdemeanor punishable under this Act, shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.' (r)

Larceny after two summary convictions.—Sec. 9. 'Whosoever shall commit the offence of simple larceny, or any offence hereby made punishable like simple larceny, after having been twice summarily convicted of any of the offences punishable upon summary conviction, under the provisions contained in the Act of the session held in the seventh and eighth years of King George the Fourth, chapter twenty-nine, or the Act of the same session, chapter thirty, or the Act of the ninth year of King George the Fourth, chapter fifty-five, or the Act of the same year, chapter fifty-six, or the Act of the session held in the tenth and eleventh years of Queen Victoria, chapter eighty-two, or the Act of the session held in the eleventh and twelfth years of Queen Victoria, chapter fifty-nine, *or in sections three, four, five, and six of the Act of the session held in the fourteenth and fifteenth years of Queen Victoria, chapter ninety-two, or in this Act or the Act of this session intituled an Act to consolidate and amend the statute law of England and Ireland relating to malicious injuries to property* (whether each of the convictions shall have been in respect of an offence of the same description or not, and whether such convictions

(o) See 27 & 28 Vict. c. 47, s. 2. As to directing that the prisoner be subject to the supervision of the police, see *post*, p. 69.

(p) This clause is taken from the 7 & 8 Geo. 4, c. 28, s. 11; 9 Geo. 4, c. 54, s. 21 (1.), which rendered any person convicted of any felony (not capital) liable to transportation for life; and the 16 & 17 Vict. c. 99, s. 12 (amended by 27 & 28 Vict. c. 47, s. 2, 34 & 35 Vict. c. 112), which provided that no person should be liable to be transported by reason only of a conviction for larceny after a previous conviction for felony, but that every such person so convicted might be punished by penal servitude for not more than ten years, &c. The 7 & 8 Geo. 4, c. 28, s. 11, and 9 Geo. 4, c. 54, s. 21, were, therefore, repealed by that Act so far as they relate to the punishment

of larceny after a previous conviction for felony, but no further, and they are still in force except in that case, and certain offences relating to the coin. By the 18 & 19 Vict. c. 126, justices of the peace may convict persons guilty of larceny, &c., summarily, and this clause renders persons so convicted, who afterwards are guilty of larceny, liable to the same punishment as if they had been previously convicted upon an indictment for felony. As to hard labour, whipping, &c. see *post*.

(q) That is by ss. 31, 32, 33, and 36, and does not apply to a conviction under s. 38 for false pretences. *R. v. Horn*, 15 Cox, C. C. 205.

(r) This clause is new. See *R. v. Garland*, 11 Cox, C. C. 222.

or either of them shall have been or shall be before or after the passing of this Act), shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years and not less than three years — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.' (s)

Form of indictment for a subsequent offence. (t) — Sec. 116. 'In any indictment for any offence punishable under this Act, and committed after a previous conviction or convictions for any felony, misdemeanor, or offence or offences punishable upon summary conviction, it shall be sufficient, *after charging the subsequent offence*, to state that the offender was at a certain time and place, or at certain times and places convicted of felony, or of an indictable misdemeanor, or of an offence or offences punishable upon summary conviction (as the case may be), without otherwise describing the previous felony, misdemeanor, offence or offences; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous felony or misdemeanor, or a copy of any such summary conviction, purporting to be signed by the clerk of the Court or other officer having the custody of the records of the Court where the offender was first convicted, or to which such summary conviction shall have been returned, or by the deputy of such clerk or officer (for which certificate or copy a fee of five shillings and no more shall be demanded or taken), shall, upon proof of the identity of the person of the offender, be sufficient evidence of such conviction, without proof of the signature or official character of the person appearing to have signed the same; and the proceedings upon any indictment for committing any offence after a previous conviction or convictions shall be as follows; (that is to say), the offender shall, in the first instance, be arraigned (u) upon so much only of the indictment as charges the subsequent offence, and if he plead not guilty, or if the Court order a plea of not guilty to be entered on his behalf, the jury shall be charged, (v) in the first instance, to inquire concerning such subsequent offence only; and if they find him guilty, or if on arraignment he plead guilty, he shall then, and not before, be asked whether he had been previously convicted as alleged in the indictment, and if he answer that he had been so previously convicted, the Court may proceed to sentence him accordingly, but if he deny that he had been so previously convicted, or stand mute of malice, or will not answer directly to such question, the jury shall then be charged to inquire concerning such previous conviction, or convictions, and in such case it shall not be necessary to swear the jury again, but the oath already taken by them shall for all purposes be deemed to

(s) This clause is taken from the 12 & 13 Vict. c. 11, s. 3, and extended so as to include persons who have been twice summarily convicted under the 14 & 15 Vict. c. 92, ss. 3, 4, 5, & 6 (I.), or the Malicious Injuries Act of this session, or this Act.

(t) See *post*.

(u) See *R. v. Martin*, 39 L. J. M. C. 31; *R. v. Fox*, 10 Cox, C. C. 502. As to the former practice, see *Anonymous*, 5 Cox, C. C. 268. *R. v. Key*, 2 Den. C. C. 347, 3 C. & K. 371; *R. v. Shuttleworth*, 2 Den. C. C. 351, 3 C. & K. 375.

(v) See former Act, 6 & 7 Will. 4, c. 111.

extend to such last-mentioned inquiry: Provided, that if upon the trial of any person for any such subsequent offence such person shall give evidence of his good character, it shall be lawful for the prosecutor, in answer thereto, to give evidence of the conviction (*w*) of such person for the previous offence or offences before such verdict of guilty shall be returned, and the jury shall inquire concerning such previous conviction or convictions at the same time that they inquire concerning such subsequent offence.' (*x*)

Prevention of Crimes Act. — By 34 & 35 Vict. c. 112 (The Prevention of Crimes Act, 1871), s. 9, the rules contained in this 116th section in relation to the form of and the proceedings upon an indictment for any offence punishable under that Act committed after previous conviction, shall, with the necessary variations, apply to any indictment for committing a crime as defined by this Act (*y*) after previous conviction for a crime, whether the crime charged in such indictment, or the crime to which such previous conviction relates, be or be not punishable under the said Act of the 24 & 25 Vict. c. 96.

Direction that prisoner be under supervision of police. — By sec. 8, where any person is convicted on indictment of a crime, (*y*) and a previous conviction of a crime is proved against him, the Court having cognizance of such indictment may, in addition to any other punishment which it may award to him, direct that he is to be subject to the supervision of the police for a period of seven years, or of such less period as the Court may direct, commencing immediately after the expiration of the sentence passed on him for the last of such crimes.

Interpretation clause. — By sec. 20, the expression "crime" means

(*w*) As to proof of previous convictions, where proceedings are taken against a person for receiving goods knowing them to be stolen, and the goods are found in his possession, see 34 & 35 Vict. c. 112, s. 19, noticed Vol. 2.

(*x*) This clause is framed from the 7 & 8 Geo. 4, c. 28, s. 11; 9 Geo. 4, c. 54, s. 21 (1.); 6 & 7 Will. 4, c. 111; 12 & 13 Vict. c. 11, s. 4; and 14 & 15 Vict. c. 19, ss. 2, 9. See *post*, in this vol., as to the mode of proceeding, &c., on the similar clause in the Coin Act. The words 'after charging the subsequent offence' were inserted in order to render it absolutely necessary always to charge the subsequent offence or offences first in the indictment, and after so doing to allege the previous conviction or convictions. This was the invariable practice on the Oxford Circuit, and the Select Committee of the Commons were clear that it ought to be universally followed, so that the previous conviction should not be mentioned, even by accident, before a verdict of guilty of the subsequent offence had been delivered. Mr. Davis (Cr. L. 118), however, says, 'It seems to be immaterial whether the prior conviction be alleged before or after the substantive charge,' for which he cites *R. v. Hilton*, Bell, C. C. 20. Now that case was decided on the 7 & 8 Geo.

4, c. 28, s. 11, which had not in it the words 'after charging the subsequent offence,' and is, therefore, no authority on the present clause, in which those words are inserted to render the course held sufficient in *R. v. Hilton* unlawful. Whenever a statute increases the punishment of an offender on a subsequent conviction, and gives no mode of stating the former conviction, the former indictment, &c., must be set out at length, as was the case in Mint prosecutions before the present Coin Act; but where a statute gives a new form of stating the former conviction, that form must be strictly pursued; for no rule is more thoroughly settled than that in the execution of any power created by any Act of Parliament, any circumstance required by the Act, however unessential and unimportant otherwise, must be observed, and can only be satisfied by a strictly literal and precise performance, *R. v. Austrey*, 6 M. & S. 319; and to suppose that this clause, which makes it sufficient to allege the former conviction 'after charging the subsequent offence' can be satisfied by alleging it *before* charging the subsequent offence, is manifestly erroneous. See also my note, Greaves, Crim. Acts, 201, 2nd Ed. — C. S. G.

(*y*) See s. 20, *infra*.

in England and Ireland, any felony, or the offence of uttering false or counterfeit coin, or of possessing counterfeit gold or silver coin, or the offence of obtaining goods or money by false pretences, or the offence of conspiracy to defraud, or any misdemeanor under the 24 & 25 Vict. c. 96, s. 58 (vol. 2); and in Scotland, any of the pleas of the Crown, any theft which, in respect of any aggravation, or of the amount in value of the money, goods or thing stolen, may be punished with penal servitude, any forgery, and any uttering of any forged writing, falsehood, fraud and wilful imposition, uttering base coin, or the possession of such coin with intent to utter the same. The expression "offence," means any act or omission which is not a crime as defined by this Act, and is punishable on indictment or summary conviction.

Punishment for felony after previous conviction, &c.—The 7 & 8 Geo. 4, c. 28, s. 11, (z) reciting that it was expedient to provide for the more exemplary punishment of offenders who commit felony after a previous conviction for felony, whether such conviction shall have taken place before or after the commencement of this Act, enacts, 'that if any person shall be convicted of any felony, not punishable with death, committed after a previous conviction for felony, such person shall, on such subsequent conviction, be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years (a) or to be imprisoned for any term not exceeding four years; (b) and in an indictment for any such felony committed after a previous conviction for felony, it shall be sufficient to state that the offender was, at a certain time and place, convicted of felony, without otherwise describing the previous felony; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous felony, purporting to be signed by the clerk of the court, or other officer having the custody of the records of the court, where the offender was first convicted, or by the deputy of such clerk or officer, (for which certificate a fee of six shillings and eight pence, and no more, shall be demanded or taken), shall, upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction, without proof of the signature or official character of the person appearing to have signed the same.' (c)

Any number of previous convictions may be charged.—An indictment after charging a larceny from the person, alleged two previous convictions of the prisoner for felony, one after the other, and upon a case reserved, it was held that this was right. They do not vary the offence; they only affect the quantum of punishment. A difficulty as to the proof of identity might occur as to one conviction, and not as to another, and it is also very important that the judge should

(z) As to when this enactment applies, see *ante*, p. 67, note (p).

(a) Now penal servitude, see *post*.

(b) The power to order whipping under this section has been repealed by the Statute Law Revision Act, 1888. By sect. 8, the imprisonment may be in the common gaol or house of correction, and with or without

hard labour, and with or without solitary confinement for any period (1 Vict. c. 90, s. 5) not exceeding one month at a time, or three months in the space of one year, *ante*, p. 65; as to police supervision, see 34 & 35 Vict. c. 112, s. 8, *supra*.

(c) See 34 & 35 Vict. c. 112, s. 9, *ante*, p. 69.

know how many times the prisoner has been convicted. (*d*) A count alleged that at the General Gaol Delivery at Newgate E. Hilton was convicted of felony, and that the said E. Hilton 'being so convicted of felony as aforesaid,' on, &c., stole a purse containing money. The prisoner was arraigned in the first instance on that part of the count which charged the stealing the purse, and the jury having found a verdict of guilty, it was objected that she could not be arraigned on that part of the count charging the former conviction, but the objection was overruled, and she was arraigned on the former conviction, pleaded not guilty, and the jury were charged to inquire into the former conviction, and found that she had been so previously convicted; and it was held, upon a case reserved, that the conviction was right; for it could make no difference whether the statement of the former conviction is at the beginning or end of the indictment. (*e*)

Form of the certificate. (*f*)—A certificate stated that the prisoners were in due form of law 'tried and convicted' of a felony, the particulars of which were set out; and Cresswell, J., held, under 7 & 8 Geo. 4, c. 28, s. 11, that the certificate was insufficient, as there was no statement in the certificate that any judgment had been given on that conviction, and the judgment might have been arrested. (*g*) The indictment alleged that the prisoners were 'duly convicted of felony,' without any further allegation as to the judgment, and Cresswell, J., held that it was sufficient. (*h*)

Proof of identity.—In order to prove that the prisoner is the same person that was before convicted, it is not necessary to call any witness that was present at the former trial; it is sufficient to prove that he was the person who underwent the sentence mentioned in the certificate. In order to prove a previous conviction a certificate was put in, stating that at the sessions for the borough of Newbury, held on the 31st October, 1 Vict., the prisoner had been convicted of stealing cotton-prints, and sentenced to be imprisoned for four months. The governor of Reading gaol proved that the prisoner was in his custody before those sessions; that he sent him to Newbury at that time, and received him back with an order from the Newbury sessions, and that he remained in his custody for four months under that sentence; and this was held sufficient. (*i*) But where a certificate stated that G. Lloyd was convicted of felony at the Herefordshire sessions for July, 1841, and sentenced to hard labour for a month, and the porter of the gaol proved that previous to those sessions the prisoner was in his custody, and went up, with others, for trial, and returned the same evening to prison, where he continued for one month from the day of the trial; Maule, J., held that there was no evidence that

(*d*) *R. v. Clark*, Dears. C. C. 198, 3 C. & K. 367.

(*e*) *R. v. Hilton*, Bell, C. C. 20, decided upon the 7 & 8 Geo. 4, c. 28, s. 11. It does not appear that the jury in this case were sworn to inquire into the previous conviction at all; a clear irregularity. See note (*z*), *ante*, p. 69, that this case is no authority under the 24 & 25 Vict. c. 96, s. 116.

(*f*) See 34 & 35 Vict. c. 112, s. 18, noticed vol. iii. Evidence.

(*g*) *R. v. Ackroyd*, 1 C. & K. 158; *R. v. Stonnell*, 1 Cox, C. C. 142.

(*h*) *R. v. Spencer*, 1 C. & K. 159. But see 24 & 25 Vict. c. 99, the Act relating to coin, s. 37, *post*.

(*i*) *R. v. Crofts*, 9 C. & P. 219. *Sed quare*, whether this evidence showed that the prisoner was imprisoned for the same felony as that mentioned in the certificate? It showed, indeed, that he was in gaol for some offence, but it might be another felony or a misdemeanor. C. S. G.

the prisoner was the person who was convicted of the particular offence mentioned in the certificate; the offence for which the prisoner suffered the punishment mentioned by the witness might have been a misdemeanor. (*j*) And where, a certificate having been put in, a gaoler, who was called to prove an admission made by the prisoner, said, 'I asked the prisoner, "How many years ago was it that you were here before?"' He said, "It was a many years ago." I then said, "You were then convicted of felony;" and the prisoner said, "Yes, I was." It was objected, first, that some one ought to have been called who was present when the prisoner was previously tried; and, secondly, that this admission was not sufficient, as it did not show of what felony the prisoner was convicted, but only that he had been convicted of a felony. Bosanquet, J., 'I think an admission of the prisoner is sufficient; but I think this evidence is not sufficient; it must be proved to be the same felony as that mentioned in the certificate.' (*k*) Where, however, W. Levy had been summarily convicted at Leeds under the Summary Larceny Act, 18 & 19 Vict. c. 126, and a conviction before the justices of Leeds was put in, and the governor of Leeds gaol produced a commitment signed by the same justices and otherwise agreeing in every particular with the conviction, and proved that the prisoner had undergone the sentence in pursuance of the terms of the commitment; it was held that this was sufficient evidence of the identity of the prisoner. (*l*)

If a prisoner seeks to show that he has a good character, the previous conviction may be proved. — Whether a prisoner calls witnesses to his character, or cross-examines the witnesses as to his character, he 'gives evidence' of his character within the meaning of the 24 & 25 Vict. c. 96, s. 116, and the previous conviction may be proved in the first instance. (*m*) Upon the trial of an indictment charging a previous conviction, a witness for the prosecution, on cross-examination by the counsel for the prisoner, stated that he had known the prisoner for six or seven years last past, and that during that time the prisoner had borne a good character for honesty. The counsel for the prosecution thereupon claimed, under the 14 & 15 Vict. c. 19, s. 9, (*n*) to give evidence of the previous conviction of the prisoner in 1838, as mentioned in the indictment. This evidence was objected to; first, because the evidence of the good character of the prisoner was confined to the period between 1841 and 1851, and, therefore, evidence of the prisoner's conviction in 1838 was no answer thereto; secondly, because the witness, being a witness for the prosecution only, the prisoner did not, by the answers of the witness on cross-examination, give evidence of his (the prisoner's) good character within the meaning of the statute. But the Court overruled the objections; and, upon a case reserved, the judges were unanimously of opinion, that the natural and necessary meaning to be put upon the words of the statute was, that if the prisoner, either by himself or his counsel, attempts to prove a good character for honesty, either

(*j*) *R. v. Lloyd*, MSS. C. S. G. 1 Cox, C. C. 51.

(*k*) *R. v. J. and T. Goodman*, Stafford Sum. Ass. 1830, MSS. C. S. G., a case decided on 6 & 7 Will. 4, c. 111.

(*l*) *R. v. Levy*, 8 Cox, C. C. 73, Byles, J., S. C. as *R. v. Leng*, 1 F. & F. 77.

(*m*) *R. v. Gadbury*, 8 C. & P. 676.

(*n*) Repealed by the 24 & 25 Vict. c. 95.

directly by calling witnesses, or indirectly by cross-examining the witnesses for the Crown, it is lawful for the prosecution to give in evidence the previous conviction for the consideration of the jury. (o)

In the previous case, on the prisoner's counsel saying, 'Suppose that a witness for the prosecution is asked by the prisoner's counsel some question which has no reference to character, and he should happen to say something favourable to the prisoner's character, could the prisoner, under such circumstances, be said to give evidence as to his character?' Lord Campbell, C. J., observed, 'That would raise a different question; I should not, in such a case, admit evidence of a previous conviction.' (p) It is obvious, that where the prisoner gives evidence of his good character, the proper course is for the prosecutor to require the officer of the court to charge the jury with the previous conviction, and then to put in the certificate and prove the identity of the prisoner in the usual way. If the prisoner gives such evidence during the course of the case for the prosecution, then this should be done before the case for the prosecution closes; but if the evidence of character is given after the case for the prosecution closes, then the previous conviction must be proved in reply.

An indictment for a subsequent felony need not conclude 'against the form of the statute,' as the charge of the former conviction is merely in the nature of a suggestion in order to warrant the higher punishment. (q)

As to the mode of proving a previous conviction, see 33 & 34 Vict. c. 112, s. 18, and Vol. 3, Evidence.

As to special offences, where a person has been twice convicted of crime, see 34 & 35 Vict. c. 112, s. 7, *post*, p. 77.

For enactment as to the children of a woman convicted of a crime, when a previous conviction is proved against her, see *post*, 79.

Penal Servitude.

An opinion at one time prevailed that it was expedient to award to certain offences fixed terms of transportation or imprisonment, and many statutes were passed containing such fixed terms. That opinion afterwards was abandoned, and in consequence the 9 & 10 Vict. c. 24, s. 1, was passed, which, after reciting that 'in certain cases of felony the Court is not empowered by law to award sentence of transportation for a less period than the term of the offender's life or some long term of years, or sentence of imprisonment for any shorter term than two years; but it is desirable that some such offenders should suffer transportation or imprisonment for a shorter period respectively, at the discretion of the Court before which they are convicted,' enacts that 'in all cases where the Court is now (26th June, 1846) empowered or required to award a sentence of transportation exceeding seven years, it shall be lawful for such Court, at its discretion, to award a sentence of transportation for a term of years not less than seven years, or to

(o) *R. v. Shrimpton*, 2 Den. C. C. 319, 3 C. & K. 373.

(p) *Ibid*.

(q) *R. v. Blea*, 8 C. & P. 735, decided before 14 & 15 Vict. c. 100, s. 24, which see *ante*, p. 36.

award such sentence of imprisonment for any period not exceeding two years, with or without hard labour, as shall to the Court in its discretion appear just under all the circumstances.'

By the 16 & 17 Vict. c. 99, penal servitude was introduced in lieu of transportation in certain cases and under certain regulations.

By sec. 6, every person who under this Act shall be sentenced or ordered to be kept in penal servitude may, during the term of the sentence or order, be confined in any such prison or place of confinement in any part of the United Kingdom, or in any river, port, or harbour of the United Kingdom, in which persons under sentence or order of transportation, may now by law be confined, or in any other prison in the United Kingdom, or in any part of Her Majesty's dominions beyond the seas, or in any port or harbour thereof, as one of Her Majesty's principal secretaries of state may from time to time direct, and such person may during such term be kept to hard labour, and otherwise dealt with in all respects as persons sentenced to transportation may now by law be dealt with while so confined.

Secs. 1, 2, 3, and 4 of 16 & 17 Vict. c. 99, were repealed by the 20 & 21 Vict. c. 3, s. 1, and by sec. 2 of this Act, 'no person shall be sentenced to transportation; and any person who [if the 16 & 17 Vict. c. 99, and 20 & 21 Vict. c. 3, had not been passed] might have been sentenced to transportation, shall be liable to be sentenced to be kept in penal servitude for a term of the same duration as the term of transportation to which such person would have been liable if the said [Acts] had not been passed; and in every case where at the discretion of the Court one of any two or more terms of transportation might have been awarded, the Court shall have the like discretion to award one of any two or more of the terms of penal servitude which are hereby authorised to be awarded instead of such terms of transportation: Provided always, that any person who might at the discretion of the Court have been sentenced either to transportation for any term or to any period of imprisonment, shall be liable at the discretion of the Court to be sentenced either to penal servitude for the same term or to the same period of imprisonment; and in any case in which before the passing of the [16 & 17 Vict. c. 99] sentence of seven years' transportation might have been passed, it shall be lawful for the Court at its discretion to pass a sentence of penal servitude of not less than three years.'

By sec. 6, where in any enactment now in force the expression 'any crime punishable with transportation,' or 'any crime punishable by law with transportation,' or any expression of the like import, is used, the enactment shall be construed and take effect as applicable also to any crime punishable with penal servitude.

At one time by 27 & 28 Vict. c. 47, s. 2, where any person was convicted on indictment of any crime or offence punishable with penal servitude, after having been previously convicted of felony, the least sentence of penal servitude that could be awarded was a period of seven years, (r) and it was then held that the indictment must charge the previous conviction. (s) That section has, however, been repealed

(r) *R. v. Deane*, 2 Q. B. D. 305; 13 Cox, C. C. 386.

(s) *R. v. Willis*, 41 L. J. M. C. 104; *R. v. Summers*, L. R. 1 C. C. R. 182.

by 42 & 43 Vict. c. 55, s. 1, and it would now seem that in such a case the prisoner might be sentenced to three years penal servitude. (*t*)

Forfeiture of licence. — By the 27 & 28 Vict. c. 47, sec. 4. If any holder of a licence granted in the form in the schedule is convicted, either by verdict of a jury or upon his own confession, of any offence for which he is indicted, his licence shall be forthwith forfeited by virtue of such conviction. (*u*)

Sec. 7. When the holder of a licence is convicted of an offence punishable summarily under this or any other Act, a certificate thereof is to be forwarded to a secretary of state in Great Britain or to the lord lieutenant in Ireland, and thereupon the licence may be revoked.

Sec. 9. 'Where any licence granted in the form set forth in the said Schedule (A.) is forfeited by a conviction of any indictable offence, (*v*) or is revoked in pursuance of a summary conviction under this Act or any other Act of Parliament, the person whose licence is forfeited or revoked shall, after undergoing any other punishment to which he may be sentenced for the offence in consequence of which his licence is forfeited or revoked, further undergo a term of penal servitude equal to the portion of his term of penal servitude that remained unexpired at the time of his licence being granted, and shall, for the purpose of his undergoing such last mentioned punishment, be removed from the prison of any county, borough, or place in which he may be confined, to any prison in which convicts under sentence of penal servitude may lawfully be confined, by warrant under the hand and seal of any justice of the peace of the said county, borough, or place, and shall be liable to be there dealt with in all respects as if such term of penal servitude had formed part of his original sentence.'

Sec. 10 empowers Her Majesty or the lord lieutenant of Ireland to grant licences in any other form than that in the schedule and containing different conditions; and such licences shall be revokable at pleasure by the authority by which they were granted; but a breach of their conditions is not to subject any holder of a licence to summary conviction.

By the Prevention of Crimes Act, 1871, 34 & 35 Vict. c. 112, s. 3 *et seq.*, the Penal Servitude Acts are amended.

Penalty on holders of licences getting their livelihood by dishonest means. — By sec. 3, it is enacted, Any constable in any police district may, if authorised so to do in writing by the chief officer of police in that district, without warrant take into custody any convict who is the holder of a licence granted under the Penal Servitude Acts, if it appears to such constable that such convict is getting his livelihood by dishonest means, and may bring him before a court of summary jurisdiction for adjudication. If it appears from the facts proved before such court that there are reasonable grounds for believing that the convict so brought before it is getting his livelihood by dishonest means, such convict shall be deemed to be guilty of an offence against this Act, and his licence shall be forfeited.

Penalty on breach of conditions of licence. — By sec. 4, where in

(*t*) See 54 & 55 Vict. c. 69, s. 1.

(*v*) See 54 & 55 Vict. c. 69, s. 3.

(*u*) The rest of the section is repealed by the 34 & 35 Vict. c. 112, s. 21.

any licence granted under the Penal Servitude Acts, any conditions different from or in addition to those contained in Schedule A. of the Penal Servitude Act, 1864, are inserted, the holder of such licence, if he breaks any such conditions by an act that is not of itself punishable, either upon indictment or upon summary conviction, shall be deemed guilty of an offence against this Act, and shall be liable to imprisonment for any period not exceeding three months, with or without hard labour. A copy of any conditions annexed to any licence granted under the Penal Servitude Acts, other than the conditions contained in Schedule A. of the Penal Servitude Act, 1864, shall be laid before both Houses of Parliament within twenty-one days after the making thereof, if Parliament be then sitting, or if not, then within fourteen days after the commencement of the next session of Parliament.

Convict holding licence to notify residence to police. — By sec. 5, every holder of a licence granted under the Penal Servitude Acts who is at large in Great Britain or Ireland shall notify the place of his residence to the chief officer of police of the district in which his residence is situated, and shall, whenever he changes such residence within the same police district, notify such change to the chief officer of police of that district, and whenever he is about to leave a police district he shall notify such his intention to the chief officer of police of that district, stating the place to which he is going, and, as far as is practicable, his address at that place, and whenever he arrives in any police district he shall forthwith notify his place of residence to the chief officer of police of such last-mentioned district; (*w*) moreover, every male holder of such a licence as aforesaid shall, once in each month, report himself at such time as may be prescribed by the chief officer of police of the district in which such holder may be, either to such chief officer himself, or to such other person as that officer may direct, and such report may, according as such chief officer directs, be required to be made personally or by letter. (*x*)

(*w*) These words are introduced by 54 & 55 Vict. c. 69, s. 4.

(*x*) By the Prevention of Crimes Act, 1879 (42 & 43 Vict. c. 55), s. 2. 'Any holder of a licence required, under s. 5, and any person subject to the supervision of the police required, by s. 8 of the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), to notify his residence or any change of his residence to a chief officer of police, shall comply with such requirement by personally presenting himself and declaring his place of residence to the constable or person who at the time when such notification is made is in charge of the police station or office of which notice has been given to such holder or person, as the place for receiving his notification, or if no such notice has been given, in charge of the chief office of such chief officer of police.'

'The power of the chief officer of a police district to direct that the reports required by ss. 5 & 8 of the Prevention of Crimes Act 1871, to be made by holders of licences and persons subject to the supervision of the

police, shall be made to some other person, shall extend to authorise him to direct such reports to be made to the constable or person in charge of any particular police station or office without naming the individual person. Any appointment, direction, or authority purporting to be signed by the chief officer of police, and to have been made or given for the purposes of this act or of ss. 5 & 8 of the Prevention of Crimes Act, 1871, or one of them, shall be evidence until the contrary is proved, that the appointment, direction, or authority thereby made or given was duly made or given by the chief officer of police; and evidence that it appears from the records kept by authority of the chief officer of police that a person required as above mentioned to notify his residence or change of residence, or to make a report, has failed to comply with such requirement, shall be *prima facie* evidence that the person has not complied with such requirement; but if the person charged alleges that he made such notification or report to any particular person or at any particular time, the court shall

If any person to whom this section applies fails to comply with any of the requisitions of this section, he shall in any such case, be guilty of an offence against this Act, (y) unless he proves to the satisfaction of the court before whom he is tried, either that being on a journey he tarried no longer in the place in respect of which he is charged with failing to notify his place of residence than was reasonably necessary, or that otherwise he did his best to act in conformity with the law, and on conviction of such offence, it shall be lawful for the court in its discretion either to forfeit his licence or to sentence him to imprisonment, with or without hard labour, for a term not exceeding one year. (z)

Sec. 6 contains regulations for the registering and photographing of criminals.

Special offences by persons twice convicted of crime.—By sec. 7, where any person is convicted on indictment of a crime, (a) and a previous conviction of a crime is proved against him, he shall, at any time within seven years immediately after the expiration of the sentence passed on him for the last of such crimes be guilty of an offence against this Act, and be liable to imprisonment, with or without hard labour, for a term not exceeding one year, under the following circumstances, or any of them:—

First. If, on his being charged by a constable with getting his livelihood by dishonest means, and being brought before a court of summary jurisdiction, it appears to such court that there are reasonable grounds for believing that the person so charged is getting his livelihood by dishonest means; or

Secondly. If, on being charged with any offence punishable on indictment or summary conviction, and on being required by a court of summary jurisdiction to give his name and address, he refuses to do so, or gives a false name or a false address: or,

Thirdly. If he is found in any place, whether public or private, under such circumstances as to satisfy the court before whom he is brought that he was about to commit or to aid in the commission of any offence punishable on indictment or summary conviction, or was waiting for an opportunity to commit, or aid in the commission of any offence punishable on indictment or summary conviction: or,

Fourthly. If he is found in or upon any dwelling-house, or any building, yard, or premises, being parcel of or attached to such dwelling-house, or in or upon any shop, warehouse, counting-house, or other place of business, or in any garden, orchard, pleasure ground, or nursery ground, or in any building or erection in any garden, orchard, pleasure ground, or nursery ground, without being able to account to the satisfaction of the court before whom he is brought for his being found on such premises.

Any person charged with being guilty of any offence against this Act mentioned in this section may be taken into custody as follows, (that is to say):—

require the attendance of such persons as may be necessary to prove the truth or falsehood of such allegation.

(y) Sect. 17 states how offences against the Act may be prosecuted before a court of summary jurisdiction.

(z) This latter clause is substituted for the old enactment by 54 & 55 Vict. c. 69, s. 4.

(a) See the interpretation clause, s. 20, *ante*, p. 69.

In the case of any such offence against this Act as is first in this section mentioned, by any constable without warrant, if such constable is authorised so to do by the chief officer of police of his district;

In the case of any such offence against this Act as is thirdly in this section mentioned, by any constable without warrant, although such constable is not specially authorised to take him into custody;

Also, where any person is charged with being guilty of an offence against this Act fourthly in this section mentioned, he may, without warrant, be apprehended by any constable, or by the owner or occupier of the property on which he is found, or by the servants of the owner or occupier, or by any other person authorised by the owner or occupier, and may be detained until he can be delivered into the custody of a constable.

By sec. 8, where any person is convicted on indictment of a crime, (b) and a previous conviction of a crime is proved against him, the court having cognizance of such indictment may, in addition to any other punishment which it may award to him, direct that he is to be subject to the supervision of the police for a period of seven years, or such less period as the court may direct, commencing immediately after the expiration of the sentence passed on him for the last of such crimes.

Every person subject to the supervision of the police, who is at large in Great Britain or Ireland, shall notify the place of his residence to the chief officer of police of the district in which his residence is situated, and shall, whenever he changes such residence within the same police district, notify such change to the chief officer of police of that district, 'and whenever he is about to leave a police district, he shall notify such his intention to the chief officer of police of that district, stating the place to which he is going, and also, if required, and, so far as is practicable, his address at that place, and whenever he arrives in any police district he shall forthwith notify his place of residence to the chief officer of police of such last-mentioned district;' (c) moreover every person subject to the supervision of the police, if a male, shall once in each month report himself at such time as may be prescribed by the chief officer of police of the district in which such holder may be, either to such chief officer himself, or to such other person as that officer may direct, and such report may, according as such chief officer directs, be required to be made personally or by letter. (d)

If any person to whom this section applies fails to comply with any of the requisitions of this section, he shall, in any such case, be guilty of an offence against this Act, unless he proves to the satisfaction of the court before whom he is tried, either that being on a journey he tarried no longer in the place, in respect of which he is charged with failing to notify his place of residence, than was reasonably necessary, or that otherwise he did his best to act in conformity with the law; and on conviction of such offence it shall be lawful for

(b) See the interpretation clause, s. 20, *ante*, p. 69.

(c) These words are substituted by 54 & 55 Vict. c. 69, s. 4.

(d) As to notification, see 42 & 43 Vict. c. 55, s. 2, *ante*, p. 76, note (r).

the court in its discretion either to forfeit his licence, or to sentence him to imprisonment with or without hard labour for a term not exceeding one year. (e)

Proceedings upon indictment for subsequent conviction. — By sec. 9, the rules contained in the 24 & 25 Vict. c. 96, s. 116 (*ante*, p. 68), in relation to the form of and the proceedings upon an indictment for any offence punishable under that Act committed after previous conviction, shall, with the necessary variations, apply to any indictment for committing a crime as defined by this Act after previous conviction for a crime, whether the crime charged in such indictment or the crime to which such previous conviction relates be or be not punishable under the said Act, 24 & 25 Vict. c. 96.

Children of woman convicted after previous conviction. — By sec. 14, where any woman is convicted of a crime, (f) and a previous conviction of a crime is proved against her, any children of such woman under the age of fourteen years, who may be under her care and control at the time of her conviction for the last of such crimes, and who have no visible means of subsistence, or are without proper guardianship, shall be deemed to be children to whom in Great Britain the provisions of the Industrial Schools Act, 1866 (29 & 30 Vict. c. 118), and in Ireland the provisions of the Industrial Schools (Ireland) Act, 1868, apply, and the court by whom such woman is convicted, or two justices or a magistrate, shall have the same power of ordering such children to be sent to a certified industrial school as is vested in two justices or a magistrate by the fourteenth section of the Industrial Schools Act, 1866, and by the eleventh section of the Industrial Schools (Ireland) Act, 1868, in respect of the children in the said sections described.

Penal Servitude Act, 1891. — By the 54 & 55 Vict. c. 69: —

Sec. 1. — (1.) Where under any enactment in force when this section comes into operation a court has power to award a sentence of penal servitude, the sentence may, at the discretion of the court, be for any period not less than three years, and not exceeding either five years, or any greater period authorised by the enactment.

(2.) Where under any Act now in force or under any future Act a court is empowered or required to award a sentence of penal servitude, the court may in its discretion, unless such future Act otherwise provides, award imprisonment for any term not exceeding two years, with or without hard labour.

(3.) Section two of the Penal Servitude Act, 1864, is hereby repealed with respect to any sentence awarded after the date at which this section comes into operation.

Sec. 2. (1.) Any constable may take into custody without warrant any holder of a licence under the Penal Servitude Acts, or any person under the supervision of the police in pursuance of the Prevention of Crimes Act, 1871, whom he reasonably suspects of having committed any offence, and may take him before a court of summary jurisdiction to be dealt with according to law.

(2.) Any convict may be convicted before a court of summary

(e) These words are substituted by 54 & 55 Vict. c. 69, s. 4.

(f) See the interpretation clause, s. 20, *ante*, p. 69.

jurisdiction of an offence against section three of the Prevention of Crimes Act, 1871, although he was brought before the court on some other charge, or not in manner provided by that section.

Sec. 3. (1.) Where an offender is, under section nine of the Penal Servitude Act, 1864, undergoing, or liable to undergo, a term of penal servitude in consequence of the forfeiture or revocation of a licence granted in pursuance of the Penal Servitude Acts, Her Majesty may grant a licence to the offender in like manner as if the forfeiture or revocation of the former licence were a sentence of penal servitude which the offender is liable to undergo.

(2.) Where a person is sentenced on any conviction to a term of penal servitude, and by virtue of the same conviction his licence is forfeited, the term for which he is sentenced, together with the term which he is required further to undergo under the said section, shall, for all purposes of the Penal Servitude Acts relating to licences, be deemed to be one term of penal servitude, and those Acts shall apply as if, on conviction of the offence, the offender had been sentenced to the combined term.

By sec. 4. — (1.) Sections five and eight of the Prevention of Crimes Act, 1871, and section two of the Prevention of Crimes Act, 1879 (which recites and refers to those sections), are modified as shown above.

(2.) Her Majesty may, by order under the hand of a Secretary of State, remit any of the requirements of sections five and eight of the Prevention of Crimes Act, 1871, either generally or in the case of any holder of a licence or person subject to the supervision of the police.

Sec. 5. The provisions of the Penal Servitude Act, 1864, applying to a licence in the form set forth in Schedule A. to that Act, shall apply also to a licence in any other form for the time being authorised by section ten of that Act.

Sec. 6. A person who has been convicted on indictment of a crime within the meaning of the Prevention of Crimes Act, 1871, and against whom a previous conviction of such a crime is proved, shall,

(a.) if the second sentence is to a term of imprisonment, then at any time within seven years after the expiration of the sentence; and

(b.) if the second sentence is to a term of penal servitude, then whilst at large on licence under that sentence, and also at any time within seven years after the expiration of the sentence, be guilty of an offence against the Prevention of Crimes Act, 1871, under the circumstances stated in section seven of that Act or any of them, and may be taken into custody in manner provided by that section.

Sec. 7. Section four of the Act passed in the fifth year of the reign of King George the Fourth, chapter eighty-three, intituled 'An Act for the punishment of idle and disorderly persons and rogues and vagabonds in that part of Great Britain called England,' as amended by section fifteen of the Prevention of Crimes Act, 1871, shall be read and construed as if the provisions applying to suspected persons and reputed thieves frequenting (g) the places and with the intent therein described, applied also to every suspected person or

(g) As to the meaning of "frequent," see *R. v. Clark*, 14 Q. B. D. 92.

reputed thief loitering about or in any of the said places and with the said intent.

Sec. 8. The Secretary of State may make regulations as to the measuring and photographing of all prisoners who may for the time being be confined in any prison; and all the provisions of section six of the Prevention of Crimes Act, 1871, with respect to the photographing of prisoners shall apply to any regulations as to measuring made in pursuance of this section. All regulations made under this section shall be laid before both Houses of Parliament as soon as practicable after they are made.

Juvenile Offenders.

By the Reformatory Schools Act 1893 (56 & 57 Vict. c. 48):—

Sec. 1. Where a youthful offender, who in the opinion of the court before whom he is charged is less than sixteen years of age, is convicted, whether on indictment or by a court of summary jurisdiction, of an offence punishable with penal servitude or imprisonment, and either—

(a) appears to the court to be not less than twelve years of age; or

(b) is proved to have been previously convicted of an offence punishable with penal servitude or imprisonment, the court may, in addition to or in lieu of sentencing him according to law to any punishment, order that he be sent to a certified reformatory school, and be there detained for a period of not less than three and not more than five years, so, however, that the period is such as will in the opinion of the court expire at or before the time at which the offender will attain the age of nineteen years.

By sec. 2. Without prejudice to any other powers of the court, the court may direct that the offender be taken to a prison, or to any other place, not being a prison, which the court thinks fit, and the occupier of which is willing to receive him, and be detained therein for any time not exceeding seven days, or in case of necessity for a period not exceeding fourteen days, or until an order is sooner made for his discharge, or for his being sent to a reformatory school, or otherwise dealt with under this or any other Act; and the person to whom the order is addressed is hereby empowered and required to detain him accordingly, and if the offender escapes he may be apprehended without warrant and brought back to the place of detention.

Punishment of hard labour, solitary confinement, whipping, &c.

By 3 Geo. 4, c. 114, after reciting the 53 Geo. 3, c. 162, it is enacted, that 'whenever any person shall be convicted of any of the offences hereafter specified and set forth, that is to say [any assault with intent to commit felony]; any attempt to commit felony; any riot [any misdemeanor for having received stolen goods, knowing them to have been stolen; any assault upon a peace officer, or upon an officer of the customs or excise, or upon any other officer of the revenue, in the due discharge and execution of his or their respective duty or duties, or upon any person or persons acting

in aid of any such officer or officers in the due discharge and execution of his or their respective duty or duties, any assault committed in pursuance of any conspiracy to raise the rate of wages; being an utterer of counterfeit money, knowing the same to be counterfeit; knowingly and designedly obtaining money, goods, wares, or merchandises, bills, bonds, or other securities for money, by false pretences, with intent to cheat any person of the same]; keeping a common gaming-house, a common bawdy-house, or a common ill-governed and disorderly house; wilful and corrupt perjury, or of subornation of perjury; [having entered any open or enclosed ground with intent there illegally to destroy, take, or kill game or rabbits, or with intent to aid, abet, and assist any person or persons illegally to destroy, take, or kill game or rabbits, and having been there found armed with an offensive weapon], (h) in each and every of the above cases, and whenever any person shall be convicted of any or either of the aforesaid offences, it shall and may be lawful for the court before which any such offender shall be convicted, or which by law is authorised to pass sentence upon any such offender, to award and order (if such court shall think fit) sentence of imprisonment with hard labour for any term not exceeding the term for which such court may now imprison for such offences, either in addition to or in lieu of any other punishment which may be inflicted on any such offenders by any law in force before the passing of this Act; and every such offender shall thereupon suffer such sentence, in such place, and for such time as aforesaid, as such court shall think fit to direct.'

The parts of this statute between brackets, except the part stated to be repealed by 36 & 37 Vict. c. 91, are repealed by the 9 Geo. 4, c. 31, s. 1; 9 Geo. 4, c. 53, s. 1; 9 Geo. 4, c. 74, s. 125; 7 & 8 Geo. 4, c. 27; and 2 Will. 4, c. 34, s. 1.

As to sentence to hard labour where offence punishable under 7 & 8 Geo. 4, c. 28, see s. 9 of that Act, *ante*, p. 65.

By 7 Will. 4 & 1 Vict. c. 84, s. 3, when any person shall be convicted of any offence punishable under this Act for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, with or without hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, not exceeding one month at any one time, and not exceeding three months in any one year, as to the court in its discretion shall seem meet.

By 14 & 15 Vict. c. 100, s. 29, whenever any person shall be convicted of any one of the offences following, as an indictable misdemeanor; that is to say, any cheat or fraud punishable at common law; any conspiracy to cheat or defraud, or to extort money or goods, or falsely to accuse of any crime, or to obstruct, prevent, pervert, or defeat the course of public justice; any escape or rescue from lawful custody on a criminal charge; any public and indecent exposure of the person; any indecent assault, or any assault occasioning actual bodily harm; any attempt to have carnal knowledge of a girl under twelve years of age; any public selling, or exposing for public sale

(h) The part within brackets is repealed by 36 & 37 Vict. c. 91.

or to public view of any obscene book, print, picture, or other indecent exhibition; it shall be lawful for the court to sentence the offender to be imprisoned for any term now warranted by law, and also to be kept to hard labour during the whole or any part of such term of imprisonment.

Each of the Consolidation Acts, 24 & 25 Vict. c. 96 (larceny, &c.), s. 118; c. 97 (malicious injuries to property), s. 74; c. 98 (forgery), s. 52; c. 99 (offences relating to the coin), s. 39, and c. 100 (offences against the person), s. 69, contains the following clause:—

‘Whenever imprisonment, with or without hard labour, may be awarded for any indictable offence under this Act, the Court may sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction.’

By 28 & 29 Vict. c. 126, (entitled, ‘An Act to consolidate and amend the law relating to prisons,’) s. 67, In every prison to which this Act applies, prisoners convicted of misdemeanor, and not sentenced to hard labour, shall be divided into at least two divisions, one of which shall be called the first division; and whenever any person convicted of misdemeanor is sentenced to imprisonment without hard labour, it shall be lawful for the court or judge before whom such person has been tried to order, if such court or judge think fit, that such person shall be treated as a misdemeanant of the first division; and a misdemeanant of the first division shall not be deemed to be a criminal prisoner within the meaning of this Act. (i)

Each of the Consolidation Acts 24 & 25 Vict. c. 96, s. 119; c. 97, s. 75; c. 98, s. 53; c. 99, s. 40, and c. 100, s. 70, contains the following clause:—

‘Whenever solitary confinement may be awarded for any indictable offence under this Act, the Court may direct the offender to be kept in solitary confinement for any portion or portions of his imprisonment, or of his imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year.’ (j)

Whipping.—Each of the Consolidation Acts 24 & 25 Vict. c. 96, s. 119; c. 97, s. 75; c. 100, s. 70, contains the following clause:—

‘Whenever whipping may be awarded for any indictable offence under this Act, the Court may sentence the offender to be once privately whipped; *and the number of strokes, and the instrument with which they shall be inflicted, shall be specified by the Court in the sentence.*’

No limit as to the instrument to be used or the number of strokes which may be inflicted seems to be imposed in the case of whipping

(i) This Act does not apply to the prisons for convicts under the superintendence of the directors of convict prisons, or to any military or naval prison (s. 3). The expressions hereinafter mentioned shall have the meanings hereinafter attached to them unless there is something in the tenor of the Act inconsistent with such meanings, i. e., prison shall mean gaol, house of correction, bridewell, or penitentiary; it shall also include the airing grounds or other grounds or buildings occupied by prison officers, for the

use of the prison and contiguous thereto. ‘Gaoler’ shall mean governor, keeper, or other chief officer of a prison (s. 4). The 40 & 41 Vict. c. 21 contains further regulations for the treatment of prisoners, and by s. 40 persons convicted of sedition or seditious libel, and by s. 41, persons imprisoned for any contempt of court are to be treated as first class misdemeanants. See *Osborne v. Milman*, 18 Q. B. D. 471.

(j) See 1 Vict. c. 90, s. 5, *ante*, p. 66.

for indictable offences. By 25 & 26 Vict. c. 18, where whipping is ordered by justices in the case of an offender under fourteen years of age, the instrument is to be a birch rod, and the number of strokes are not to exceed twelve. A similar provision is contained in the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49, s. 11), and by s. 10 of the same Act, a child under twelve may not be ordered to receive more than six strokes of the birch rod. By 25 & 26 Vict. c. 18, s. 2, 'No offender shall be whipped more than once for the same offence.'

Whipping can only be awarded to adults under the provisions of 26 & 27 Vict. c. 44, which provides that a male offender may be once, twice, or thrice, privately whipped, and that if his age does not exceed sixteen years, the number of strokes shall not exceed twenty-five at each whipping, and the instrument used shall be a birch rod. In the case of any other male offender, the number of strokes shall not exceed fifty at each whipping, and the court is to specify the instrument to be used. In the case of taking a reward for helping to the discovery of stolen property, whipping can be inflicted on a male offender who is under the age of eighteen (24 & 25 Vict. c. 96, s. 101). In many other cases (chiefly relating to offences against property) this punishment can be inflicted on male offenders under the age of sixteen, and also, by the 48 & 49 Vict. c. 69, s. 4, in case of offences against girls under thirteen. This section expressly incorporated the provisions of 25 & 26 Vict. c. 18. It would, therefore, seem that it is the intention of the legislature, where a sentence of whipping is imposed on a boy over fourteen and under sixteen years of age that the instrument to be used should be a birch rod, and the number of strokes should not be more than twenty-five. There is no power to order whipping in cases of assault, as 48 & 49 Vict. c. 69, s. 4, only refers to carnal knowledge or attempted carnal knowledge of a girl under thirteen. (k)

Fine and sureties for the peace. (l) — Each of the Consolidation Acts, 24 & 25 Vict. c. 96, s. 117; c. 97, s. 73; c. 98, s. 51; c. 99, s. 38; and c. 100, s. 71, contains the following clause: —

'Whenever any person shall be convicted of any indictable misdemeanor punishable under this Act, the Court may, if it shall think fit, in addition to, or in lieu of any of the punishments by this Act authorised, fine the offender, and require him to enter into his own recognizances, and to find sureties, both or either, for keeping the peace and being of good behaviour; and in case of any felony punishable under this Act, (m) the Court may, if it shall think fit, require the offender to enter into his own recognizances, and to find sureties, both or either, for keeping the peace in addition to any punishment by this Act authorised: Provided that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year.'

Punishment of principals in second degree, and accessories. — Each of the Consolidation Acts, 24 & 25 Vict. c. 96, s. 98; c. 97, s. 56; c. 98, s. 49; c. 99, s. 35, and c. 100, s. 67, enacts that 'In the case of every felony punishable under this Act, every principal in the second degree,

(k) Power is given to justices in Quarter Session by 5 Geo. 4, c. 83, s. 10 to punish by whipping incorrigible rogues and vagabonds.

(l) As to finding sureties in common-law misdemeanors, see post.

(m) The 24 & 25 Vict. c. 100 (the Offences Against the Person Act), s. 71, here adds, 'otherwise than with death.'

and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act (*n*) shall be liable to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; (*o*) and whosoever shall counsel, aid, or abet the commission of any indictable misdemeanor punishable under this Act shall be liable to be proceeded against, indicted, and punished, as a principal offender.' (*p*)

Sentence when Person in Prison for another Crime.

By the 7 & 8 George 4, c. 28, s. 10, 'wherever sentence shall be passed for felony on a person already imprisoned under sentence for another crime, it shall be lawful for the court to award imprisonment for the subsequent offence, to commence at the expiration of the imprisonment to which such person shall have been previously sentenced; and where such person shall be already under sentence, either of imprisonment or of transportation, (*q*) the court, if empowered to pass sentence of transportation, (*q*) may award such sentence for the subsequent offence, to commence at the expiration of the imprisonment or transportation (*q*) to which such person shall have been previously sentenced, although the aggregate term of imprisonment or transportation (*q*) respectively may exceed the term for which either of those punishments could be otherwise awarded.'

Where a person is charged with several offences at the same time of the same kind he may be sentenced to several terms of imprisonment or penal servitude one after the conclusion of the other. (*r*)

So where an indictment for perjury contained two counts charging perjury on two different occasions but with the same object, it was held that they were distinct offences which might however be included in one indictment; that a general verdict of Guilty was good, and that the full punishment of seven years penal servitude might be inflicted for each offence, the second term to begin at the termination of the first. (*s*)

Binding over to come up for Judgment when called upon.

By the Probation of First Offenders Act, 1887 (50 & 51 Vict. c. 25) —

Sec. 1. (1) In any case in which a person is convicted of larceny or false pretences, or any other offence punishable with not more than two years imprisonment before any court, and no previous conviction is proved against him, if it appears to the court before whom he is so convicted that regard being had to the youth, character, and antecedents of the offender, to the trivial nature of the offence, and

(*n*) Accessories after the fact to murder and the receivers of stolen goods are excepted.

(*o*) The Offences Against the Person Act and Coin Act omit solitary confinement.

(*p*) This clause is omitted in the Coin Act, but the 24 & 25 Vict. c. 94, s. 8, supplies the omission.

(*q*) Penal servitude now; see the 20 & 21 Vict. c. 3, s. 6, *ante*, p. 74.

(*r*) *R. v. Williams*, 1 Leach, 536. See *Gregory v. R.*, 15 Q. B. 974; 19 L. J., Q. B. 366.

(*s*) *R. v. Castro*, 6 Ap. Cas. 229, in which the House of Lords entirely declined to follow the American case of *Tweed v. Liscomb*, where the contrary was decided in the State of New York, 15 Sickel's, N. Y. C. A. 559.

to any extenuating circumstances under which the offence was committed, it is expedient that the offender be released on his entering into a recognizance with or without sureties, and, during such period as the court may direct, to appear and receive judgment when called upon, and in the mean time to keep the peace and be of good behaviour,

(2) The court may, if it thinks fit, direct that the offender shall pay the costs of the prosecution, or some portion of the same, within such period and by such instalments as may be directed by the court.

Sec. 2. (1) If a court having power to deal with the offender in respect of his original offence, or any court of summary jurisdiction, is satisfied by information on oath that the offender has failed to observe any of the condition of his recognizance, it may issue a warrant for his apprehension.

(2) An offender when apprehended on any such warrant shall if not brought forthwith before the court having power to sentence him be brought before a court of summary jurisdiction, and that court may either remand him by warrant until the time at which he was required by his recognizance to appear for judgment, or until the sitting of the court having power to deal with his original offence, or may admit him to bail with a sufficient surety conditioned on his appearing for judgment.

(3) The offender when so remanded may be committed to a prison either for the county or place in or for the county or place where he is bound to appear for judgment, and the warrant of remand shall order that he be brought before the court before which he was bound to appear for judgment, or to answer as to his conduct since his release.

Sec. 3. The Court before directing the release of an offender under this Act, shall be satisfied that the offender or his surety has a fixed place of abode or regular occupation in the county or place for which the Court acts, or in which the offender is likely to live during the period named for the observance of the conditions.

Sec. 4. In this Act the term 'Court' includes a court of summary jurisdiction.

Restitution.

Restitution to the owner of stolen property. — As to restitution and recovery of stolen property (*t*) by the 24 & 25 Vict. c. 96, s. 100, 'if any person guilty of any such (*u*) felony or misdemeanor as is mentioned in this Act, in stealing, taking, obtaining, *extorting, embezzling, converting, or disposing of*, or in knowingly receiving any chattel, money, valuable security, or other property whatsoever, shall be indicted for such offence, by or on the behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representative; and in every case in this section aforesaid the Court before whom (*v*) any

(*t*) As to power of magistrates to order restitution, see 2 & 3 Vict. c. 71, s. 29; 42 & 43 Vict. c. 49, s. 44; *R. v. D'Eyncourt*, 21 Q. B. D. 109.

(*u*) This section applies where goods, &c., have been obtained by false pretences; *R. v.*

Stancilffe, 11 Cox, C. C. 318; *R. v. Goldsmith*, 12 Cox, C. C. 594.

(*v*) The Court of Q. B. has no power to order the writ of restitution; *Walker v. London (Mayor of)*, 11 Cox, C. C. 280, 38 L. J. M. C. 107.

person shall be tried for any such felony or misdemeanor shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof in a summary manner: Provided, that if it shall appear before any award or order made that any valuable security shall have been *bona fide* paid or discharged by some person or body corporate liable to the payment thereof, or being a negotiable instrument shall have been *bona fide* taken or received, by transfer or delivery, by some person or body corporate, for a just and valuable consideration, without any notice or without any reasonable cause to suspect that the same had by any felony or misdemeanor been stolen, taken, obtained, *extorted, embezzled, converted, or disposed of*, in such case the Court shall not award or order the restitution of such security; *provided also, that nothing in this section contained shall apply to the case of any prosecution of any trustee, banker, merchant, attorney, factor, broker, or other agent, intrusted with the possession of goods or documents of title to goods, for any misdemeanor against this Act.* (w)

The law is that upon the conviction of a thief, the prosecutor acquires a new title to his goods; and, therefore, although previous to the conviction they may have been bought by an innocent purchaser in market overt, upon the conviction the prosecutor may sue the innocent purchaser in trover, (x) and this applies where the goods have been obtained by false pretences, as well as where they have been stolen. (y)

By 35 & 36 Vict. c. 93, s. 30, if any person is convicted in any court of feloniously taking, or fraudulently obtaining any goods and chattels, and it appear to the court that the same have been pawned with a pawnbroker, the court, on proof of the ownership of the goods and chattels, may, if it thinks fit, order the delivery thereof to the owner, either on payment to the pawnbroker of the amount of the loan or of any part thereof, or without payment thereof or of any part thereof, as to the court, according to the conduct of the owner and the other circumstances of the case, seem just and fitting.

Restitution of the proceeds of stolen property. — One stole cattle and sold them in open market at Coventry, and was immediately apprehended by the sheriffs of Coventry, and they seized the money, and the thief was hanged at the suit of the owner of the cattle; and by the Court: the party shall have restitution of the money, notwithstanding the words of the 21 H. 8, c. 11, 'the goods stolen,' &c.; and Crooke, J., said that this was usual at Newgate. (z) And where a servant took gold from his master, and changed it into silver, it was held that the master should have restitution of the silver by the 21 H. 8, c. 11. (a)

(w) This clause is taken from the 7 & 8 Geo. 4, c. 29, s. 57, and 9 Geo. 4, c. 55, s. 50 (1.). It is extended so as to include cases where property has been extorted, embezzled, or disposed of within the meaning of any of the sections of this Act. The last proviso was introduced especially to protect persons who receive goods from factors, &c., under such circumstances that their title to them is valid. See 6 Geo. 4, c. 94, and 5 & 6 Vict. c. 39. It is to be observed, however, that this proviso only excepts prosecutions for misdemeanors from the operation of

this section, and leaves all cases of felony within it. The proviso applies to the right to recover as well as to the summary restitution. *Chichester v. Hill*, 15 Cox, C. C. 258.

(x) *Lindsay v. Cundy*, 1 Q. B. D. 348, reversed on a different view of facts, 2 Q. B. D. 96 & 3 Ap. Cas. 459.

(y) *Bentley v. Vilmont*, 12 Ap. Cas. 471.

(z) *Harris's case*, Noy, 128.

(a) *Hanberries' case*, cited in *Holiday v. Hicks*, Cro. El. 661.

Where a prisoner was convicted of stealing a bill of exchange for £100, and a considerable sum of money in specie, and the evidence tended to show that he must have purchased a horse with part of the proceeds of the bill, the Court ordered the horse to be delivered to the prosecutor. (*b*) It has been held that the Court has jurisdiction under 24 & 25 Vict. c. 96, s. 100 to entertain an application for the restitution of the proceeds of the property as well as the property itself, but such an application ought only to be granted if the proceeds are in the hands of the convict, or of an agent who holds them for him. (*c*)

Restitution after a transfer under the Factors Act. — Where a prisoner was indicted for stealing a £10 Bank of England note, it was held that an order could not be made to restore it after it had been paid and cancelled by the Bank. (*d*)

Where the prisoner had been convicted of stealing certain pieces of plush, the property of De Gilley, and it appeared that he had sold the plush to Hart for £1,200, under such circumstances as to enable Hart successfully to defend an action brought by De Gilley, on the ground that he had *bona fide* dealt with the prisoner as the agent of De Gilley and as having the possession of the plush within the 5 & 6 Vict. c. 39, it was held that the property in the plush reverted in De Gilley on the conviction of the prisoner, and an order was made under the 7 & 8 Geo. 4, c. 29, s. 57, to restore it to De Gilley. (*e*)

Mode of proceeding where the prisoner pleads guilty. — A prisoner pleaded guilty to several indictments charging him with stealing a large amount of property, and an order was applied for upon several pawnbrokers to deliver up to the prosecutor the goods which had been pledged with them. It was objected for the pawnbrokers that it might be that the property had never belonged to the prosecutor; or, if it had, that the prisoner had been his agent, and had pledged the goods under circumstances that did not amount to felony, and that the prisoner's confession was no evidence against the pawnbrokers. Alderson, B.: 'I certainly think that the pawnbrokers should not be absolutely bound by the prisoner's confession. It ought not to affect them. But, on the other hand, the Act prescribes that where the person robbed has prosecuted the thief to conviction, he shall have an order from the Court that his goods be restored to him. Would not the better course be to bring the goods into court that they may be identified, and that affidavits should be made on both sides of any matters the parties may think it necessary to state? We should then have an opportunity of forming our judgment upon the facts.' It was suggested that the depositions would disclose what the facts were. Alderson, B.: 'But then even the statement in the depositions would not be conclusive against third persons.' The next day Alderson, B., said: 'We have looked over the depositions, and are satisfied that this is not a case within the Factors Act, that the prisoner was not an agent, and that in making away with the property he was clearly

(*b*) *R. v. Powell*, 7 C. & P. 640. The Common-Serjeant, after consulting Gurney, B., and Williams, J. See *R. v. The City of London*, *infra*.

(*c*) *R. v. Central Criminal Court*, 17 Q.

B. D. 598. See this case on appeal, 18 Q. B. D. 314.

(*d*) *R. v. Stanton*, 7 C. & P. 481. Vaughan and Williams, Js.

(*e*) *R. v. Wollez*, 8 Cox, C. C. 337, Com. Kerr.

guilty of felony. We shall, therefore, make the order for restitution, subject, of course, to the identity of the goods being established.' (f)

Judge has power only as regards stolen property and its proceeds. — A judge has no power either at common law or by statute to direct the disposal of property in the possession of a convicted felon, not belonging to, or not being the proceeds of property that belonged to, the prosecutor. Where, therefore, an order stated that the prisoner had been convicted of stealing a large quantity of gold, and that certain Turkish bonds were found in his possession, and that one-sixth of these bonds had been bought with money produced by the sale of the property so stolen, and that the other five-sixths were held by a trustee for a woman and her child, and it was ordered that the bonds should be delivered to the prosecutor's solicitor to the use of the prosecutor as to one-sixth, and as to the other five-sixths to be settled on the woman and child, it was held, that the order was bad as to the five-sixths: for the judges had no power, either by statute or at common law, to order any disposal of these portions of the property. (g)

Stolen goods sold in 'market overt.' — The order of restitution is cumulative to the ordinary remedy by action, and is not a condition precedent to such remedy, and the only consequence of the Court refusing an order is, to leave the owner to the ordinary remedy by action; and in such case the owner may maintain trover for the stolen goods after the conviction of the thief; for though the goods have been sold in market overt, the property in them is revested in the owner on conviction of the thief. (h)

Where pawnbroker has advanced money on goods. — It was held in Ireland, on the 9 Geo. 4, c. 55, s. 50 (similar to the 7 & 8 Geo. 4, c. 29, s. 57), that the prosecutor ought not to be ordered to pay a pawnbroker the money advanced by him on stolen goods which are ordered to be restored to the owner. (i)

Restitution when goods have been sold and money found on the prisoner. — By 30 & 31 Vict. c. 35, s. 9, where any prisoner shall be convicted, either summarily or otherwise, of larceny or other offence, which includes the stealing of any property, and it shall appear to the Court by the evidence that the prisoner has sold the stolen property to any person, and that such person has had no knowledge that the same was stolen, and that any monies have been taken from the prisoner on his apprehension, it shall be lawful for the Court, on the application of such purchaser, and on the restitution of the stolen

(f) *R. v. Macklin*, 5 Cox, C. C. 216, Alderson, B., and Martin, B. It was urged that a writ of restitution should be awarded, and then the whole matter might be enquired into. Alderson, B., said, that the only case he could find of such a writ was *Burgess v. Coney*, 1 Trem. Pl. C. 315, and he saw no necessity for it in this case. It seems that the order for restitution will be limited to the property identified at the trial, as being the subject of the indictment. *R. v. Goldsmith*, 12 Cox, C. C. 594.

(g) *R. v. The City of London*, 1 E. B. & E. 509; 27 L. J. M. C. 231. See *R. v.*

Pierce, 7 Cox, C. C. 206, which is a report of the making of the order in question.

(h) *Scattergood v. Sylvester*, 15 Q. B. 506; *R. v. Stancliffe*, 11 Cox, C. C. 318, where goods had been pawned to a *bona fide* pawnee. *Walker v. Matthews*, 8 Q. B. D. 109. As to the meaning of market overt, see *Hargreave v. Spink* (1892), 1 Q. B. 25.

(i) *R. v. Sargent*, 5 Cox, C. C. 499. See 35 & 36 Vict. c. 93, s. 30, *ante*, 87. *Crampton, J., and Richards, B.* It is perfectly clear the Court has no jurisdiction to make any such order to pay the pawnbroker.

property to the prosecutor, to order that out of such monies a sum not exceeding the amount of the proceeds of the said sale be delivered to the said purchaser.

Costs of Prosecutions. — Ordering Rewards.

Attendance of witnesses, how remunerated. — Formerly the law provided no means for reimbursing the witnesses on criminal prosecutions. As length, by the 27 Geo. 2, c. 3, 18 Geo. 3, c. 19, and 58 Geo. 3, c. 70, in cases of felony, certain provisions were made for that purpose. These, however, did not extend to cases of misdemeanors; but now by the 7 Geo. 4, c. 64, s. 22 (repealing the above-mentioned statutes) it is enacted, 'that the court before which any person shall be prosecuted or tried for any felony is hereby authorized and empowered, at the request of the prosecutor or of any other person, who shall appear on recognizance or subpoena to prosecute or give evidence against any person accused of any felony, to order payment unto the prosecutor of the costs and expenses which such prosecutor shall incur in preferring the indictment, and also payment to the prosecutor and witnesses for the prosecution of such sums of money as to the court shall seem reasonable and sufficient to reimburse such prosecutor and witnesses for the expenses they shall have severally incurred in attending before the examining magistrate or magistrates (*j*) and the grand jury, and in otherwise carrying on such prosecution, and also to compensate them for their trouble and loss of time therein; and, although no bill of indictment be preferred, it shall still be lawful for the court, where any person shall, in the opinion of the court, *bona fide* have attended the court in obedience to any such recognizance or subpoena, to order payment unto such person of such sum of money as to the court shall seem reasonable and sufficient to reimburse such person for the expenses which he or she shall have *bona fide* incurred by reason of attending before the examining magistrate or magistrates, and by reason of such recognizance or subpoena, and also to compensate such person for trouble and loss of time; and the amount of the expenses of attending before the examining magistrate or magistrates, and the compensation for trouble and loss of time therein, shall be ascertained by the certificate of such magistrate or magistrates, granted before the trial or attendance in court, if such magistrate or magistrates shall think fit to grant the same; and the amount of all the other expenses and compensation shall be ascertained by the proper officer of the court, subject nevertheless to the regulations to be established in the manner hereinafter mentioned.' (*k*)

And by sec. 23, after reciting that for want of power in the court to order payment of the expenses of any prosecution for a misdemeanor, many individuals are deterred by the expense from prosecuting persons guilty of misdemeanors, it is further enacted, 'that where any prosecutor or other person shall appear before any court on recogni-

(*j*) 29 & 30 Vict. c. 52, provides for payment of witnesses' expenses, &c., when there is no committal for trial. This Act has from time to time been continued.

(*k*) And see 33 & 34 Vict. c. 23, ss. 3 & 4, *post*.

zance or subpoena, to prosecute or give evidence against any person indicted of any assault with intent to commit felony, of any attempt to commit felony, of any riot, of any misdemeanor for receiving any stolen property knowing the same to have been stolen, of any assault upon a peace officer in the execution of his duty, or upon any person acting in aid of such officer, of any neglect or breach of duty as a peace officer, of any assault committed in pursuance of any conspiracy to raise the rate of wages, of knowingly and designedly obtaining any property by false pretences, of wilful and indecent exposure of the person, of wilful and corrupt perjury, or of subornation of perjury; every such court is hereby authorized and empowered to order payment of the costs and expenses of the prosecutor and witnesses for the prosecution, together with a compensation for their trouble and loss of time, in the same manner as courts are hereinbefore authorized and empowered to order the same in cases of felony; and although no bill of indictment be preferred, it shall still be lawful for the court, where any person shall have *bona fide* attended the court, in obedience to any such recognizance, to order payment of the expenses of such person, together with a compensation for his or her trouble and loss of time, in the same manner as in cases of felony: provided, that in cases of misdemeanor the power of ordering the payment of expenses and compensation shall not extend to the attendance before the examining magistrate.' (1)

The 14 & 15 Vict. c. 55, s. 1, repeals the proviso in the preceding section, which provides that the payment of expenses and compensations shall not extend to the attendance before the examining magistrate.

Sec. 2. 'All the provisions of the 7 Geo. 4, c. 64, as amended by this Act, authorizing and empowering courts to order payment of costs and expenses, and compensation for trouble and loss of time, in cases of the several misdemeanors enumerated in sec. 23 of the said Act of King George the Fourth, and concerning orders for payment of such costs, expenses, and compensation, and the payment thereof, and all the provisions of any other Act for, concerning, or applicable to the payment of such costs, expenses, and compensation in cases of the said misdemeanors, shall extend and be applicable in the case of any of the misdemeanors hereinafter mentioned; namely, unlawfully and carnally knowing and abusing any girl being above the age of ten years and under the age of twelve years; unlawfully taking or causing to

(1) Sec. 24 provides that the order for the payment of the expenses shall be made out by the clerk of the assizes, &c., and paid by the county treasurer; and sect. 25 provides how the expenses shall be paid in places not contributing to the county rate. Sec. 26 empowered the Courts of Quarter Sessions to make regulations as to the rate of costs and expenses. But this section is repealed by the 14 & 15 Vict. c. 55, s. 4. The 7 Geo. 4, c. 64, s. 27, empowers the judge of the Court of Admiralty in felonies and misdemeanors of the denominations before mentioned, committed upon the high seas, 'to order the assistant to the counsel for the affairs of the admiralty and navy, to pay

such costs, expenses, and compensation to prosecutors and witnesses, in like manner as other courts may order the treasurer of the county to pay the same.' [See 7 & 8 Vict. c. 2, s. 1, *ante*, as to costs where offence committed within the jurisdiction of the Admiralty. See also 17 & 18 Vict. c. 104, ss 267, 518, *ante*.] The Municipal Corporation Act, 5 & 6 Will. 4, c. 76, s. 113, provides that all sums directed to be paid by virtue of the 7 Geo. 4, c. 64, in respect of felonies and misdemeanors committed, or supposed to have been committed, in any borough in which a separate Court of Quarter Sessions shall be holden, shall be paid out of the borough fund; and the order of the

be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her; (m) conspiring to charge any person with any felony, or to indict any person of any felony; conspiring to commit any felony.'

Sec. 3 is repealed by 37 & 38 Vict. c. 66, the Statute Law Revision Act, 1875.

Sec. 4 repealed the power of the Quarter Sessions to establish and alter regulations as to the rate of any costs and expenses in criminal cases.

Regulations as to costs, expenses, and compensations.—Sec. 5. 'It shall be lawful for one of Her Majesty's principal secretaries of state to revoke any regulations made under the provision hereinbefore repealed, and to make regulations as to the rates or scales of payment of all or any costs, expenses, and compensations to be allowed or ordered to be paid under the said Act or any other Act or this Act to prosecutors and witnesses, and to persons attending the court in obedience to any recognizance or subpoena, in cases of criminal prosecutions, and (except as hereinafter mentioned) to persons who may have been active in or towards the apprehension of persons charged with offences, and also regulations as to the rates or scales of payment according to which certificates may be granted by the examining magistrate or magistrates in respect of the expenses of any prosecutor, or witness or witnesses for the prosecution, or other person, of attending before such magistrate or magistrates, and of any compensation for trouble and loss of time therein, in any case where any court or judge is empowered under the said Act of the seventh year of King George the Fourth or any other Act or this Act to order payment of such expenses or compensation, and concerning the forms of such certificates and the details or particulars to be inserted therein of the expenses, trouble, and loss of time to which such certificates relate, and it shall be lawful for one of Her Majesty's principal secretaries of state from time to time to alter any such regulations or make new regulations in relation to any of the matters aforesaid, and such regulations for the time being shall be binding on all courts and persons whomsoever.'

Sec. 6. 'Where any court or judge empowered under the said Act of the seventh year of King George the Fourth, or under any other Act or this Act, in this behalf, shall order payment to any prosecutor, or witness or witnesses for the prosecution, or to any person attending the court in obedience to any recognizance or subpoena, in the case of any

court shall be directed to the treasurer of the borough. Sec. 114 provides for the treasurers of counties keeping accounts of the expenses of prosecutions of offenders sent from boroughs for trial at the assizes, and for the payment of them by the boroughs. As to the construction of this section, see *R. v. Johnson*, 10 A. & E. 740. See 15 & 16 Vict. c. 81, s. 38. The 2 & 3 Vict. c. 82, which provides for the trial of offenders in detached parts of counties, by sect. 2 provides for the treasurers of counties keeping an account of the expenses of prosecutions,

in detached parts of counties, and for the payment of the same by the county to which the detached parts belong. The 5 & 6 Vict. c. 98, ss. 18, 19, and 20, contains also provisions for the payment by boroughs of the expenses of the prosecution of borough prisoners confined in county gaols, and for the manner of paying the expenses of the conveyance and maintenance of such prisoners.

(m) The preceding cases are now provided for by the 24 & 25 Vict. c. 100, s. 77.

prosecution for felony or any misdemeanor or offence of any costs or expenses incurred, or of any compensation for trouble or loss of time, or order payment (except as hereinafter mentioned) to any person who may appear to have been active in or towards the apprehension of any person charged with any offence, of compensation for expenses, exertions, and loss of time in or towards such apprehension, the amount of such costs, expenses, or compensation shall be ascertained by the proper officer of the court according to the regulations made under this Act; and where the expenses and compensation in respect of attending before any examining magistrate or magistrates are so ordered to be paid, such expenses and compensation shall also be ascertained by the proper officer of the court according to such regulations, but the amount thereof as so ascertained shall not exceed the amount mentioned in the certificate of the examining magistrate or magistrates, and, save as aforesaid, the certificate of any examining magistrate or magistrates shall not be conclusive as to the amount to be allowed for expenses of attendance before him or them, or for compensation for trouble or loss of time therein.'

The Larceny Act, 24 & 25 Vict. c. 96, s. 121, the Malicious Injuries Act, 24 & 25 Vict. c. 97, s. 77, and the Forgery Act, 24 & 25 Vict. c. 98, s. 54, contain the like provisions as to costs in the case of misdemeanors, which are in the following terms:—

The court before which any indictable misdemeanor against this Act shall be prosecuted or tried, may allow the costs of the prosecution in the same manner as in cases of felony; and every order for the payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid, upon the same terms and in the same manner in all respects as in cases of felony.

The Coin Act, 24 & 25 Vict. c. 99, s. 42, provides for the costs of prosecutions in mint cases. See this enactment noticed *post*. The Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50) makes provision for the payment of costs in prosecutions for corrupt practices.

Guardians and overseers required to prosecute in certain cases.—By the Offences against the Person Act, 24 & 25 Vict. c. 100, s. 73, 'where any complaint shall be made of any offence against section twenty-six of this Act, (n) or of any bodily injury inflicted upon any person under the age of sixteen years, for which the party committing it is liable to be indicted, and the circumstances of which offence amount, in point of law, to a felony, or an attempt to commit a felony, or an assault with intent to commit a felony, and two justices of the peace before whom such complaint is heard shall certify under their hands that it is necessary for the purposes of public justice that the prosecution should be conducted by the guardians of the union or place, or, where there are no guardians, by the overseers of the poor of the place in which the offence shall be charged to have been committed, such guardians or overseers, as the case may be, upon personal service of such certificate or a duplicate thereof upon the clerk of such guardians or upon any one of such overseers, shall conduct the prosecution, and shall pay the costs reasonably and properly incurred by

(n) This clause relates to ill-treating apprentices and servants, and will be found *post*, vol. i.

them therein (so far as the same shall not be allowed to them under any order of any court) out of the common fund of the union, or out of the funds in the hands of the guardians or overseers, as the case may be; and, where there is a board of guardians, the clerk or some other officer of the union or place, and, where there is no board of guardians, one of the overseers of the poor may, if such justices think it necessary for the purposes of public justice, be bound over to prosecute.' (o)

Sec. 74. 'Where any person shall be convicted on any indictment of any assault, whether with or without battery and wounding, or either of them, such person may, if the court think fit, in addition to any sentence which the court may deem proper for the offence, be adjudged to pay to the prosecutor his actual and necessary costs and expenses of the prosecution, and such moderate allowance for the loss of time as the court shall by affidavit or other inquiry and examination ascertain to be reasonable; and unless the sum so awarded shall be sooner paid, the offender shall be imprisoned for any term the court shall award, not exceeding three months, in addition to the term of imprisonment (if any) to which the offender may be sentenced for the offence.' (p)

Sec. 75. 'The court may, by warrant under hand and seal, order such sum as shall be so awarded to be levied by distress and sale of the goods and chattels of the offender, and paid to the prosecutor, and that the surplus, if any, arising from such sale shall be paid to the owner; and in case such sum shall be so levied, the imprisonment awarded until payment of such sum shall thereupon cease.'

Sec. 77. 'The court before which any misdemeanor indictable under the provisions of this Act shall be prosecuted or tried may allow the costs of the prosecution in the same manner as in cases of felony; and every order for the payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid, upon the same terms and in the same manner in all respects as in cases of felony.' (q)

It may be as well to observe that the 14 & 15 Vict. c. 19, s. 14, is only in force in one case, as all the other clauses creating offences in that Act are repealed. By sec. 11 of that Act any person may apprehend any person committing any indictable offence by night, and by sec. 12, any person liable to be apprehended under that Act assaulting or offering violence to any person authorized to apprehend or detain him, or to any person acting in his aid and assistance, is guilty of a misdemeanor: and by sec. 14, 'in all prosecutions for any offence against the provisions of this Act, it shall be lawful for the court

(o) This clause is taken from the 14 & 15. Vict. c. 11, ss. 6, 7. See 7 & 8 Vict. c. 101, s. 59; 28 & 29 Vict. c. 79, s. 9.

(p) This and the following clauses are new in England; they are taken from the 10 Geo. 4, c. 34, ss. 33, 34 (I.).

(q) This clause is old, as far as relates to the costs of misdemeanors against the 14 & 15 Vict. c. 19, 14 & 15 Vict. c. 11, 12 & 13 Vict. c. 76. It is new as to any misdemeanor created by this Act. The words of the clause originally were, 'any indictable misdemeanor against this Act,' but in the committee of the Commons they were al-

tered to 'any misdemeanor indictable under the provisions of this Act,' in order merely to exclude common assaults, and nothing more; and it should seem that that is the only case where costs cannot be given; for wherever it is necessary to insert in an indictment the particular words of any clause in this Act in order to warrant the punishment given by that clause, the misdemeanor plainly is 'indictable under the provisions of this Act.' Thus, under sec. 47, the indictment must allege actual bodily harm, and therefore in that case the court may allow the costs. C. S. G. As to the person enti-

before which any such offence shall be prosecuted or tried to allow the expenses of the prosecution in all respects as in cases of felony.' (r)

By the 13 & 14 Vict. c. 101, s. 9, 'where any person shall be charged with and convicted of any assault upon any officer of a work-house or relieving officer in the due execution of his duty, or upon any person acting in aid of such officer, the court may sentence the offender to the same punishment as is provided by law for an assault upon a peace officer or revenue officer in the due execution of his duty, and shall have the same power as in case of such last-mentioned assault to order payment of the costs and expenses of the prosecution.' And by the 14 & 15 Vict. c. 105, s. 18, the preceding provision is extended 'to an assault upon any person included under the word "officer" in the 4 & 5 Will. 4, c. 75, or upon any other person acting in his aid.'

The 14 & 15 Vict. c. 100, s. 19, provides for the costs of the prosecution where a judge, &c., has ordered the indictment to be tried under that Act. See this enactment noticed, vol. iii., Perjury.

As to the costs of the prosecution of a bankrupt, see *post*, vol. ii.

As to the costs of prosecutions under the Merchant Shipping Acts, see *ante*.

As to costs of a prosecution under the Prevention of Cruelty to Children Act, see *post*.

As to costs under the Official Secrets Act, see *post*.

As to the costs of prosecutions under the Corrupt Practices Act, 1883 (46 & 47 Vict. c. 51), see s. 57.

As to costs of prosecutions under the Merchandise Marks Act, 1887, see 50 & 51 Vict. c. 28, s. 14, vol. ii.

Costs in prosecutions for indecent assault. — By the Criminal Law Amendment Act, 1885, 48 & 49 Vict. c. 69, s. 18. 'The court before which any misdemeanor indictable under this Act, or any case of indecent assault shall be prosecuted or tried, may allow the costs of the prosecution in the same manner as in cases of felony, and may in like manner on conviction, order payment of such costs by the person convicted, and every order for the allowance or payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid upon the same terms and in the same manner in all respects as in cases of felony.'

Central Criminal Court. — The Central Criminal Court Act, 4 & 5 Will. 4, c. 36, s. 12, enacts, that 'it shall be lawful for any two of the said justices and judges of oyer and terminer and of gaol delivery to order and direct the costs and expenses of prosecutors and witnesses, in all cases where prosecutors and witnesses may be by law entitled thereto, to be paid by the treasurer of the county, in which the offence of any person prosecuted would have been tried but for this Act; and that every such treasurer, or some known agent, shall attend the said justices and judges of oyer and terminer and gaol delivery during the sitting of the court, to pay all such orders.'

By the 19 & 20 Vict. c. 16 (which empowers the Court of Queen's

tled to conduct a prosecution and thus get (r) See sec. 11, *post*, vol. i. and sec. 12, costs, see *R. v. Yates*, 7 Cox, C. C. 361; *post*, vol. i.
R. v. Bushell, 16 Cox, C. C. 367.

Bench to order certain offenders to be tried at the Central Criminal Court), s. 13, 'whenever any indictment or inquisition shall have been transmitted or removed to the said Central Criminal Court under the provisions of this Act, it shall be lawful for the said Central Criminal Court to order such expenses of the prosecutor and witnesses, and such other expenses, and such of the several rewards payable in pursuance of any statute made or to be made, as to such Central Criminal Court shall seem reasonable and sufficient, to be paid by and to the same persons and in the same manner as if such Central Criminal Court were holden under commissions of oyer and terminer and gaol delivery for the county or place in which such indictment shall have been found or such inquisition shall have been taken.'

Sec. 25. 'Whenever any application shall be made on behalf of Her Majesty or of any prosecutor to the said Court of Queen's Bench, or to any judge thereof, for an order that any person charged with any offence shall be tried at the said Central Criminal Court under the provisions of this Act, it shall be lawful for the said Court of Queen's Bench in term time, or for the said judge in vacation, to issue a certificate, upon the production of which the commissioners of Her Majesty's treasury may order to be paid out of any monies provided by Parliament for law charges in England to the person so charged a sum not exceeding twenty pounds, to enable such person to defray the charges and expenses of the attendance of his witnesses: provided that the sum so advanced shall be allowed for in the sum which in the event of the acquittal of such person may become payable under the order hereinafter mentioned.'

Sec. 26. 'In case any person who shall be tried at the said Central Criminal Court under the provisions of this Act, upon an application on behalf of Her Majesty or of any prosecutor, shall be there acquitted, it shall be lawful for the justices and judges of the said Central Criminal Court before whom any such acquittal shall have taken place, or for any two or more of them, to order reimbursement to the person so acquitted of such sum as shall appear to them to have been properly expended for such removal of the trial of such person, and the commissioners of Her Majesty's treasury shall upon receipt of such order pay such sum or sums out of any monies provided by Parliament for law charges in England.' (s)

By the 46 & 47 Vict. c. 51, s. 50, indictments under the Corrupt Practices Prevention Acts may under certain circumstances be tried at the Central Criminal Court.

Costs of prosecutions in adjoining counties. — The 38 Geo. 3, c. 52, ss. 2, 3, provides for the trial in the next adjoining county of offences committed or charged to have been committed in certain cities and towns corporate; and by sec. 8, 'in all cases of indictments and other proceedings, which may be tried before His Majesty's justices of oyer and terminer or general gaol delivery for any county, in pursuance of the provisions contained in this Act, it shall and may be lawful for such justices to order the expenses of the prosecution, and of the wit-

(s) By sec. 24 the Court of Queen's Bench may impose terms on the prosecutor or person charged as to costs, &c. By sect. 27, the treasurer of the county where the offence was committed is to pay for the prisoner's maintenance in Newgate.

nesses, and of the several rewards payable in pursuance of the statutes in such cases made and provided on the conviction of offenders, to be paid by and to the same persons, and in the same manner, as the same would be payable if such indictment had been tried in the court of oyer and terminer or general gaol delivery of the county of such city or town corporate.' (t) The 51 Geo. 3, c. 100, s. 2, extends the preceding clause to the expenses of maintaining the prisoner and carrying his sentence into execution in the adjoining county. The 14 & 15 Vict. c. 55, s. 19, provides that in the counties of cities and towns named in the first column of Schedule (C.) to the 5 & 6 Will. 4, c. 76, prisoners may be committed and tried in the counties declared by sec. 24 to be the next adjoining counties, and which are those mentioned in the second column of the said schedule, and sec. 23 provides that all the provisions of the 51 Geo. 3, c. 100, applicable to convictions in pursuance of the provisions of the 38 Geo. 3, c. 52, 'and to the execution of the sentences passed upon any convicts on such convictions, and all the provisions of the said Acts respectively concerning the payment of expenses, shall be applicable in all cases of persons who may be tried in or removed for trial to any adjoining county in pursuance of the provisions of this Act, in like manner as in cases of persons tried in or removed for trial to any adjoining county in pursuance of the provisions of the said Act of the 38 Geo. 3.'

The 60 Geo. 3, and 1 Geo. 4, c. 14, s. 1, authorize justices of the peace to commit any person charged with any capital offence committed within any exclusive jurisdiction, not being a county, to the gaol of the county within which such exclusive jurisdiction is situated, to be tried at the next assizes for such county; and by sec. 3, 'in all cases of any commitment to the county gaol, under the authority of this Act, all the expenses to which the county may be put by reason of such commitment, together with all such expenses of the prosecution and witnesses as the judge shall be pleased to allow by virtue of any law now in force, shall be borne and paid by the said town, liberty, soke or place within which such offence shall have been committed, in like manner and to be raised by the same means whereby such expenses would have been raised and paid if the offender had been prosecuted and tried within the limits of such exclusive jurisdiction; and that the judge, or court of oyer and terminer and general gaol delivery, shall have full power and authority to make such order touching such costs and expenses as such judge or court shall deem proper; and also to direct by whom and in what manner such expenses shall in the first instance be paid and borne, and in what manner the same shall be repaid and raised within the limits of such exclusive jurisdiction, in case there be no treasurer or other officer within the same, who by the custom and usage of such place ought to pay the same in the first instance.'

By s. 169 of the Municipal Corporations Act, 1882, (u) a municipal corporation of a borough having a separate Court of Quarter Sessions, shall be liable to pay the costs of any felony or other offence committed or supposed to be committed within the borough and of which

(t) Sec. 9 makes Yorkshire the next adjoining county to Kingston-upon-Hull, and Northumberland to Newcastle-upon-Tyne.

Sec. 10 of this Act is repealed by the 5 & 6 Will. 4, c. 76, s. 109.

(u) 45 & 46 Vict. c. 50.

the costs of prosecution are payable by law. The order for payment is to be directed to the treasurer of the borough.

Cases in which the costs have been allowed. — The following cases relative to the allowance of costs under these statutory provisions may properly be introduced in this place.

A party bound over by the sessions to prosecute at a superior court is entitled to his expenses under the 7 Geo. 4, c. 64. The prosecutor was bound over by the Court of Quarter Sessions for Surrey, to prosecute for a burglary at the Central Criminal Court, and it was held that he was entitled to his expenses. (*v*)

Where the prosecutor and his witnesses had been bound by recognizance to prosecute and to give evidence at the assizes, but by a mistake the prisoner had been discharged by proclamation at the adjourned sessions, which preceded the assizes; and the prosecutor and his witnesses had appeared at the assizes and preferred an indictment, which had been found by the grand jury; Taunton, J., held, that as the bill had been preferred and found, he might, under the word 'prosecuted,' in sec. 22 of 7 Geo. 4, c. 64, order the expenses; but if the witnesses had merely appeared at the assizes according to their recognizances, and no bill had been preferred, he should have had no authority. (*w*)

Where a prosecutrix and witnesses were bound over to prosecute and give evidence against a prisoner for feloniously administering a destructive thing to the prosecutrix, but, by the advice of counsel, no indictment for felony was preferred, but only an indictment for a common-law misdemeanor, the costs of the attendance of the prosecutrix and witnesses were allowed under the 7 Geo. 4, c. 64, s. 23. (*x*)

Where a prisoner who was committed on a charge of felony during the assizes, did not reach the assize town until after the grand jury were discharged, Hullock, B., after reference to the statute, allowed the witnesses their expenses. (*y*)

Where an indictment for a riot was found at one assizes, and the trial took place at the subsequent assizes, but no person was bound over to prosecute at these assizes, but the witnesses were subpoenaed to appear at both the assizes; the Court of King's Bench were clearly of opinion that the judge had authority to order the costs of the witnesses to be paid; but it was doubted whether the judge had authority to grant the prosecutor his costs. (*z*) But where the prosecutor, in a case of perjury, was not bound over to prosecute by any magistrate, but he had included his own name in a subpoena, which he had caused to be issued, the court were of opinion that the words of the Act did not limit the allowance of the expenses of the prosecutor to those which he incurred as a witness, but that he was entitled to receive

(*v*) *R. v. Paine*, 7 C. & P. 135, Lord Denman, C. J., J. A. Park, J., and Bolland, B.

(*w*) *R. v. Robey*, 5 C. & P. 552.

(*x*) *R. v. Hanson*, 2 C. & K. 912, Williams, J. The charges in the indictment were of misdemeanors, for which no costs could have been allowed.

(*y*) Anonymous, 1 Lew. 128.

(*z*) *R. v. Jeyes*, 3 A. & E. 416. It was

contended that the words must be read *reddendo singula singulis*; and the statute (7 Geo. 4, c. 64) therefore applied where the prosecutor appeared on recognizance or the witness on subpoena. Littledale, J., said, 'There is much doubt in my mind as to the expenses of the prosecutor. At present I think that he is not entitled to them; it seems likely that the legislature meant to give the expenses to the prosecutor only

them in his character of prosecutor; and they made an order accordingly. (a)

Where the prisoner had been apprehended by a Bench warrant, and the prosecutor was under no recognizance to prosecute, and none of the witnesses were under recognizances, but one of them had been subpoenaed; on a motion for the costs of the prosecution, Parke, B., at first, thought that he could only grant the costs of the witness who had been subpoenaed, but said he would consider the point; and on the following day his lordship said that on comparing the words of the 7 Geo. 4, c. 64, s. 22 (relating to felonies) with those of the subsequent section (relating to misdemeanors), it appeared to him that the Court had authority, in prosecutions for the former class of offences, to award the prosecutor his costs, even though he was not under any recognizance; and he accordingly granted the costs of the prosecution generally, including the witnesses. (b)

A prosecution upon the 8 & 9 Vict. c. 109, s. 17, (c) for winning money by unlawful devices, is one in which the costs can be ordered under the words, 'knowingly and designedly obtaining any property by false pretences,' in the 7 Geo. 4, c. 64, s. 23. (d)

Where in a case of manslaughter the father of the deceased gave a retainer to an attorney to prosecute, and he prepared briefs and delivered them to counsel, and obtained and paid for copies of the depositions before the coroner; but the magistrates, who committed the prisoner for trial, bound over a constable of the county police to prosecute, and as was usual in such cases, and in pursuance of general orders given to the attorney of the police force by the constabulary committee for the county, he prepared a brief, which he delivered to another counsel; it was held under the 7 Geo. 4, c. 64, s. 22, that the person who was bound over to prosecute was really the prosecutor, and that he must be allowed the expenses of the prosecution, but that the attorney retained by the father could not be allowed any costs. (e)

An engine-driver on a railway had been committed by the coroner for manslaughter, and the grand jury ignored the bill, and no evidence was offered on the coroner's inquisition with the sanction of the judge, and an attorney, acting on the instructions of the relations of the deceased, had carried on the prosecution. Everything had been done which was necessary, and the secretary of state had expressed his opinion that it should be a government prosecution. But the superintendent of police had been bound over to prosecute, and this had been reported to the deputy clerk of the peace, who was authorized to prosecute at the expense of the county, but had declined to do so because the costs allowed by the treasury were insufficient. It was held that, as no authority was given by the superintendent of police to the attorney to prosecute, he could not be allowed the costs. (f)

where he goes before a magistrate, who binds him over. A magistrate on hearing the complaint frequently dismisses it; if the prosecutor then goes to the grand jury, I think he ought not to be paid by the treasurer.'

(a) *R. v. Sheering*, 7 C. & P. 440, *cor.* J. A. Park, J., and Coleridge, J.

(b) *R. v. Butterwick*, 2 M. & Rob. 196.

(c) *Post*, vol. i.

(d) *R. v. Gardner*, 5 Cox, C. C. 140. Talfourd, J., after consulting Patteson, J.

(e) *R. v. Yates*, 7 Cox, C. C. 361, Martin, B., and Bramwell, B.

(f) *R. v. Cook*, 1 F. & F. 389, Bramwell, B.

An indictment charging that the defendant assaulted J. S., and unlawfully and indecently (not saying publicly) exposed his person to J. S., with intent to incite J. S. to commit an unnatural offence with the defendant, is not an offence within the 7 Geo. 4, c. 64, s. 23, and therefore the court cannot allow the prosecutor his expenses under that clause. (*g*)

Neither the committing magistrate nor the judge at the trial has power to order the costs of apprehending a prisoner on a charge of felony in Scotland (*h*) or in America; (*i*) nor has the court any authority to order payment of the expenses of taking a prisoner who is in custody in Millbank penitentiary to an assize town under a *habeas corpus*, in order that he may be tried for felony. (*j*)

Where an indictment for riot was found at the Quarter Sessions, and removed by the prosecutor into the Court of King's Bench by *certiorari*, and the record sent down for trial at Nisi Prius, made a *remanet*, and again entered at the following assizes, when the defendants were convicted. No recognizance had been returned to the Crown Office, and the prosecutor was not bound by recognizance to prosecute in the Court of King's Bench. The witnesses were subpoenaed, but their expenses were not prayed by them, but by the prosecutor, as having been defrayed by him; the prosecutor also had caused himself to be subpoenaed. The consideration of the judges was desired whether, in such case of an indictment for a misdemeanor, removed by the prosecutor himself from the Quarter Sessions into the King's Bench, an order of Nisi Prius might legally be made for any and what costs, or whether the application must not be elsewhere; and the judges determined that no costs were allowable under the statute. (*k*)

Where six indictments for felony were removed by the prisoner, one of which only was tried, and at the trial the judge doubted whether he had any power to give the prosecutor his costs, the Court of King's Bench refused to order the treasurer of the county of the city of Exeter to pay the prosecutor the expenses of the prosecution; as, if the costs of the prosecution could be granted at all, they ought to be granted by the judge who tried the prisoner. (*l*)

Where, in pursuance of a recognizance, the prosecutor at the Quarter Sessions preferred an indictment for riot, and he afterwards removed it

(*g*) R. v. —, 8 A. & E. 589.

(*h*) R. v. Seaton, 6 Cox, C. C. 78, note, Cresswell, J.

(*i*) R. v. Barrett, 6 Cox, C. C. 78. Williams, J., suggested that the proper course was to memorialize the secretary of state, and then probably the judge would be referred to, and would report whether it was a fit case for the allowance.

(*j*) R. v. Waters, 8 Cox, C. C. 350. Channell, B., after consulting Keating, J.

(*k*) R. v. Johnson, R. & M. C. C. R. 173. The same point was decided by the judges in R. v. Oates, mentioned in R. & M. C. C. R. 175. In R. v. Ellis, convicted at Nisi Prius, at Exeter, in 1826, for a felony committed before the 7 Geo. 4, c. 64, was in operation, and whilst the 58 Geo. 3, c. 70, was in force, the Court of King's Bench

made a rule absolute, ordering the city and county of Exeter to pay the expenses. The 7 Geo. 4, c. 64, was in force at the time of the trial. R. & M. C. C. R. 175. See R. v. The Treasurer of the County of the City of Exeter, *infra*, where the court seem to have been of opinion that the costs had been improperly allowed in this instance, and to have overruled this case.

(*l*) R. v. The Treasurer of Exeter, 5 M. & Ry. 167. Littledale, J., added, 'even the judge has no power where the case has been removed by *certiorari*. There is no difference in substance between an indictment removed by the prisoner and an indictment removed by the prosecutor.' 'The Act only applies to indictments tried before the courts in which they were found.'

into the Court of King's Bench, it was held that the prosecutor was not entitled to his costs; and Lord Tenterden, C. J., said, that the matter had been considered by the twelve judges, who were all of opinion that the Act (7 Geo. 4, c. 64) did not apply to cases where the indictment had been removed into the Court of King's Bench by *certiorari*. (*m*)

But where an indictment was found at the Middlesex Quarter Sessions, and removed by the defendant by *certiorari* into the Queen's Bench, and tried at the sittings after term, when Lord Denman, C. J., made an order for the payment to the prosecutor or his attorney of the expenses of the prosecution and the witnesses, and that order was afterwards made a rule of court; upon showing cause against a rule to show cause why that rule should not be discharged, it was contended that the words of the statute applied to any court, and that the reason of the decision in *R. v. Jeyes* (*n*) was, that the statute was passed to indemnify persons unable to bear the expense, and that inability was not likely to exist where the party voluntarily removed the indictment to the superior court, and that the view taken by Littledale, J., in *R. v. The Treasurer of Exeter*, (*o*) was incorrect. In support of the rule it was contended that the statute ceased to apply after a removal by *certiorari*, and that there was no distinction as to the party removing the indictment; the court, however, did not express any opinion upon this point. (*p*)

By 16 & 17 Vict. c. 30, s. 5, whenever a writ of *certiorari* to remove an indictment is awarded at the instance of the prosecutor, the prosecutor shall enter into recognizance, with the condition 'that the prosecutor shall pay to the defendant or defendants, in case he or they shall be acquitted, his or their costs incurred subsequent to such removal.' (*q*) The defendant was convicted on some of the counts of an indictment which had been removed by *certiorari*, and acquitted on others. It was held that she had not been acquitted upon the indictment within the meaning of the section. (*r*)

Costs of attending a coroner's inquest. — Under the 7 Geo. 4, c. 64, s. 22, the court, upon a trial for murder or manslaughter, has no power to allow the costs of the attendance of witnesses at the inquest held upon the body of the deceased, (*s*) or of a surgeon for examining the body by order of the coroner. (*t*)

(*m*) *R. v. Richards*, 8 B. & C. 420. It is not stated that the prosecutor or the witnesses attended the trial under subpoena or recognizance.

(*n*) *Ante*, p. 98.

(*o*) *Supra*.

(*p*) *R. v. —* 8 A. & E. 589.

(*q*) Similar provisions are contained in Rule 30 of Crown Office Rules, 1886.

(*r*) *R. v. Bayard* (1892), 2 Q. B. 181.

(*s*) *R. v. Rees*, 5 C. & P. 302.

(*t*) *R. v. Taylor*, 5 C. & P. 301. The 6 & 7 Will. 4, c. 89, however, after by sec. 1 providing that the coroner may summon medical witnesses, and by sec. 2, that a majority of the jury may require the coroner to summon additional medical witnesses, if the first are not satisfactory, enacted by sec. 3 that legally qualified practitioners attend-

ing in obedience to such summons should receive such remuneration and fees as were specified in the schedule to that Act, which were, in Great Britain, to be paid out of the funds collected for the relief of the poor; but by sec. 4, no fee is to be paid if the examination takes place without the order of the coroner, or by sec. 5, where the death was in any hospital, infirmary, &c. By the 1 Vict. c. 68, s. 1, the justices of the peace at Quarter Sessions, and the town council of any borough having a coroner, are to make a schedule of the fees to be paid by the coroner holding an inquest (other than the fees payable to medical witnesses under the 6 & 7 Will. 4, c. 89). Sec. 2 repeals so much of the 6 & 7 Will. 4, c. 89, as relates to the payment of the fees to medical witnesses out of the funds raised for the relief of the poor,

Where the grand jury ignored a bill of indictment for concealing the birth of a child, and the coroner's clerk, who was also under-clerk to the magistrates, was bound over to prosecute; Maule, J., refused to allow the costs. (*u*)

Extra expenses. — Where a witness was brought to bed during her attendance under a recognizance at the assizes; Parke, J., allowed her the difference between the expenses which would have been incurred had she been at home and those actually incurred at the assize town; (*v*) and so where a witness who had come to the assizes at York, under a recognizance to give evidence in a case of forgery, became insane, and it was thought necessary to convey him to the lunatic asylum at Wakefield; Patteson, J., upon the authority of the preceding case, ordered a similar allowance as to the expenses of medical attendance during the time the witness remained at York after he was attacked, and also for the expenses of conveying him to the asylum at Wakefield. (*w*)

Where in a case of bigamy the prisoner's first wife had been brought from a distance in order to be identified, if necessary, by a witness, who was willing to take her back, but could not well afford to do so, and she was in very poor circumstances, but it did not become necessary to identify her; Rolfe, B., allowed the witness all the reasonable expense of bringing the wife and returning her home, in the same manner as a party who had brought a register or book would be allowed all the reasonable cost of producing it in court and restoring it to its former place of custody. (*x*)

Where in a case of murder it appeared that the offence was committed in a small township, the inhabitants of which were a small community, and extremely poor, and had shown great zeal and activity in getting up the case, and had been put to considerable expense in so doing, which they were but ill able to afford; the court was applied to that certain expenses might be allowed over and above those usually allowed by the officer of the court, and it was submitted that the words 'in otherwise carrying on the prosecution' were sufficiently large to include the expenses applied for; Lord Denman, C. J., after time taken to consider, granted the application, and the clerk of assize made out the order for all the expenses incurred, except the attendance of the witnesses before the coroner. (*y*)

Cost of cases reserved. — Upon the trial of a felony a case was reserved for the opinion of the judges, and at the following assizes,

and provides that the coroner shall pay them; and by sec. 3, the coroners of counties are to lay their accounts before the Quarter Sessions, and the coroners of boroughs to lay them before the town council, and the coroner is to be repaid in the former case out of the county rates, and in the latter out of the borough fund. It may be proper to observe that it is the bounden duty of a coroner, wherever the death has arisen under such circumstances as lead to the conclusion that the party has died from the criminal acts of another, to cause a *post mortem* examination of the body to be made by some medical practitioner. In *R. v. Webb*, Hereford Spr. Ass. 1843, on an indictment for

murder by violence inflicted upon the head, no *post mortem* examination had taken place, and Wightman, J., commented in strong terms on the great impropriety of neglecting such a course, and observed that it was clearly the duty of a coroner to order such an examination to take place.

(*u*) *R. v. Hodgson*, 1 Cox, C. C. 43. No ground is stated for the refusal.

(*v*) Anonymous, cited, 1 Lew. 133.

(*w*) *In re Mallison*, 1 Lew. 132.

(*x*) *R. v. Thomas*, 1 Cox, C. C. 44.

(*y*) *Lewen's case*, 2 Lew. 161. The depositions taken before the coroner were allowed for.

Williams, J., who had reserved the case, after reading the 7 Geo. 4, c. 64, s. 22, allowed the costs of the argument before the judges as expenses in 'otherwise carrying on the prosecution.' (z) So where a prisoner had been convicted of obtaining money by false pretences, and a point was reserved, which was decided against the prisoner, and the costs of the prosecution had been ordered on the conviction of the prisoner; Williams, J., after passing sentence on the prisoner at the assizes after the conviction was affirmed, allowed the costs of the case reserved. (a) But it has since been held that the court which reserves the case may at the time allow the costs to be incurred in the court above as well as the other costs of the prosecution. And, although the court above has no power to make an order for the costs, it would be convenient for the officer of that court to examine into the costs incurred in that court; and, although his certificate could not in law bind the taxing officer below, those officers would no doubt consider it as binding upon them. (b)

Costs where the trial has been postponed. — In one case it was said that when a trial for felony is postponed, the practice is not to allow the prosecutor his expenses till the assize at which the trial comes on, and the expenses were in that case refused at the assizes at which the trial was postponed. (c) So where a defendant did not appear in pursuance of his recognizances, and the prosecutor's recognizances were enlarged until the defendant could be apprehended; Patteson, J., declined to make any order for costs until the case was finally disposed of. (d) But where the coroner had bound over the prosecutor and witnesses to appear at the assizes to give evidence in a case of manslaughter, but the prisoner, who had neither been apprehended nor was under recognizance, did not appear at the assizes; Alderson, B., after ordering him to be called, and directing the trial to be put off till the next assizes, allowed the expenses of the prosecutor and witnesses. (e) So in a case of murder, which was postponed until the following assizes, on the application of the prisoner, and in which the costs of the prosecution were very heavy; Alderson, B., made an order for their payment. (f) So where a prisoner charged with murder had been removed to a lunatic asylum under the 3 & 4 Vict. c. 54, and a bill was found against him for the murder; Pollock, C. B., directed the trial to be postponed to the next assizes, and the recognizances of the witnesses to be respited until then, and thought that the costs of the witnesses should not be allowed until it should be

(z) *R. v. Cluderoy*, 3 C. & K. 205, A.D. 1849. See 1 Den. C. C. 514, for the case before the judges.

(a) *R. v. Woolley*, 4 Cox, C. C. 452. Lord Campbell, C. J., probably was consulted on this point.

(b) *R. v. Lewis*, D. & B. 326; and though the court spoke of drawing up a rule, it has not been done, and no doubt the practice will be in future according to this opinion of the court. In *R. v. Dolan*, Dears. C. C. 436, and *R. v. Hornsea*, Dears. C. C. 291, the court above held that they had no jurisdiction over the costs.

(c) *R. v. Hunter*, 3 C. & P. 591, J. A. Park, J.

(d) *R. v. Young*, 2 Cox, C. C. 280. The bill in this case was found at the Summer Assizes, 1846, and the defendant's bail obtained an enlargement of his recognizances on the ground of his ill-health. At the Spring Assizes, 1847, his recognizances were estreated, and the application for costs was at the Summer Assizes, 1847, when every endeavour had been made in vain to procure his apprehension.

(e) *Flannery's case*, 1 Lew. 133, and in a similar case *Gurney, B.*, allowed the costs, *ibid.* note.

(f) *Bolam's case*, Rosc. Cr. Ev. 220.

seen whether the prisoner could then be brought up. (*g*) But at the next assizes, on an affidavit that the prisoner was in a hopeless condition of insanity and never likely to be better; Patteson, J., allowed the costs, and bound the witnesses to appear when called upon. (*h*)

Costs ordered out of the funds of a borough. — Hayward and others were convicted upon an indictment for forging a will, at the Shrewsbury assizes. The offence was laid as having been committed at the parish of W. in the county of Salop. An order was made 'by the court' and signed by the clerk of assize, requiring the treasurer of the stock of the borough of Oswestry, in the county of Salop, to pay the prosecutor and his witnesses the costs. The borough of Oswestry does not contribute to the county rate, but raises a rate of the same nature within itself, which is applicable to the costs of prosecutions for offences committed within the borough. The body of the will appeared to have been written, and the supposed mark of the testatrix and signature of the first witness affixed, in the borough of Oswestry. The second signature was added at Wrexham in Denbighshire. Hayward was apprehended at L. in Shropshire, where he had had the will, but, before his apprehension, he had brought the will to Oswestry, and sent it to St. Asaph for probate. The prosecutor and witnesses were bound over by magistrates of Shropshire to give evidence of an offence stated by the recognizances and commitment to have been there committed. The treasurer having refused to obey the order, the Court of Queen's Bench held that the order was conclusive, and granted a mandamus to enforce it; and, assuming that the validity of the order could be inquired into, Lord Denman, C. J., and Patteson, J., held that it was rightly made. The offence appeared to have been committed partly in Shropshire and partly in Denbighshire; and, therefore, the case was rightly tried in Shropshire under the 7 Geo. 4, c. 64, s. 12. And no act appeared to have been done in any part of Shropshire but Oswestry; then as between the county and Oswestry, for the purpose of this order, the offence was one committed in Oswestry. (*i*)

Compensation. — The 7 Geo. 4, c. 64, s. 28, 'for the better remuneration of persons who have been active in the apprehension of certain offenders,' enacts, that 'where any person shall appear to any court of oyer and terminer, gaol delivery, superior criminal court of a county palatine, or court of great sessions, to have been active in or towards the apprehension of any person charged with murder, or with feloniously and maliciously shooting at, or attempting to discharge any kind of loaded firearms at any other person, or with stabbing, cutting, or poisoning, or with administering anything to procure the miscarriage of any woman, or with rape, or with burglary or felonious housebreaking, or with robbery on the person, or with arson, or with horse-stealing, bullock-stealing, or sheep-stealing, or with being accessory before the fact to any of the offences aforesaid, or with receiving any stolen property, knowing the same to have been stolen; every such court is hereby authorized and empowered in any of the cases aforesaid to order the sheriff of the county in which the offence shall have been committed to

(*g*) *R. v. Derryhouse*, 2 Cox, C. C. 291.

(*h*) *Ibid.* p. 446.

(*i*) *R. v. Oswestry*, 12 Q. B. 239. At all events there seems to have been an uttering

in Oswestry. See the case as *R. v. Hayward*, 2 C. & K. 234, and as *R. v. Jones*, 1 Den. C. C. 166.

pay to the person or persons who shall appear to the court to have been active in or towards the apprehension of any person charged with any of the said offences, such sum or sums of money as to the court shall seem reasonable and sufficient to compensate such person or persons for his, her, or their expenses, exertions, and loss of time in or towards such apprehension; and where any person shall appear to any court of sessions of the peace to have been active in or towards the apprehension of any party charged with receiving stolen property, knowing the same to have been stolen, such court shall have power to order compensation to such person in the same manner as the other courts hereinbefore mentioned: provided always, that nothing herein contained shall prevent any of the said courts from also allowing to any such persons, if prosecutors or witnesses, such costs, expenses, and compensation as courts are by this Act empowered to allow to prosecutors and witnesses respectively.' (j)

Sec. 30. 'If any man shall happen to be killed in endeavouring to apprehend any person who shall be charged with any of the offences hereinbefore last mentioned, it shall be lawful for the court before whom such person shall be tried to order the sheriff of the county to pay to the widow of the man so killed, in case he shall have been married, or to his child or children, in case his wife shall be dead, or to his father or mother, in case he shall have left neither wife nor child, such sum of money as to the court in its discretion shall seem meet; and the order for payment of such money shall be made out and delivered by the proper officer of the court unto the party entitled to receive the same, or unto some one on his or her behalf, to be named in such order by the direction of the court; and every such order shall be paid by and repaid to the sheriff in the manner hereinbefore mentioned.'

By the 14 & 15 Vict. c. 55, s. 7, 'nothing in this Act or in any regulations under this Act shall interfere with, or affect the power of any court to order payment to any person who may appear to such court to have shown extraordinary courage, diligence, or exertion in or towards any such apprehension as hereinbefore mentioned of such sum as such court shall think reasonable and adjudge to be paid in respect of such extraordinary courage, diligence, or exertion.'

Sec. 8. 'When any person appears to any court of sessions of the peace to have been active in or towards the apprehension of any party charged with any of the offences in the said enactment mentioned which such sessions may have power to try, such court of sessions shall have power to order compensation to be paid to such person in the same manner as the other courts in the said enactment mentioned: provided that such compensation to any one person shall not exceed the sum of five pounds, and that every order for payment to any person of such compensation be made out and delivered by the proper officer of the court unto such person without fee or payment for the same.'

The 7 Geo. 4, c. 64, s. 28, does not authorize the court to award compensation to persons who have been active in and towards the

(j) Sect. 29 provides that such orders shall be paid by the sheriff, who may obtain immediate re-payment on application to the treasury.

apprehension of a person guilty of sacrilege. (*k*) And upon the authority of this case, Bolland, B., refused to allow compensation in a similar case; though, in the absence of such authority, both he and Parke, J., would have been disposed to put a different construction upon the statute. (*l*) But it has been held that a person who has been active in the apprehension of a prisoner charged with stealing a cow is entitled to a reward under this section, as the words bullock-stealing, horse-stealing, and sheep-stealing are intended to describe the kind or class of offences in connection with which rewards were to be allowed. (*m*) Where the prosecutrix's brother-in-law, who lived in her house, was attacked and wounded in bed by some burglars, but he made a gallant resistance and got outside the door of his room and shut it, keeping the burglars inside, and shouting aloud for assistance, and some neighbours came and secured the prisoners, who were still in the room; Talfourd, J., held that, giving a liberal construction to the 7 Geo. 4, c. 64, s. 28, the case was within it, and ordered a reward accordingly. (*n*) And where a prisoner was indicted for an attempt to murder her child by suffocating it, and an application was made to allow the extra expenses incurred by the constable in apprehending the prisoner, and for his loss of time, and the attention of the court was directed to the case not being one within the words of sec. 28; Patteson, J., was of opinion that it was within the spirit and intention of the Act, though not within the words, and therefore allowed the expenses. (*o*) But stealing from the person is not included within the words, 'robbery from the person.' (*p*) And where on a trial for robbery it appeared that the prosecutor had displayed great courage in apprehending the prisoner; Parke, B., ordered him to be paid a reward, under the word 'exertions.' (*q*)

The rewards which may be given under this section are not confined to cases where the party has been put to expense or loss of time, but have been ordered to be paid to persons who have displayed great courage in the apprehension of offenders, although they have neither been put to expense nor loss of time. Thus they have been granted where the person has apprehended the prisoner in the actual commission of a burglary; (*r*) and also where the party came downstairs when a burglary was committed, but did not apprehend the prisoners, who were three in number, but was able to give such a description of them as caused their apprehension. (*s*)

Where it does not appear upon the evidence given on the trial that the party has been active in the apprehension, an affidavit is necessary to be laid before the judge, in order to induce him to grant a reward. (*t*) Thus where in a case of horse-stealing a constable had

(*k*) Robinson's case, 1 Lew. 129, Hullock, B., who said that 'The word "sacrilege," if used alone in a statute, would not be construed to come within the words "burglary," or "housebreaking;" and that wherever, in a penal statute, churches are intended to be included, the word "sacrilege" is introduced.'

(*l*) Anonymous, 1 Lew. 130.

(*m*) R. v. Gilbrass, 7 C. & P. 444, Law Recorder.

(*n*) R. v. Dunning, 5 Cox, C. C. 142.

(*o*) Durkin's case, 2 Lew. 163.

(*p*) R. v. Thompson, 1 Cox, C. C. 43. Maule, J., Rosc. C. E. 225.

(*q*) Womersley's case, 2 Lew. 162.

(*r*) R. v. Barnes, 7 C. & P. 166, Coleridge, J.

(*s*) R. v. Blake, 7 C. & P. 166, Williams, J. And rewards were ordered in a similar way at the Bristol Special Commission. See 7 C. & P. 167.

(*t*) R. v. Jones, 7 C. & P. 167, J. A. Park, J.

used great exertions in apprehending the prisoner, and establishing the case against him, and had gone various journeys and been at considerable expense; Lord Campbell, C. J., held that the application must be founded on an affidavit of the party, stating the amount of money actually expended, &c. (*u*)

Serving order for costs.—The entire order of a court to pay the costs of a prosecution made under the 7 Geo. 4, c. 64, s. 26, must be served on the county treasurer, and if the part served only contain a portion of the order, the treasurer is not bound to obey it. (*v*)

Costs of witnesses for defence.—By 30 & 31 Vict. c. 35, s. 5, the court before which any accused person shall be prosecuted or tried, or for trial before which he may be committed or bailed to appear for any felony or misdemeanor, is hereby authorized and empowered, in its discretion, at the request of any person who shall appear before such court or recognizance to give evidence on behalf of the person accused, to order payment unto such witness so appearing such sum of money as to the court shall seem reasonable and sufficient to compensate such witness for the expenses, trouble, and loss of time he shall have incurred or sustained in attending before the examining magistrate, and at or before such court, and the amount of such expenses of attending before the examining magistrate, and compensation for trouble and loss of time therein, shall be ascertained by the certificate of such magistrate, granted before the attendance in court; and the amount of all other expenses and compensation shall be ascertained by the proper officer of the court, who shall, upon receipt of the sum of sixpence for each witness, make out and deliver to the person entitled thereto an order for such expenses and compensation, together with the said fee of sixpence, upon such and the same treasurers and officers as would now by law be liable to payment of an order for the expenses of the prosecutor or witnesses against such accused person; and if the accusation be of such kind that the court shall have no power to order the expenses of the prosecutor, then upon the treasurer or other officer in the capacity of a treasurer of the county, riding, division, city, borough, or place where the offence of such accused person may be alleged to have been committed, which treasurer or other officer is hereby required to pay the same orders upon sight thereof, and shall be allowed the same in his accounts. Provided always, that in no case shall any such allowances or compensation exceed the amount now by law permitted to be made to prosecutors and witnesses for the prosecution; and provided always, that such allowances and compensation shall be allowed and paid as part of the expenses of the prosecution. (*w*)

By 32 & 33 Vict. c. 89, s. 9, this part (*x*) of this Act shall be construed as one with the above Act of 30 & 31 Vict. c. 35, which may be cited as the Criminal Law Amendment Act, 1867.

Sec. 10. Where the officer of the court who, in pursuance of section five of the Criminal Law Amendment Act, 1867, makes out

(*u*) *R. v. Haines*, 5 Cox C. C. 114.

(*v*) *R. v. Jones*, 2 M. C. C. R. 171.

(*w*) As to the costs to be paid by the Director of Public Prosecutions, see 42 & 43

Vict. c. 22, s. 7, and *Stubs v. Director of Public Prosecutions*, 24 Q. B. D. 577.

(*x*) S. 9 to s. 11.

an order for the payment of expenses and compensation to witnesses is paid by salary, or is for the time being allowed under the table of fees relating to his office to take one fee only of fixed amount in respect of his several duties relating to the prosecution of an offender, such officer shall make out and deliver such order without taking any fee for the same, and the said section shall be construed as if all mention of the sum or fee of sixpence were omitted therefrom.

Sec. 11. Where the fee of sixpence is, in pursuance of section five of the Criminal Law Amendment Act, 1867, as amended by this Act, taken by a clerk of the peace or other officer, the amount of such fees received by him during any year after the passing of this Act shall be included in the total amount of fees in criminal prosecutions received by him, which is to be ascertained under 18 & 19 Vict. c. 126, s. 18, and shall be included in every return or account of fees made or rendered by such clerk of the peace or other officer.

As to the power of the court to condemn a person convicted of treason or felony to the payment of costs, see 33 & 34 Vict. c. 23, s. 3, *post*, 109.

As to a person acquitted being ordered to be paid his costs by the prosecutor under the Vexatious Indictment Acts, see 30 & 31 Vict. c. 35, noticed *ante*.

Costs on indictment for libel. — As to a prosecutor or defendant being entitled to recover costs from the other of them in the case of an indictment by a private prosecutor for a libel, see *post*, 'Libel.'

Where indictment removed by 'certiorari.' — The enactment 5 W. & M. c. 11, s. 3, relating to costs on a removal by *certiorari*, is partially considered *post*, 'Nuisances to Highways.'

Forfeiture for Felony, &c.

The 33 & 34 Vict. c. 23, recites that it is expedient to abolish the forfeiture of lands and goods for treason and felony, and to otherwise amend the law relating thereto. By sec. 1, from and after the passing of this Act, no confession, verdict, inquest, conviction, or judgment of, or for any treason or felony, or *felo de se*, shall cause any attainder or corruption of blood, or any forfeiture, or escheat, provided that nothing in this Act shall affect the law of forfeiture consequent upon outlawry.

Sec. 2 provided nevertheless, that if any person hereafter convicted of treason or felony, for which he shall be sentenced to death, or penal servitude, or any term of imprisonment, with hard labour, or exceeding twelve months, shall at the time of such conviction, hold any military or naval office, or any civil office under the crown, or other public employment, or any ecclesiastical benefice, or any place, office, or emolument in any university, college, or other corporation, or be entitled to any pension, or superannuation allowance, payable by the public, or out of any public fund, such office, benefice, employment, or place, shall forthwith become vacant, and such pension or superannuation allowance or emolument shall forthwith determine and cease to be payable, unless such person shall receive a free pardon from Her

Majesty within two months after such conviction, or before the filling up of such office, benefice, employment, or place, if given at a later period; and such person shall become, and (until he shall have suffered the punishment to which he had been sentenced, or such other punishment as by competent authority may be substituted for the same, or shall receive a free pardon from Her Majesty) shall continue thenceforth incapable of holding any military or naval office, or any civil office under the crown, or other public employment, or any ecclesiastical benefice, or of being elected, or sitting, or voting as a member of either House of Parliament, or of exercising any right of suffrage or other parliamentary or municipal franchise whatever within England, Wales, or Ireland.

Sec. 3. It shall be lawful for any court by which judgment shall be pronounced or recorded upon the conviction of any person for treason or felony, in addition to such sentence as may otherwise by law be passed, to condemn such person to the payment of the whole, or any part, of the costs or expenses incurred in and about the prosecution and conviction for the offence of which he shall be convicted, if to such court it shall seem fit so to do; and the payment of such costs and expenses, or any part thereof, may be ordered by the court to be made out of any moneys taken from such person on his apprehension, or may be enforced at the instance of any person liable to pay, or who may have paid the same, in such and the same manner (subject to the provisions of this Act) as the payment of any costs ordered to be paid by the judgment or order of any court of competent jurisdiction in any civil action or proceeding may for the time being be enforced. Provided, that in the mean time, and until the recovery of such costs and expenses from the person so convicted as aforesaid, or from his estate, the same shall be paid and provided for in the same manner as if this Act had not passed; and any money which may be recovered in respect thereof from the person so convicted, or from his estate, shall be applicable to the reimbursement of any person or fund by whom, or out of which, such costs and expenses may have been paid or defrayed.

After the conviction of a prisoner for felony, the Central Criminal Court made an order, under sec. 3 of 33 & 34 Vict. c. 23, for the payment of the costs of the prosecution out of the moneys found on the prisoner at the time of his apprehension. The validity of this order being questioned by the trustee in bankruptcy of the prisoner's estate, on the ground that the prisoner had been adjudicated a bankrupt between the dates of his apprehension and conviction, and that on such adjudication all his property vested in the trustee: Held, that the order was rightly made, the trustee, on adjudication of bankruptcy, taking the property of the bankrupt prisoner, subject to the possibility of the Criminal Court making the order in question. *Quære*, whether such an order would be valid if the prisoner were adjudicated bankrupt in respect of an act of bankruptcy committed before his apprehension. (y)

(y) *R. v. Roberts*, 12 Cox, C. O. 574, 43 L. J. M. C. 17, *et per* Blackburn, J.; 'I wish to guard against being supposed to say that simply because money is found on the person of a prisoner at the time of his apprehension, the Criminal Court may make an order for the payment of the costs of the prosecution out of it. I am inclined to think that if moneys belonging to some one else are found in his possession, *e. g.*, if the per-

hension, the Criminal Court may make an order for the payment of the costs of the prosecution out of it. I am inclined to think that if moneys belonging to some one else are found in his possession, *e. g.*, if the per-

Sec. 4. It shall be lawful for any such court as aforesaid, if it shall think fit upon the application of any person aggrieved, and immediately after the conviction of any person for felony, to award any sum of money, not exceeding one hundred pounds, by way of satisfaction or compensation for any loss of property suffered by the applicant through or by means of the said felony, and the amount awarded for such satisfaction or compensation shall be deemed a judgment debt due to the person entitled to receive the same from the person so convicted, and the order for payment of such amount may be enforced in such and the same manner as in the case of any costs ordered by the court to be paid under the last preceding section of this act. (z)

Sec. 5. The word 'forfeiture,' in the construction of this Act, shall not include any fine or penalty imposed on any convict by virtue of his sentence.

Sec. 6. The expression 'convict,' as hereinafter used, shall be deemed to mean any person against whom, after the passing of this Act, judgment of death, or of penal servitude, shall have been pronounced or recorded by any court of competent jurisdiction in England, Wales, or Ireland, upon any charge of treason or felony.

By sec. 7, when any convict shall die or be made bankrupt, or shall have suffered any punishment to which sentence of death if pronounced or recorded against him may be lawfully commuted, or shall have undergone the full term of penal servitude for which judgment shall have been pronounced or recorded against him, or such other punishment as may by competent authority have been substituted for such full term, or shall have received Her Majesty's pardon for the treason or felony of which he may have been convicted, he shall thenceforth so far as relates to the provisions hereinafter contained, cease to be subject to the operation of this Act.

Sec. 8. No action at law or suit in equity for the recovery of any property, debt, or damage whatsoever shall be brought by any convict against any person during the time while he shall be subject to the operation of this Act; and every convict shall be incapable, during such time as aforesaid, of alienating or charging any property, or of making any contract, save as hereinafter provided.

By sec. 9, the Crown may appoint administrators of a convict's prop-

son arrested is a banker's clerk, carrying a bag of gold to the bank, the banker, who is the owner of the money, would have a right to interfere in such a case against any order being made. I also wish to guard myself against being supposed to decide that if the prisoner was adjudicated bankrupt by reason of an act of bankruptcy committed before his arrest, the trustee might not have a right to intervene. Nothing appears in the present case to raise this point. So far as appears, the prisoner at the time of his arrest was in possession of moneys which he might have disposed of in any way he pleased. Then sect. 3 of the Act for Abolishing Forfeitures for Treason and Felony provides that such moneys shall be subject to the power of the criminal court, to make an order for the pay-

ment out of them of the costs of the prosecution. That power may be exercised by the court, notwithstanding every effort which the prisoner may make, whilst *sui juris*, to make away with the moneys. In case of bankruptcy intervening — not a bankruptcy by reason of an act of bankruptcy antecedent to the arrest — the trustee takes what was the property of the bankrupt, and subject to all the rights of third parties previously existing. I think there did exist in the present case, at the time of the adjudication of bankruptcy, a vested right, or lien, or hold, by virtue of the statute, on the moneys found on the person of the prisoner at the time of his arrest, and that consequently the order was rightly made.'

(z) See *R. v. Lovett*, 11 Cox, C. C. 602.

erty. By sec. 13, they may pay out of the property costs of the prosecution, &c., and the debts and liabilities of the convict.

By sec. 15, the administrator may cause to be paid or satisfied, out of such property, such sum of money by way of satisfaction or compensation for any loss of property or other injury alleged to have been suffered by any person through or by means of any alleged criminal or fraudulent act of such convict, as to him shall seem just, although no proof of such alleged criminal or fraudulent act may have been made in any court of law or equity; and all claims to any such satisfaction or compensation may be investigated in such manner as the administrator shall think fit, and the decision of the administrator thereon shall be binding: Provided always, that nothing in this Act shall take away or prejudice any right, title, or remedy to which any person alleging himself to have suffered any such loss or injury would have been entitled by law if this Act had not passed.

By sec. 17, the several powers hereinbefore given to the said administrator, or any of them, may be exercised by him in such order and course, as to priority of payments or otherwise, as he shall think fit; and all contracts of letting or sale, mortgages, conveyances, or transfers of property, *bona fide* made by the said administrator under the powers of this Act, and all payments or deliveries over of property, *bona fide* made by or under the authority of the said administrator for any of the purposes hereinbefore mentioned, shall be binding; and the propriety thereof, and the sufficiency of the grounds on which the said administrator may have exercised his judgment or discretion in respect thereof, shall not be in any manner called in question by such convict, or by any person claiming an interest in such property by virtue of this Act.

By sec. 18, the property reverts to the convict or his representatives on completion of sentence, pardon, or death.

By sec. 21, if no administrator is appointed, a curator may be appointed by justices.

By sec. 27, the execution of judgments against convicts is provided for.

By 33 & 34 Vict. c. 29, s. 14, every person convicted of felony shall for ever be disqualified from selling spirits by retail, and no licence to sell spirits by retail shall be granted to any person who shall have been so convicted as aforesaid; and if any person shall, after having been so convicted as aforesaid, take out or have any licence to sell spirits by retail, the same shall be void to all intents and purposes; and every person who, after being so convicted as aforesaid, shall sell any spirits by retail in any manner whatever, shall incur the penalty for doing so without a licence.

By 9 Geo. 4, c. 32, s. 3, after reciting that it is expedient to prevent all doubts respecting the civil rights of persons convicted of felonies, not capital, who have undergone the punishment to which they were adjudged, it is enacted: That where any offender hath been or shall be convicted of any felony not punishable with death, and hath endured or shall endure the punishment to which such offender hath been or shall be adjudged for the same, the punishment so endured hath and shall have the like effect and consequences as a pardon under the

great seal as to the felony whereof the offender was so convicted: Provided always, that nothing herein contained, nor the enduring of such punishment, shall prevent or mitigate any punishment to which the offender might otherwise be lawfully sentenced on a subsequent conviction for any other felony.

CHAPTER THE SECOND.

OF PERSONS CAPABLE OF COMMITTING CRIMES.

It is a general rule that no person shall be excused from punishment for disobedience to the laws of the country, unless he be expressly defined and exempted by the laws themselves. (a) The inquiry, therefore, as to those who are capable of committing crimes, will best be disposed of by considering the several pleas and excuses which may be urged on behalf of a person who has committed a forbidden act, as grounds of exemption from punishment.

Those pleas and excuses must be founded upon the want or defect of *will* in the party by whom the act has been committed. For without the consent of the *will*, human actions cannot be considered as culpable; nor where there is no will to commit an offence, is there any just reason why a party should incur the penalties of a law made for the punishment of crimes and offences. (b) The cases of want or defect of will seem to be reducible to four heads: I. Infancy. II. *Non compos mentis*. III. Subjection to the power of others. IV. Ignorance.

Infants. — I. The full age of man or woman by the law of England is twenty-one years: (c) under which age a person is termed an *infant*, and is exempted from punishment in some cases of misdemeanors and offences that are not capital. (d) But the nature of the offence will make differences which should be observed. Thus, if it be any notorious breach of the peace, as a riot, battery, or the like, an infant above the age of fourteen is equally liable to suffer as a person of the full age of twenty-one; (e) and if an infant judicially perjure himself in point of age, or otherwise, he shall be punished for the perjury; and he may be indicted for cheating with false dice, &c.: (f) but if the offence charged by the indictment be a mere non-feasance¹ (unless it be of such a thing as the party be bound to by reason of tenure or the like, as to repair a bridge, &c.), (g) there, in some cases, he shall be privileged by his non-age, if under twenty-one, though above fourteen years; because laches in such a case shall not be imputed to him. (h)

(a) 4 Blac. Com. 20.

(b) 1 Hale, 14.

(c) It is the full age of male or female according to common speech. Lit. sec. 104, 259.

(d) 1 Hale, 20.

(e) 4 Blac. Com. 23, 1 Hale, 20. Co. Lit. 247 b.

(f) Bac. Abr. Inf. (H.) Sid. 253. See 48 & 49 Vict. c. 69, s. 4.

(g) 2 Inst. 703. R. v. Sutton, 3 Ad. & E. 597, *post*, Bridges.

(h) 1 Hale, 20. Bac. Abr. Inf. (H.).

AMERICAN NOTE.

¹ In America a mere child cannot be made criminally responsible for a nuisance created on his land, *P. v. Townsend*, 3 Hill, 479.

It is said that if an infant of the age of eighteen years be convicted of a disseisin with force, yet he shall not be imprisoned; (*i*) and the law is said to be, that though an infant at the age of eighteen or even fourteen, by his own acts may be guilty of a forcible entry, and may be fined for the same, yet he cannot be imprisoned, because his infancy is an excuse by reason of his indiscretion; and it is not particularly mentioned in the statute against forcible entries, that he shall be committed for such fine. (*j*) An infant, however, cannot be guilty of a forcible entry or disseisin by barely commanding one or by assenting to one to his use; because every command or assent of this kind by a person under such incapacity is void; but an actual entry by an infant into another's freehold gains the possession and makes him a disseisor. (*k*)

With regard to capital crime the law is more minute and circum-spect; distinguishing with greater nicety the several degrees of age and discretion: though the capacity of doing ill or contracting guilt is not so much measured by years and days as by the strength of the delinquent's understanding and judgment. (*l*) But within the age of seven years an infant cannot be punished for any capital offence, whatever circumstances of a mischievous discretion may appear; for *ex presumptione juris* such an infant cannot have discretion; and against this presumption no averment shall be admitted. (*m*) An infant under the age of seven years cannot be guilty of felony; and therefore a defendant cannot justify taking such an infant into custody and taking him before a magistrate upon the ground that he had been caught stealing a piece of wood. (*mm*)

On the attainment of fourteen years of age, the criminal actions of infants are subject to the same modes of construction as those of the rest of society; for the law presumes them at those years to be *doli capaces*, and able to discern between good and evil, and therefore subjects them to capital punishments as much as if they were of full age. (*n*) But during the interval *between fourteen years and seven*,¹ an infant shall be *prima facie* deemed to be *doli incapax*, and presumed to be unacquainted with guilt; yet this presumption will diminish

(*i*) 1 Hale, 21.

(*j*) Bac. Abr. Inf. (H.). Dalt. 422. Co. Lit. 357. And see 1 Hawk. P. C. c. 64, s. 35, that the infant ought not to be imprisoned because he shall not be subject to corporal punishment by force of the general words of any statute wherein he is not expressly named.

(*k*) Bac. Abr. Inf. (H.). Co. Lit. 357. 1 Hawk. P. C. c. 64, s. 35.

(*l*) 4 Blac. Com. 23.

(*m*) 1 Hale, 27; 23. 1 Hawk. c. 1, s. 1,

note (1). 4 Blac. Com. 23. A pardon was granted to an infant within the age of seven years, who was indicted for homicide; the jury having found that he did the fact before he was seven years old. 1 Hale, 27 (edit. 1800), note (*e*).

(*mm*) Marsh v. Loader, 14 C. B. (N. S.) 535.

(*n*) Dr. & Stu. c. 26. Co. Lit. 79, 171, 247. Dalt. 476, 505. 1 Hale, 25. Bac. Abr. Inf. A. & H.

AMERICAN NOTE.

¹ In different States of America there are different ages fixed under which an infant is *doli incapax*. Thus in Texas the infant must be over nine years of age, and if under thirteen evidence must be given of his criminal capacity, Parker v. S., 20 Tex. Ap.

451, and the death penalty will not be inflicted when the prisoner is under seventeen. In Illinois the ages respectively are ten and fourteen. Angelo v. P., 96 Ill. 209; 36 Am. R. 132.

with the advance of the offender's years, and will depend upon the particular facts and circumstances of his case. The evidence of malice, however, which is to supply age, should be strong and clear beyond all doubt and contradiction; but if it appear to the court and jury that the offender was *doli capax*, and could discern between good and evil, he may be convicted and suffer death. (o) Thus, it is said that an infant of eight years old may be guilty of murder, and shall be hanged for it, (p) and where an infant between eight and nine years old was indicted, and found guilty of burning two barns, and it appeared, upon examination, that he had malice, revenge, craft, and cunning, he had judgment to be hanged, and was executed accordingly. (q)

An infant of the age of nine years, having killed an infant of the like age, confessed the felony; and, upon examination, it was found that he hid the blood and the body. The justices held that he ought to be hanged; but they respited the execution that he might have a pardon. (r) Another infant, of the age of ten years, who had killed his companion and hid himself was, however, actually hanged; upon the ground that it appeared by his hiding that he could discern between good and evil; and *malitia supplet ætatem*. (s) And a girl of thirteen was burnt for killing her mistress. (t) Whenever a person under the age of fourteen is charged with committing a felony, the proper course is to leave the case to the jury to say whether, at the time of committing the offence, such person had guilty knowledge that he was doing wrong. (u)

In 1748, W. York, a boy of ten years of age, was convicted for the murder of a girl of about five years of age; but Willes, C. J., out of regard to the tender years of the prisoner, respited execution till he could take the opinion of the rest of the judges, whether it was proper to execute him or not.

The boy and girl were parish children, under the care of a parishioner; and on the day of the murder he and his wife went out to their work, and left the children in bed together. When they returned, the girl was missing; and the boy, being asked what was become of her, answered that he had helped her up and put on her clothes, and she had gone he knew not whither. Upon this, strict search was made for the child. During this search, the man observed that a heap of dung near the house had been newly turned up; and, upon removing the upper part of the heap, he found the body of the child about a foot's depth under the surface, cut and mangled in a most barbarous and horrid manner. Upon this discovery the boy,

(o) 1 Hale, 25, 27. 4 Blac. Com. 32. The civil law, as to capital punishments, distinguished the ages into four ranks: 1. *Ætas pubertatis plena*, which is eighteen years. 2. *Ætas pubertatis*, or *pubertas* generally, which is fourteen years, at which time persons were likewise presumed to be *doli capaces*. 3. *Ætas pubertatis proxima*; but in this the Roman lawyers were divided, some assigning it to ten years and a half, others to eleven; before which the party was not presumed to be *doli capax*. 4. *Infantia*, which lasts till seven years, within which

age there can be no guilt of a capital offence. 1 Hale, 17–19.

(p) Dalt. Just. c. 147.

(q) Dean's case, 1 Hale, 25, note (u).

(r) 1 Hale, 27. F. Corone, 57. B. Corone, 133.

(s) Spigurnal's case, 1 Hale, 26. Fitz. Rep. Corone, 118.

(t) Alice de Waldborough's case, 1 Hale, 26.

(u) R. v. Owen, 4 C. & P. 386, Little-dale, J. R. v. Smith, 1 Cox, C. C. 260, Erle.

who was the only person capable of committing the fact, that was left at home with the child, was charged with the fact, which he stiffly denied. When the coroner's jury met, the boy was again charged, but persisted still to deny the fact. At length, being close interrogated, he fell to crying, and said he would tell the whole truth. He then said that the child had been used to foul herself in bed; that she did so that morning (which was not true, for the bed was searched and found to be clean), that thereupon he took her out of the bed and carried her to the dung-heap, and with a large knife, which he found about the house, cut her in the manner the body appeared to be mangled, and buried her in the dung-heap; placing the dung and straw that was bloody under the body, and covering it up with what was clean; and having so done, he got water and washed himself as clean as he could. The boy was the next morning carried before a neighbouring justice of the peace, before whom he repeated his confession, with all the circumstances he had related to the coroner and his jury. The justice of the peace very prudently deferred proceeding to a commitment, until the boy should have an opportunity of recollecting himself. Accordingly he warned him of the danger he was in if he should be thought guilty of the fact he stood charged with, and admonished him not to wrong himself: and then ordered him into a room where none of the crowd that attended should have access to him. When the boy had been some hours in this room, where victuals and drink were provided for him, he was brought a second time before the justice, and then he repeated his former confession; upon which he was committed to gaol. On the trial, evidence was given of the declarations before mentioned to have been made before the coroner and his jury, and before the justice of the peace; and of many declarations to the same purpose which the boy made to other people after he came to gaol, and even down to the day of his trial; for he constantly told the same story in substance, commonly adding that the devil put him upon committing the fact. Upon this evidence, with some other circumstances tending to corroborate the confessions, he was convicted. The judges having taken time to consider this report, unanimously agreed; 1. That the declarations stated in the report were evidence proper to be left to the jury. 2. That, supposing the boy to have been guilty of this fact, there were so many circumstances stated in the report which were undoubtedly tokens of what Lord Hale calls a *mischievous discretion*, that he was certainly a proper subject for capital punishment, and ought to suffer; for it would be of very dangerous consequence to have it thought that children may commit such atrocious crimes with impunity. That there are many crimes of the most heinous nature, such as (in the present case) the murder of young children, poisoning parents or masters, burning houses, &c., which children are very capable of committing, and which they may in some circumstances be under strong temptations to commit; and, therefore, though the taking away the life of a boy of ten years old might savour of cruelty, yet, as the example of that boy's punishment might be a means of deterring other children from the like offences, and as the sparing the boy, *merely on account of his age*, would probably have a quite contrary tendency; in justice to the public, the law ought to

take its course; unless there remained any doubt touching his guilt. In this general principle all the judges concurred; but two or three of them, out of great tenderness and caution, advised the chief justice to send another reprieve for the prisoner; suggesting that it might possibly appear, on further inquiry, that the boy had taken this matter upon himself at the instigation of some person or other, who hoped by this artifice to screen the real offender from justice. Accordingly, the chief justice granted one or two more reprieves; and desired the justice of the peace who took the boy's examination, and also some other persons, in whose prudence he could confide, to make the strictest inquiry they could into the affair, and report to him. At length, he, receiving no further light, determined to send no more reprieves, and to leave the prisoner to the justice of the law at the expiration of the last; but, before the expiration of that reprieve, execution was respite till further order, by warrant from one of the secretaries of state; and at the summer assizes, 1757, the prisoner had the benefit of His Majesty's pardon, upon condition of his entering immediately into the sea service. (*v*)

In the case of *rape*, the law presumes that an infant under the age of fourteen years is unable to commit the crime; and therefore he cannot be guilty of it. (*w*) So also, for the like reason, such an infant cannot be guilty of an assault with intent to commit a rape, (*x*) or of carnally knowing a girl under thirteen years of age, (*y*) but he can be convicted, on an indictment for this offence, of an indecent assault. (*z*) And this presumption cannot be rebutted, and evidence is not admissible to prove that the infant is in fact competent to commit any such offence. (*a*)¹ But this presumption is upon the ground of impotency rather than the want of discretion; for he may be a principal in the second degree, as aiding and assisting in this offence as well as in other felonies, if it appear by sufficient circumstances that he had a mischievous discretion. (*b*)

An infant of over fourteen years of age may be convicted of larceny as a bailee, since bailment is not a contract but a delivery upon condition. (*c*)

It is said that an act making a new felony does not extend to an infant under the age of discretion, namely, fourteen years old, (*d*) and that general statutes which give corporal punishment are not to ex-

(*v*) York's case, Fost. 70, *et seq.*

(*w*) R. v. Groombridge, 7 C. & P. 582. Gaselee, J., after consulting Lord Abinger, C. B., as to whether the words 'every person' in the 9 Geo. 4, c. 31, s. 16, altered the former law.

(*x*) R. v. Eldershaw, 8 C. & P. 396, Vaughan, J. R. v. Phillips, 8 C. & P. 736, Patteson, J.

(*y*) R. v. Jordan, 9 C. & P. 118, Williams, J. R. v. Waite (1892), 2 Q. B. 600.

(*z*) 48 & 49 Vict. c. 69, s. 9. R. v. Williams (1893), 1 Q. B. 320.

(*a*) R. v. Phillips, and R. v. Jordan, *supra*.

(*b*) 1 Hale, 630.²

(*c*) R. v. McDonald, 15 Q. B. D. 323. See judgment of Lord Coleridge in R. v. Ashwell, 16 Q. B. D. 190, Vol. II.

(*d*) 1 Hale, 706. Eyston and Studde's case, Plowd. Com. 465, a. And see 1 Hale, 21, 22. Bac. Abr. Infancy (H).

AMERICAN NOTES.

¹ In America, however, evidence is admissible to prove that a boy under fourteen is mature, and therefore capable of rape. S. v. Pugh, 7 Jones (Law), 61; P. v. Randolph, 2 Parker, C. R. 174; Williams v.

S. 14 Ohio, 222; S. v. Sam, 1 Wis. 300; Bishop, i. 373.

² See S. v. Jones, 83 N. C. 605; 35 Am. R. 586.

tend to infants; and that, therefore, if an infant be convicted in ravishment of ward, he shall not be imprisoned, though the statute of Merton, c. 6, be general in that case. (e) But this must be understood, where the corporal punishment is, as it were, but collateral to the offence, and not the direct intention of the proceeding against the infant for his misdemeanor; in many cases of which kind the infant under the age of twenty-one shall be spared, though possibly the punishment be enacted by Parliament. (f)

But where a fact is made felony or treason, it extends as well to infants, if above fourteen years, as to others. And this appears by several Acts of Parliament, as by 1 Jac. 1, c. 11, (g) of felony for marrying two wives, in which there was a special exception of marriages within the age of consent; so that if the marriage were above the age of consent, though within the age of twenty-one years, it was not exempted from the penalty. So by the 21 Hen. 8, c. 7, (h) concerning felony by servants that embezzle their masters' goods delivered to them, there was a special provision that it should not extend to servants under the age of eighteen years, who certainly had been within the penalty, if above the age of discretion, namely, fourteen years, though under eighteen years, unless there had been a special provision to exclude them. And so by the 12 Ann. c. 7, (i) (by which it was made felony without benefit of clergy to steal goods to the value of 40s. out of a house, though the house were not broken open), where apprentices who should rob their masters were excepted out of the Act. (i)

In many cases of crimes committed by infants, the judges will in prudence respite the execution in order to get a pardon: and it is said that if an infant apparently wanting discretion be indicted and found guilty of felony, the justices themselves may dismiss him without a pardon. (j) But this authority to dismiss him must be understood of a reprieve before judgment; or of a case where the jury find the prisoner within the age of seven years, or not of sufficient discretion to judge between good and evil. (k)

Persons non compos mentis. — II. It has been considered, that there are four kinds of persons who may be said to be *non compos*: — 1. An idiot. 2. One made *non compos* by sickness. 3. A lunatic. 4. One that is drunk. (l) But it should be observed, that every person at the age of discretion is presumed sane, unless the contrary is proved; and if a lunatic has lucid intervals, the law presumes the offence of such person to have been committed in a lucid interval, unless it appears to have been committed in the time of his distemper. (m)

Idiots. — An *idiot* is a fool or madman from his nativity, and one who never has any lucid intervals: and such an one is described as

(e) Bac. Abr. Infancy (H). Plowd. 364. 1 Hale, 21.

(f) Bac. Abr. Infancy (H). 1 Hale, 21.

(g) Repealed, 9 Geo. 4, c. 31, s. 1.

(h) Repealed, 7 & 8 Geo. 4, c. 27.

(i) Bac. Abr. Infancy (H). Co. Lit. 147. 1 Hale, 21, 22. As to indicting an infant for an offence under the Bankruptcy Acts, see *R. v. Wilson*, 5 Q. B. D. 28, *post*, sub tit. Bankruptcy.

(j) 35 Hen. 6, 11 and 12.

(k) 1 Hale, 27. 1 Hawk. P. C. c. 1, s. 8. And, *quære*, whether in any case of an infant convicted by a jury, the judge would take upon himself to dismiss him. It is submitted that the regular course would be to respite execution, and recommend the prisoner for a pardon.

(l) Co. Lit. 247. *Beverley's case*, 4 Co. 124.

(m) 1 Hale, 33, 34.

a person that cannot number twenty, tell the days of the week, does not know his father or mother, his own age, &c.: but these are mentioned as instances only; for whether idiot or not is a question of fact for the jury. (n) One who is *surdus et mutus a nativitate* is in presumption of law an idiot, and the rather because he has no possibility to understand what is forbidden by law to be done, or under what penalties; but if it appear that he has the use of understanding, which many of that condition discover by signs to a very great measure, then he may be tried, and suffer judgment and execution; though great caution should be used in such a proceeding. (o)

A person made *non compos mentis* by sickness, or, as it has been sometimes expressed, a person afflicted with *dementia accidentalis vel adventitia*, is excused in criminal cases from such acts as are committed while under the influence of his disorder. (p) Several causes have been assigned for this disorder; such as the distemper of the humours of the body; the violence of a disease, as fever or palsy; or the concussion or hurt of the brain; and, as it is more or less violent, it is distinguishable in kind or degree, from a particular *dementia*, in respect of some particular matters, to a *total alienation* of the mind, or complete madness. (q)

(n) Bac. Abr. Idiots, &c. (A). Dy. 25. Moor, 4, pl. 12. Bro. Idiot, 1. F. N. B. 233.

(o) 1 Hale, 34. And see the note where it is said that according to 43 Assia. pl. 30, and 8 Hen. 4, c. 2, if a prisoner stands mute, it shall be inquired whether it be wilful, or by the act of God; from whence Crompton infers that if it be by the act of God, the party shall not suffer, Crompt. Just. 29, a. But if one who is both deaf and dumb may discover by signs that he hath the use of understanding, much more may one who is only dumb, and consequently such a one may be guilty of felony. It may be observed, that from the humane exertions of many ingenious and able persons, and from the extensive charitable institutions for the instruction of the deaf and dumb, many of those unfortunate people have at the present day a very perfect knowledge of right and wrong. In Steel's case, 1 Leach, 451, a prisoner, who could not hear, and could not be prevailed upon to plead, was found mute by the visitation of God, and then tried, found guilty, and sentenced to be transported. And in Jones's case, 1 Leach, 102, where the prisoner (who was indicted on 12 Ann. c. 7, for stealing in a dwelling-house) on being put to the bar appeared to be deaf and dumb, and the jury found a verdict, 'Mute by the visitation of God;' after which a woman was examined upon her oath, to the fact of her being able to make him understand what others said, which she said she could do by means of signs, such prisoner was arraigned, tried, and convicted of the simple larceny. The proper course in such cases is, 1. To swear a jury to determine whether the prisoner be mute of malice or by

the visitation of God. 2. Whether he be able to plead. 3. Whether he be sane or not: on which issue the question is, whether he is of sufficient intellect to comprehend the course of the proceedings on the trial so as to be able to make a proper defence. R. v. Pritchard, 7 C. & P. 308, Alderson, B.; R. v. Dyson, *ibid.* 305, n. (a), Parke, B.; 8 C. 1 Lewin, 64. In R. v. Pritchard, the jury were sworn on each of the three issues separately. See R. v. Dyson, for the form of the oath administered to the interpreter. See Thompson's case, 2 Lewin, 137, where the prisoner being deaf and dumb, but able to read, the indictment was handed to him with the usual questions written upon paper, and he wrote his plea on paper. The jurors' names were then handed to him, with the question, 'whether he objected to any of them?' and he wrote for answer, 'No.' The judge's note of the evidence of each witness was handed to him, and he was asked in writing, if he had any question to put. In a case of misdemeanor, after a jury had found that the prisoner was mute by the visitation of God, but was of sound mind, his counsel was permitted to plead not guilty for him, and the trial proceeded in the usual manner, and the evidence was not interpreted to the prisoner. R. v. Whitfield, 3 C. & K. 121, Williams, J. Where a prisoner, on being brought up to be arraigned, stands mute or it appears questionable whether he be sane or not, the proper course is to swear a jury to try the question, as it is for them and not for the court to decide whether the prisoner stands mute of malice, or is insane. R. v. Israel, 2 Cox, C. C. 263.

(p) 1 Hale, 30. Bac. Abr. Idiots (A).

(q) 1 Hale, 30.

Lunatics. — A *lunatic* is one labouring also under a species of the *dementia accidentalis vel adventitia*, but distinguishable in this, that he is afflicted by his disorder only at certain periods and vicissitudes; having intervals of reason. Such a person during his frenzy is entitled to the same indulgence as to his acts, and stands in the same degree with one whose disorder is fixed and permanent. (r) The name of *lunacy* was taken from the influence which the moon was supposed to have in all disorders of the brain; a notion which has been exploded by the sounder philosophy of modern times.

The prevailing distinction in law is between *idiocy* and *lunacy*; the first, a *fatuity a nativitate*, or *dementia naturalis*, which excuses the party as to his acts; the other, accidental or adventitious madness, which, whether permanent and fixed, or with lucid intervals, goes under the name of *lunacy*, and excuses equally with idiocy as to acts done during the frenzy. (s)

The great difficulty in cases of this kind is to determine where a person shall be said to be so far deprived of his senses and memory as not to have any of his actions imputed to him; or where, notwithstanding some defects of this kind, he still appears to have so much reason and understanding as will make him accountable for his actions. Lord Hale, speaking of partial insanity, says, that it is the condition of very many, especially melancholy persons, who for the most part discover their defect in excessive fears and griefs, and yet are not wholly destitute of the use of reason; and that this partial insanity seems not to excuse them in the committing of any capital offence. And he says further, 'Doubtless most persons that are felons of themselves and others are under a degree of partial insanity when they commit these offences: it is very difficult to define the invisible line that divides perfect and partial insanity; but it must rest upon circumstances duly to be weighed and considered both by the judge and jury, lest on the one side there be a kind of inhumanity towards the defects of human nature, or, on the other side, too great an indulgence given to great crimes.' And he concludes by saying, 'the best measure I can think of is this: such a person as, labouring under melancholy distempers, hath yet ordinarily as great understanding as ordinarily a child of fourteen years hath, is such a person as may be guilty of treason or felony.' (t)

In the case of *Lord Ferrers*, who was tried before the House of Lords for murder, it was proved that his lordship was occasionally insane, and incapable from his insanity of knowing what he did, or judging of the consequences of his actions. But the murder was deliberate; and it appeared that when he committed the crime he had capacity sufficient to form a design and know its consequences. It was urged, on the part of the prosecution, that complete possession of reason was unnecessary to warrant the judgment of the law, and that it was sufficient if the party had such possession of reason as enabled him to comprehend the nature of his actions, and discriminate between moral good and evil. And he was found guilty and executed. (u)

(r) 4 Co. 125. Co. Lit. 247. 1 Hale, 31.

(t) 1 Hale, 30.

(s) Bac. Abr. Idiots, &c. (A.). 4 Co. 125.

(u) Lord Ferrers' case, 19 St. Tri. (by Howell), 947.

In *Arnold's* case, who was tried for maliciously shooting at Lord Onslow, it appeared clearly that the prisoner was, to a certain extent, deranged, and that he had greatly misconceived the conduct of Lord Onslow; but it also appeared that he had formed a regular design, and prepared the proper means for carrying it into effect. Tracey, J., told the jury, that where a person has committed a great offence, the exemption of insanity must be very clearly made out before it is allowed; that it is not every kind of idle and frantic humour of a man, or something unaccountable in his actions, which will show him to be such a madman as is to be exempted from punishment; but that where a man is totally deprived of his understanding and memory, and does not know what he is doing, any more than an infant, or a wild beast, he will properly be exempted from the punishment of the law. (*v*)

In *Parker's* case, who was indicted for aiding the King's enemies, by entering into the French service in time of war between France and this country, the defence was rested upon the ground of insanity; and a witness on his behalf stated, that his general character from a child was that of a person of very weak intellect; so weak that it excited surprise in the neighbourhood when he was accepted for a soldier. But the evidence for the prosecution had shown the act to have been done with considerable deliberation and possession of reason; and that the prisoner, who was a marine, having been captured by the French, and carried into the Isle of France, after a confinement of about six weeks, entered voluntarily into the French service, and stated to a captive comrade that it was much more agreeable to be at liberty and have plenty of money than remain confined in a dungeon. The Attorney-General replied to this defence of insanity, that before it could have any weight in rebutting a charge so clearly made out, the jury must be properly satisfied that at the time when the crime was committed the prisoner did not really know right from wrong. And the jury, after hearing the evidence summed up, without hesitation pronounced the prisoner guilty. (*w*)

T. Bowler was tried on the 2d July, 1812, for wounding William Burrowes. The defence set up for the prisoner was insanity, occasioned by epilepsy; and it was deposed by the prisoner's housekeeper, that he was seized with an epileptic fit on the 9th July, 1811, and was brought home apparently lifeless, since which time she had perceived a great alteration in his conduct and demeanor; that he would frequently rise at nine o'clock in the morning, eat his meat almost raw, and lie on the grass exposed to the rain; and that his spirits were so dejected that it was necessary to watch him, lest he should destroy himself. The keeper of a lunatic asylum deposed, that it was characteristic of insanity occasioned by epilepsy for the patient to imbibe violent antipathies against particular individuals, even his dearest friends, and to have a desire of taking vengeance upon them upon causes wholly imaginary, which no persuasion could remove, and that yet the patient might be rational and collected upon every other subject. He had no doubt of the insanity of the prisoner, and said he could not be de-

(*v*) *Arnold's case*, MS. Collision on Lunacy, 475. 8 St. Tri. 317. 16 St. Tri. (by Howell), 764, 765. The jury found the

prisoner guilty; but at Lord Onslow's request he was reprieved.

(*w*) *Parker's case*, 1812, Collis. 477.

ceived by assumed appearances. A commission of lunacy was also produced, dated June 17, 1812, and an inquisition taken upon it, whereby the prisoner was found insane, and to have been so from March 30th. (x) Le Blanc, J., told the jury, that it was for them to determine whether the prisoner, when he committed the offence with which he stood charged, was incapable of distinguishing right from wrong, or under the influence of any *illusion* in respect of the prosecutor which rendered his mind at the moment insensible of the nature of the act he was about to commit; since in that case he would not be legally responsible for his conduct. On the other hand, provided they should be of opinion that when he committed the offence he was capable of distinguishing right from wrong, and not under the influence of such an illusion as disabled him from discerning that he was doing a wrong act, he would be amenable to the justice of his country, and guilty in the eye of the law. The jury, after considerable deliberation, pronounced the prisoner guilty. (y)

In *Bellingham's* case, who was tried for the murder of Mr. Perceval, a part of the prisoner's defence was insanity; and upon this part of the case, Mansfield, C. J., stated to the jury, that in order to support such a defence it ought to be proved by the most distinct and unquestionable evidence that the prisoner was incapable of judging between right and wrong; that in fact it must be proved beyond all doubt, that at the time he committed the atrocious act with which he stood charged, he did not consider that murder was a crime against the laws of God and nature; and that there was no other proof of insanity which would excuse murder, or any other crime. That in the species of madness called lunacy, where persons are subject to temporary paroxysms, in which they are guilty of acts of extravagance, such persons committing crimes when they are not affected by the malady would be, to all intents and purposes, amenable to justice; and that so long as they could distinguish good from evil they would be answerable for their conduct. And that in the species of insanity in which the patient fancies the existence of injury, and seeks an opportunity of gratifying revenge by some hostile act, if such a person be capable in other respects of distinguishing right from wrong, there would be no excuse for any act of atrocity which he might commit under this description of derangement. (z)

So where on an indictment for murder, it appeared that the prisoner laboured under a notion that the inhabitants of Hadleigh, and particularly the deceased, were continually issuing warrants against him with intent to deprive him of his liberty and life, the judge who tried the case told the jury that 'they must be satisfied, before they could acquit the prisoner on the ground of insanity, that he did not know, when he committed the act, what the effect of it, if fatal, would be, with reference to the crime of murder. The question was, did he know that he was committing an offence against the laws of

(x) The report in *Collison*, 678, does not state the day on which the prisoner shot at W. Burrows.

(y) *Bowler's* case, *Collis*, 678, in the note.

(z) *Bellingham's* case, *Old Bailey*, 15th May, 1812, *Collis*. Addend. 636. 'I will

not refer to *Bellingham's* case, as there are some doubts as to the mode in which that case was conducted.' Per Sir J. Campbell, *Att.-Gen. in R. v. Oxford*, 9 C. & P. 538.

God and nature?' and his lordship expressed his complete accordance in the observations of Lord Mansfield, C. J., in the last case. (a)

On the trial of *Oxford*, for shooting at the Queen, Lord Denman, C. J., told the jury, 'Persons *prima facie* must be taken to be of sound mind till the contrary is shown. But a person may commit a criminal act, and not be responsible. If some controlling disease was, in truth, the acting power within him which he could not resist, then he will not be responsible. It is not more important than difficult to lay down the rule by which you are to be governed.' 'On the part of the defence, it is contended that the prisoner was *non compos mentis*, that is (as it has been said) unable to distinguish right from wrong, or, in other words, that from the effect of a diseased mind he did not know at the time that the act he did was wrong.' Something has been said about the power to contract and to make a will; but I think that those things do not supply any test. The question is, whether the prisoner was labouring under that species of insanity which satisfies you that he was quite unaware of the nature, character, and consequences of the act he was committing, or, in other words, whether he was under the influence of a diseased mind, and was really unconscious at the time he was committing the act that it was a crime?' (b)

J. Hadfield was tried in the Court of King's Bench, in 1800, for high treason, in shooting at the King, in Drury Lane Theatre; and the defence was insanity. He had been a private soldier in a dragoon regiment, and in 1793 received many severe wounds in battle, which had caused partial derangement of mind, and he had been dismissed from the army on account of insanity. Since his return to this country he had been annually out of his mind from the beginning of spring to the end of the dog-days, and had been under confinement as a lunatic. When affected by his disorder, he imagined himself to hold intercourse with God; sometimes called himself God, or Jesus Christ, and used other expressions of the most blasphemous kind; and also committed acts of the greatest extravagance; but at other times he appeared to be rational, and discovered no symptom of mental incapacity or disorder. On the 11th of May preceding his commission of the act in question his mind was very much disordered, and he used many blasphemous expressions. At one or two o'clock on the following morning, he suddenly jumped out of bed, and alluding to his child, a boy of eight months old, of whom he was usually remarkably fond, said he was about to dash his brains out against the bedpost, and that God had ordered him to do so; and upon his wife screaming, and his friends coming in, he ran into a cupboard and declared he would lie there, it should be his bed, and God had said so; and when doing this, having upset some water, he said he had lost a great deal of blood. On the same and the following day he used many incoherent and blasphemous expressions. On the morning of the 15th of May he seemed worse, said that he had seen God in the night, that the coach was waiting, and that he had been to dine with the King. He spoke very highly of the King, the royal family, and

(a) *R. v. Offord*, 5 C. & P. 168. Lord Denman, C. J., Alderson, B., and Patteson, J.

(b) *R. v. Oxford*, 9 C. & P. 525. Lord

particularly of the Duke of York. He then went to his master's workshop, whence he returned to dinner at two, but said that he stood in no need of meat, and could live without it. He asked for tea between three and four o'clock, and talked of being made a member of the society of Odd Fellows; and, after repeating his irreligious expressions, went out and repaired to the theatre. On the part of the Crown, it was proved that he had sat in his place in the theatre nearly three quarters of an hour before the King entered; that at the moment when the audience rose, on His Majesty's entering his box, he got up above the rest, and presenting a pistol loaded with slugs, fired it at the King's person, and then let it drop; and when he fired his situation appeared favourable for taking aim, for he was standing upon the second seat from the orchestra in the pit; and he took a deliberate aim, by looking down the barrel, as a man usually does when taking aim. On his apprehension, amongst other expressions, he said that 'he knew perfectly well his life was forfeited; that he was tired of life, and regretted nothing but the fate of a woman who was his wife, and would be his wife a few days longer, he supposed.' These words he spoke calmly, and without any apparent derangement; and with equal calmness repeated that he was tired of life, and said that 'his plan was to get rid of it by other means; he did not intend anything against the life of the King; he knew the attempt only would answer his purpose.' The counsel for the prisoner (c) in his very able address to the jury, put the case as one of a species of insanity in the nature of a *morbid delusion* of the intellect, and admitted that it was necessary for them to be satisfied that the act in question was the immediate unqualified offspring of the disease. And Lord Kenyon held that as the prisoner was deranged immediately before the offence was committed, it was improbable that he had recovered his senses in the interim; and although, were they to run into nicety, proof might be demanded of his insanity at the precise moment when the act was committed; yet, there being no reason for believing him to have been at that period a rational and accountable being, he ought to be acquitted. (d)

On an indictment for the murder of Mr. Drummond the defence was insanity, and the medical evidence was that persons of otherwise sound mind might be affected with morbid delusions; that the prisoner was in that condition; that a person labouring under a morbid delusion might have a moral perception of right and wrong; but that, in the case of the prisoner, it was a delusion which carried him away beyond the power of his own control, and left him no such perception; and that he was not capable of exercising any control over acts which had a connection with his delusion; that it was the nature of his disease to go on gradually until it had reached a climax, when it burst forth with irresistible intensity; that a man might go on for years quietly, though at the same time under its influence, but would at once break out into the most violent paroxysms. Tindal, C. J., told the jury, 'The question to be determined is, whether, at the time the act in question was com-

(c) Lord Erskine, then at the bar.

verdict was Not Guilty, on the ground of

(d) Hadfield's case, *Collis*. 480. The

insanity.

mitted, the prisoner had or had not the use of his understanding so as to know that he was doing a wrong or wicked act. If the jury should be of opinion that the prisoner was not sensible at the time he committed the act that he was violating both the laws of God and man, (e) then he would be entitled to a verdict in his favour; but if, on the contrary, they were of opinion that, when he committed the act, he was in a sound state of mind, (f) then their verdict must be against him.' (g)

The acquittal, in the preceding case, on the ground of insanity, gave rise to a discussion in the House of Lords, and the following questions were put to the judges, and answered by them all, except Maule, J., as follows, in June, 1843:—

Q. I. 'What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons; as, for instance, where, at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?'

A. I. 'Assuming that your lordships' inquiries are confined to those persons who labour under such partial delusions only, and are not in other respects insane, we are of opinion that notwithstanding the accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable, according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law, by which expression we understand your lordships to mean the law of the land.'

Q. II. 'What are the proper questions to be submitted to the jury where a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defence?'

Q. III. 'In what terms ought the question to be left to the jury as to the prisoner's state of mind, at the time when the act was committed?'

A. II. and III. 'As these two questions appear to us to be more conveniently answered together, we submit our opinion to be that the jury ought to be told in all cases that *every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction*; and that *to establish a defence on the ground of insanity it must be clearly proved that, at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.* The

(e) *Quære*, whether this position was not too favourable for the prisoner, as it required the jury to be satisfied that the prisoner was aware both of the laws of God and man?

(f) *Quære*, this position also, as a man may not have a *perfectly* sound mind, and yet be criminally responsible?

(g) R. v. M'Naghten, 10 Cl. & F. 200.

mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused at the time of doing the act knew the difference between right and wrong; which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally and in the abstract, as when put with reference to *the party's knowledge of right and wrong, in respect to the very act with which he is charged*. If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction: whereas, the law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it. *If the accused was conscious that the act was one that he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable*; and the usual course, therefore, has been to leave the question to the jury, whether the accused had a sufficient degree of reason to know that he was doing an act that was wrong; and this course we think is correct, accompanied with such observations and explanations as the circumstances of each particular case may require.'

Q. IV. 'If a person under an insane delusion as to existing facts commits an offence in consequence thereof, is he thereby excused?'

A. IV. 'The answer must, of course, depend on the nature of the delusion; but making the same assumption as we did before, namely, that he labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.'

Q. V. 'Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial, and the examination of the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act that he was acting contrary to law, or whether he was labouring under any, and what, delusion at the time?'

A. V. 'We think the medical man, under the circumstances supposed, cannot, in strictness, be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide, and the questions are not questions upon a mere matter of science, in which case such evidence is admissible. But where the facts are admitted, or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that

general form, though the same cannot be insisted on as a matter of right.' (h)

The prisoner, who was charged with stealing a cow, had had his cow taken from him under an illegal distress, and, with a view of recovering her, he had gone in the night to the close of the prosecutor, who had purchased her, and taken another cow out of it. Owing to the loss of his cow, and various other losses, the prisoner's mind was affected, and he was under the impression that every one was robbing him. Tindal, C. J., told the jury that it is not mere eccentricity or singularity of manner that will suffice to establish the plea of insanity; it must be shown that the prisoner 'had no competent use of his understanding, so as to know that he was doing a wrong thing in the particular act in question.' (i)

Upon an indictment for murder, by burying a child alive, upon the surgeon, who was called for the prosecution, being asked whether a fracture of the skull was the cause of the death, or whether the child had,

(h) 1 C. & K. 130, 10 C. & F. 200. Maule, J., after expressing the difficulty he felt in answering the questions, because they did not arise out of, and were not put with reference to, a particular case, or for a particular purpose, which might limit or explain the generality of their terms, said, in answer to the first question, 'so far as it comprehends the question whether a person circumstanced as stated in the question is for that reason only to be found not guilty of a crime respecting which the question of his guilt has been duly raised in a criminal proceeding, and I am of opinion that he is not. There is no law that I am aware of that makes persons in the state described in the question not responsible for their criminal acts. To render a person irresponsible for crime on account of unsoundness of mind the unsoundness should, according to the law as it has been long understood and held, be such as to render him incapable of knowing right from wrong. The terms used in the question cannot be said (with reference only to the usage of language) to be equivalent to a description of this kind and degree of unsoundness of mind.' To the second question the learned judge answered, 'If, on a trial such as is suggested in the question, the judge should have occasion to state what kind and degree of insanity would amount to a defence, it should be stated conformably to what I have mentioned in my answer to the first question as being, in my opinion, the law on this subject.' To the third question the learned judge replied, 'There are no terms which the judge is by law required to use. They should not be inconsistent with the law as above stated, but should be such as, in the discretion of the judge, are proper to assist the jury in coming to a right conclusion as to the guilt of the accused.' To the fourth question the learned judge replied that the answer to the first question was applicable to this. To the fifth question the learned judge replied, 'whether a question can be asked depends, not merely on

the questions of fact raised on the record, but on the course of the cause at the time when it is proposed to ask it; and the state of an inquiry as to the guilt of a person charged with a crime, and defended on the ground of insanity, may be such that such a question as either of those suggested is proper to be asked and answered, though the witness has never seen the person before the trial, and though he has been present and heard the witnesses; these circumstances of his never having seen the person before, and of his having been present at the trial, not being necessarily sufficient, as it seems to me, to exclude the lawfulness of a question, which is otherwise lawful, though I will not say that an enquiry might not be in such a state as that these circumstances should have such an effect. Supposing there is nothing else in the state of the trial to make the questions suggested proper to be asked and answered, except that the witness had been present and heard the evidence, it is to be considered whether that is enough to sustain the question; in principle it is open to the objection that as the opinion of the witness is founded on those conclusions of fact, which he forms from the evidence, and as it does not appear what these conclusions are, it may be that the evidence he gives is on such an assumption of facts as makes it irrelevant to the enquiry. But such questions have been very frequently asked, and the evidence to which they are directed given, and has never, that I am aware of, been successfully objected to; and I think the course and practice of receiving such evidence, confirmed by the very high authority of Tindal, C. J., Williams, J., and Coleridge, J., in *R. v. M'Naghten*, who not only received it, but left it, as I understand, to the jury without any remark derogating from its weight, ought to be held to warrant its reception, notwithstanding the objection in principle to which it may be open.'

(i) *R. v. Vaughan*, 1 Cox, C. C. 80. Summer, 1844.

after the fracture of the skull, been suffocated by being buried while alive, the prisoner said, in open court, 'I put him in alive.' Two witnesses stated that the prisoner was of 'very weak intellect,' and the surgeon of the prison stated that the prisoner was of 'very weak intellect but capable of knowing right from wrong.' Maule, J., after advert- ing to the evidence adduced, said to the jury, 'If you are satisfied that the prisoner committed this offence, but you are also satisfied that, at the time of the committing the offence, the prisoner was so insane that he did not know right from wrong, he should be acquitted on that ground; but if you think that, at the time of committing the offence, he did know right from wrong, he is responsible for his acts, although he is of weak intellect.' (j)

Upon an indictment for murder it appeared that the prisoner, in the soldiers' room in the barracks, took up his musket as if to clean it, levelled it at the deceased, fired and killed her on the spot; her husband and child being in the room, and two other soldiers being present. The prisoner was a man of singular habits, and seldom spoke to the other soldiers, was very 'secluded, sulky, and sullen,' and was described as 'a close-minded man,' and 'a man of a very nasty temper.' He had frequently complained of illness, and had made efforts to get into the hospital, but he was rejected, as having no visible disorder. (The report contains a statement of sundry other facts as to the prisoner's state of mind.) The defence was that the prisoner was insane, or that he was under such an insane impulse as to render him irresponsible. Rolfe, B., in summing up said: 'If a prisoner seeks to excuse himself upon the plea of insanity, it is for him to make it clear that he was insane at the time of committing the offence charged. The *onus* rests on him; and the jury must be *satisfied* that he actually was insane. If the matter be left in *doubt*, it will be their duty to convict him; for every man must be presumed to be responsible for his acts till the contrary is clearly shown. A case occurred some time ago at the Central Criminal Court, before Alderson, B., and the jury hesitated as to their verdict, on the ground that they were not satisfied whether the prisoner was or was not of sound mind when he committed the crime; and that learned judge told them, that, unless they were satisfied of his insanity, it would be their duty to find a verdict of guilty. Every man is held responsible for his acts by the law of this country, if he can discern right from wrong. This subject was a few years ago carefully considered by all the judges, and the law is clear upon the subject. It is true, that learned speculators, in their writings, have laid it down that men, with a consciousness that they were doing wrong, were irresistibly compelled to commit some unlawful act. But who enabled them to dive into the human heart, and see the real motive that prompted the commission of such deeds? It has been urged that no motive has been shown for the commission of this crime. It is true that there is no motive apparently but a very inadequate one; but it is dangerous ground to take, to say that a man must be insane because men fail to discern the motive for his act. It has also been said that the conduct of the prisoner was that of a

(j) *R. v. Higginson*, 1 C. & K. 129. The prisoner was convicted and executed, August, 1843. *R. v. Davies*, 1 F. & F. 69. *R. v. Richards*, 1*bid.* 87, S. P.

madman in committing the offence at such a time, in the presence of the woman's husband, who had arms within his reach; but it would be a most dangerous doctrine to lay down, that because a man committed a desperate offence, with the chance of instant death, and the certainty of future punishment before him, he was therefore insane, as if the perpetration of crimes was to be excused by their very atrocity.' (k)

On the trial of a prisoner for the murder of his wife, it appeared that he had always treated her and their children with kindness; that they were talking with a neighbour at their door late at night, and at four o'clock next morning it was discovered that he had cut the throats of his wife and child, and had attempted to commit suicide. When questioned, he exhibited no sorrow or remorse for his conduct, but stated that 'trouble and dread of poverty and destitution had made him do it, fearing that his wife and child would starve when he was dead.' He said he had contemplated suicide for a week past; he had not had any quarrel with his wife, and that, having got out of bed to destroy himself, the thought had first come into his head to kill his wife and child; he had first attacked her whilst she was asleep in bed; she got away from him, and rushed to the window; he then killed the child, and seizing his wife, pulled her backwards to him, and cut her throat; he next tried to cut his own throat, but his powers failed him, and he did not succeed, though he wounded himself severely. This narrative, coupled with a knowledge of the prisoner's private circumstances, induced the surgeon to form the opinion that the prisoner, at the time he committed the act, had not, in consequence of an uncontrollable impulse, to which all human beings are subject, any control over his conduct. The desire to inflict pain and injury on those previously dear to the prisoner, was in itself a strong symptom of insanity, and the impossibility of resisting a sudden impulse to slay a fellow-being, was another indication that the mind was insane. There was not necessarily a connection between homicidal and suicidal monomania, though it would be more likely that a monomaniac who had contemplated suicide should kill another person, than for one who had not entertained any such feelings of hostility to his own existence. Monomania was an affection, which, for the instant, completely deprived the patient of all self-control in respect of some one particular subject which is the object of the disease. The prisoner had no delusion, and his reasoning faculties did not seem to be affected; but he had a decided monomania evincing itself in the notion that he was coming to destitution. For that, there was some foundation in fact; but it was the surgeon's decided opinion that the prisoner was in an unsound state of mind at the moment he cut his wife's throat. On the day before, the prisoner had had his razor sharpened, saying he wanted it to give to some friend; and the prisoner had suffered a severe pecuniary loss not long before, and it had produced a decided effect upon his mind, giving rise to the most gloomy anticipations on account of his wife and family. Parke, B., told the jury that the only question was whether, at the time the prisoner inflicted the wound on his wife, 'he was in a state of mind to be made responsible to the law for her murder. That would depend

(k) *R. v. Stokes*, 3 C. & K. 185. Spring, 1848.

upon the question, whether he, at the time, knew the nature and character of the deed he was committing, and, if so, whether he knew he was doing wrong in so acting. This mode of dealing with the defence of insanity had not, he was aware, the concurrence of medical men; but he must, nevertheless, express his decided concurrence with Rolfe, B.'s views of such cases, that learned judge having expressed his opinion that the excuse of an irresistible impulse co-existing with the full possession of reasoning powers might be urged in justification of every crime known to the law—for every man might be said, and truly, not to commit any crime except under the influence of some irresistible impulse. Something more than this was necessary to justify an acquittal on the ground of insanity, and it would therefore be for the jury to say whether, taking into consideration all that the surgeon had said, which was entitled to great weight, the impulse, under which the prisoner had committed this deed, was one which altogether deprived him of the knowledge that he was doing wrong. Could he distinguish between right and wrong? Reliance was placed on the desire to commit suicide, but that did not always evidence insanity. And here the prisoner was led to attempt his own life by the pressure of a real substantial fact clearly apparent to his perceptive organs, and not by any unsubstantial delusion. The fact, however, must be taken into the account, for it might have had a serious effect on the mind of the prisoner, as also the absence of any attempt to escape from justice, and the want of all sense of sorrow and regret immediately after the death of his wife, contrasted with his more natural state of mind afterwards, when he felt and expressed regret and sorrow for his act. These circumstances ought all to be taken into consideration; but it was difficult to see how they could establish the plea of insanity in a case where there was a total absence of all delusion.' (1)

The prisoner, a youth of eighteen, at first pleaded guilty to an indictment for murder; the judge warned him that this would not affect his fate; his counsel said he was insane, and desired to be hung; the prisoner, however, with apparently perfect intelligence, retracted his plea, and pleaded not guilty. The deceased, a boy, had been found with his throat cut, and the prisoner gave himself up, and admitted the act, recounting all the circumstances with perfect intelligence; and it did not appear that there was any ill-will to the boy, and the prisoner had said, 'I had no particular ill-feeling against the boy, only I had made up my mind to murder some one.' He added that he had wiped his hands and the knife. Afterwards he said that it was well for a Mr. Clark that he had left Chatham, for he had prosecuted him, and he had made up his mind to murder him when he came out of gaol. Evidence was given on behalf of the prisoner of strange conduct, and a

(1) *R. v. Barton*, 3 Cox, C. C. 275. Verdict guilty. Summer, 1848.¹

AMERICAN NOTE.

¹ It is maintained by Mr. Bishop, see vol. i. s. 387, that the question of irresistible impulse is one of fact for the jury, and if established ought to constitute a complete defence. See vol. i. s. 383 (b); and as to moral insanity, see ss. 387-388.

surgeon proved that on two occasions he had sent the prisoner's mother to a lunatic asylum: she was low and desponding, and attempted suicide. The prisoner's brother was of weak intellect. On two occasions he had attended the prisoner, and said he believed he was labouring under what, in the profession, would be considered as moral insanity; that is, he knows perfectly well what he is doing, but has no control over himself. By the moral feelings he meant the propensities which may be diseased, while the intellectual faculties are sound; and that, having heard the evidence, in his opinion, it was reasonable to believe that there must in the prisoner's case be some derangement of the brain, — some deviation from the normal condition of the brain. On cross-examination, he stated that he believed the prisoner knew what he was doing, but that an impulse came upon him, which he could not control; and he adopted an opinion of Dr. Winslow's, that no man could commit suicide in a state of sanity. He believed the prisoner had no proper control over his actions. He had a knowledge of right and wrong, but could not control his actions. Evidence on the part of the Crown was given to show that the prisoner was sane. Wightman, J., said that 'in M'Naghten's case the judges laid down the rule to be that there must, to raise the defence, be a defect of reason from disease of the mind, so as that the person did not know the nature and quality of the act he committed, or did not know whether it was right or wrong. It was not mere eccentricity of conduct which made a man irresponsible for his acts. The medical man called for the defence had defined homicidal mania to be a propensity to kill, and described moral insanity as a state of mind under which a man, perfectly aware that it was wrong to do so, killed another under an uncontrollable impulse. This seemed to be a most dangerous doctrine, and fatal to the interests of society and security of life. The question was whether such a theory was in accordance with law. The rule, as laid down by the judges, was quite inconsistent with such a view; for it was, that a man was responsible for his actions if he knew the difference between right and wrong. It was urged that the prisoner did the act in order to be hanged, and so was under an insane delusion; but what delusion was he under? So far from it, it showed that he was quite conscious of the nature of the act and its consequences. He was supposed to desire to be hanged, and in order to attain the object committed murder. That might show a morbid state of mind, but not delusion. Homicidal mania, again, as described by the witnesses for the defence, showed no delusion; it merely showed a morbid desire for blood. Delusion meant the belief in what did not exist. The question for the jury was, whether the prisoner at the time he committed the act was labouring under such a species of insanity as to be unaware of the nature, the character, or the consequences of the act he committed. In other words, whether he was incapable of knowing that what he did was wrong.' (*m*)

On an indictment for murder, it appeared that the prisoner had been engaged to the deceased, but her friends disapproved, and the engagement was broken off, but renewed afterwards. However, the

(*m*) R. v. Burton, 3 F. & F. 772.

deceased formed an attachment for another, and wrote to the prisoner to break off the engagement; and he wrote three very sensible letters in reply to hers, that he would not stand in her way if she was resolved to part with him, but that he should prefer to have an interview with her, and to hear her determination from her own lips. Accordingly he went to the place where she lived, and they were seen together, and she was afterwards found with her throat cut in three places. The prisoner came up and assisted to carry her to the house, repeatedly stating that he had done it, and should be hanged for it. He said also, 'Poor Bessie! you should not have proved false to me.' He told her grandfather, who asked what was amiss, 'It is your granddaughter, Betsy, murdered. She has deceived me, and the woman that deceives me must die.' The prisoner behaved throughout with apparent indifference, and, on the arrival of the police, said that he wished to give himself up for murdering the young lady; and added, 'I am far happier now I have done it than I was before, and I trust she is.' Evidence was given that there had been insanity in the family, and Dr. Winslow stated that he had seen the prisoner. 'I talked to him largely on the subject of the crime, and I am of opinion that at the present moment he is a man of deranged intellect. He told me he did not recognise he had committed any crime at all, neither did he feel any degree of pain, regret, contrition, or remorse for what he had done. I endeavoured to impress on his mind the serious nature of the crime he had committed. He repudiated the idea of its being a crime either against God or man, and attempted to justify the act, alleging that he considered Miss Goodwin as his own property; that she had been illegally wrested from him by an act of violence; that he viewed her in the light of his wife, who had committed an act of adultery; and that he had as perfect a right to deal with her life as he had with any other description of property,—as the money in his pocket, &c. I endeavoured to prove to him the gross absurdity of his statement and the enormity of his offence: he replied, "Nothing short of a miracle can alter my opinions." The expression that Miss Goodwin was his property was frequently repeated. He killed her, he said, to recover property which had been stolen from him. I could not disturb this, as I thought, very insane idea. I said, "Suppose any one robbed you of a picture, what course would you take to recover it?" He said he would demand its restitution, and if it were not granted, he would take the person's life without compunction. I remarked that he had no right to take the law into his own hands; he should have recourse to legal measures to obtain restitution. He replied that he recognised the right of no man to sit in judgment upon him; he was a free agent; and as he did not bring himself into the world by any action of his own, he had perfect liberty to think and act as he pleased, irrespective of anyone else. I regard these expressions as evidence of a diseased intellect. He said he had been for some weeks under the influence of a conspiracy; there were six conspirators plotting against him, with a view to destroy him, with a chief conspirator at their head. This conspiracy was still going on while he was in prison, and he had no doubt that, if he were at liberty, they would continue their

operations against him, and in order to escape their evil purposes he would have to leave the country. He became much excited, and assumed a wild demoniacal aspect. I am satisfied that aspect was not simulated.' On cross-examination he said, 'I have no doubt he knows that these opinions of his are contrary to those generally entertained, and that, if acted upon, they would subject him to punishment. I should think that he would know that killing a person was contrary to law, and wrong in that sense. I should think, from his saying he should be hanged, that he knew he had done wrong. His moral sense was more vitiated than I ever found that of any other human being. His opinions were pretty much those of atheists, but he was beyond atheism. He seemed incapable of reasoning correctly on any moral subject. He denied the existence of a God and of a future world. He said it was a matter of perfect indifference whether he was dead or alive.' Martin, B., told the jury that what the law meant by an insane man was, a man who acted under delusions, and supposed a state of things to exist which did not exist, and acted thereupon. A man who did so was under a delusion, and a person so labouring was insane. In one species of insanity the patient lost his mind altogether, and had nothing but instinct left. Such a person would destroy his fellow-creatures, as a tiger did his prey, by instinct only. A man in that state had no mind at all, and therefore was not criminally responsible. The law, however, went farther than that. If a man labouring under a delusion did something of which he did not know the real character — something of the effect and consequences of which he was ignorant — he was not responsible. An ordinary instance of such delusion was where a man fancied himself a king, and treated all around him as his subjects. If such a man were to kill another under the supposition that he was exercising his prerogative as a king, and that he was called upon to execute the other as a criminal, he would not be responsible. The result was, that if the jury believed that at the time the act was committed the prisoner was labouring under a delusion, and believed that he was doing an act that was not wrong, or of which he did not know the consequences, he would be excused. If, on the other hand, he well knew that his act would take away life — that that act was contrary to the law of God, and punishable by the law of the land — he was guilty of murder. In his opinion the law was best laid down by Le Blanc, J., in *Bowler's case* [*supra*] who told the jury that it was for them to determine whether the prisoner, when he committed the offence, was incapable of distinguishing right from wrong, or under the influence of any illusion which rendered his mind at the moment insensible of the nature of the act he was about to commit; since in that case he would not be legally responsible for his conduct. On the other hand, provided they should be of opinion that when he committed the act he was capable of distinguishing right from wrong, and not under the influence of such an illusion as disabled him from discerning that he was doing a wrong act, he would be amenable to justice. After noticing other cases, Martin, B., told the jury that they must judge of the act by the prisoner's statements and by what he did at the time. Unless they were satisfied — and it was for the prisoner to make it out — that he

did not know the consequences of his act, or that it was against the law of God and man, and would subject him to punishment, he was guilty of murder. The prisoner's letters appeared to be as sensible letters as ever he had read. Again, the reason the prisoner gave for his act was, 'She should not have proved false to me.' Now, if his real motive was that he conceived himself to have been ill-used, and either from jealousy of the man who was preferred to him, or from a desire of revenge upon her, committed the act, that would be murder. Those were the very passions which the law required men to control; and if the deed was done under the influence of those passions, there was no doubt it was murder. The prisoner's expression, that he should be hanged for it, indicated that he knew the consequences of his act. Another reason he gave for what he had done was, 'The woman who deceives me must die.' If a young lady promised to marry a man, and then changed her mind, it might be truly said that she deceived him; but what would be the consequences to society if men were to say every woman who treated them in that way should die, and were to carry out those views by cutting their throats? The prisoner claimed to exercise the same power over a wife as he could lawfully exercise over a chattel; but that was not a delusion, nor like a delusion. It was the conclusion of a man, who had arrived at results different from those generally arrived at, and contrary to the laws of God and man; but it was not a delusion. It had been said by one of the witnesses that the prisoner did not know the difference between good and evil. If that was a test of insanity, many men were tried who did not know that difference. In truth, it was no test at all. The idea of a conspiracy was a delusion, but the mere setting himself up against the law of God and man was not a delusion at all. The question for the jury was, Was the prisoner insane, and did he do the act under a delusion, believing it to be other than it was? If he knew what he was doing, and that it was likely to cause death, and was contrary to the law of God and man, and that the law directed that persons who did such acts should be punished, he was guilty of murder. (n)

On an indictment for murder, the prisoner appeared to have been on the most intimate terms with the 'unfortunate woman' he had killed. No motive was assigned for the murder. The prisoner having seduced a young woman under a promise of marriage, which he had been unable to fulfil, his reason had been much affected by it. Bramwell, B., read the opinion of the judges in the House of Lords to the jury, and then said, 'It has been urged that you should acquit the prisoner on the ground that, it being impossible to assign any motive for the perpetration of the offence, he must have been acting under what is called a powerful and irresistible influence, or homicidal tendency. But the circumstance of an act being *apparently* motiveless, is not a ground from which you can safely infer the existence of such an influence. Motives exist unknown and innumerable, which might prompt the act. A morbid and restless, but resistible, thirst for blood, would itself be a motive urging to such a deed for its own relief. But if an influence be so powerful as to be

(n) R. v. Townley, 3 F. & F. 839.

termed irresistible, so much the more reason is there why we should not withdraw any of the safeguards tending to counteract it. There are three powerful restraints existing, all tending to the assistance of the person who is suffering under such an influence, — the restraint of religion, the restraint of conscience, and the restraint of law. But if the influence itself be held a legal excuse, rendering the crime punishable, you at once withdraw a most powerful restraint — that forbidding and punishing its perpetration. We must return, therefore, to the simple question you have to determine — did the prisoner know the nature of the act he was doing, and did he know that he was doing what was wrong.' (o)

On a trial for murder, it appeared that the prisoner and his wife were walking along a road, and he had been for some time chiding her, and then he fired a pistol at her and she fell; and he pulled her up, and they proceeded a few yards, when he pushed her down, and inflicted a second wound on her throat with a knife. He then got over a hedge into a field, and ran some distance, until he was overtaken by a person who had seen the woman fall. The prisoner wiped the blood off his hands, saying he had met with a misfortune and cut his finger. He would not tell what he had done with the pistol and knife, but said, 'I did it. I intended to do it, and that will put an end to it. I have been unhappy since Christmas.' At the time he shot and cut his wife, he must have known that persons were within a short distance, having just before met them. The prisoner had threatened to murder his wife before, and on the day before he was heard sharpening a knife, and the wife was afterwards seen running out of the house, followed by the prisoner with a knife similar to one found near the place where the murder was committed. The prisoner had been in gaol for debt for two months in the early part of the year, and had been unfortunate in building speculations. Several witnesses were called for the prisoner, who stated that they believed that the prisoner was not in his right mind, and proved sundry statements made by him as to his property and other matters, which were alleged to be delusions, and that his conduct had been strange, and his manner greatly excited. For the prosecution, witnesses were called to prove that he was sane, and had acted in matters of business in a rational manner. Rolfe, B., told the jury that insanity was the most difficult question which could engage the attention of any tribunal. It was difficult to define it in words, or even in idea. The opinion of the judges was taken by the House of Lords a few years back, as to what was to constitute a definition of insanity, and it created very great difficulty, but after great and anxious deliberation, they came to the conclusion that the old description was the best, viz., that insanity should constitute a defence only when a party was in such a state of mind arising from disease as to be incapable of deciding between right and wrong; but that this definition was imperfect, as all definitions must be, and would require to be modified with reference to each particular case. Applying that law to the present case, what the jury had to consider was, whether the evidence was such as to satisfy them that at the time the act was committed by the pris-

(o) *R. v. Haynes*, 1 F. & F. 666. *R. v. Brough*, 2 F. & F. 838, note, S. P.

oner, he was incapable of understanding right from wrong, as that he could not appreciate the nature of the act he was committing. Perhaps it would be going too far to say that a party was responsible in every case where he had a glimmering knowledge of what was right and wrong. In cases of this description, there was one cardinal rule which should never be departed from, viz., the burden of proving innocence rested on the accused. Every man committing an outrage on the person or property of another, must be, in the first instance, taken to be a responsible being. Such a presumption was necessary for the security of mankind. A man going about the world, marrying, dealing, and acting as if he were sane, must be presumed to be sane till he proves the contrary. The question, therefore, would be, not whether the prisoner was of sound mind, but whether he had made out to their satisfaction that he was not of sound mind. They might arrive at the conclusion, from the nature of his conduct and acts up to the time of the act in question, or shortly preceding it, that he was insane; though he was not capable of proving it by positive testimony, as such was the nature of the mind, that it might be one minute sane, and the next insane, and therefore it might be impossible for a party to give positive evidence of its condition at the particular moment in question. The conclusion seemed irresistible, that the prisoner was to some extent labouring under a delusion, but he was not exempt from responsibility because he was labouring under a delusion as to his property, unless that had the effect of making him incapable of understanding the wickedness of murdering his wife. But when that was the question they had to consider, he could not say that it was altogether immaterial that he was insane on one point only. (p) Indeed his insanity on that point might guide them to a conclusion as to his sanity on the point involved in this case, and, in this view of the matter, there were two circumstances in the evidence of great importance: these were, the want of motive for the commission of the crime, and its being committed under circumstances which rendered detection inevitable. They could come to no other conclusion than that the prisoner had taken away the life of his wife, and that this was murder, unless he had satisfied them that he was not capable at the time of appreciating his acts. (q)

On a trial for murder the prisoner was acquitted, but a question was reserved as to whether the evidence of a medical man was properly admitted. He volunteered his evidence, and wished to give his opinion upon the evidence as to the state of the prisoner's mind at the time the act was done; and he was allowed so to do. The judges did not come

(p) *Quere*, omit 'only,' which seems inconsistent with the context.

(q) *R. v. Layton*, 4 Cox, C. C. 149, Summer, 1849. *R. v. Law*, 2 F. & F. 836, S. P. See *R. v. Leigh*, 4 F. & F. 915, where on the trial of an indictment for murder, insanity was set up as a defence, and Erle, C. J., said, 'The question was, whether the prisoner was or was not responsible when he committed the act, not whether he was not guilty on the ground of insanity; that was an issue far too vague, indefinite, and undefined. The issue was, whether or not, when

he did the act, he was legally responsible; in other words, whether he knew its nature, and knew that it was wrong. The distance, indeed, between the extreme points of manifest mania and perfect sense was great, but they approach by gradual steps and slow degree. The law, however, did not say that when any degree of insanity existed, the party was not responsible, but that when he was in a state of mind to know the distinction between right and wrong, and the nature of the act he committed, he was responsible.' See *R. v. Southey*, 4 F. & F. 864.

to any formal resolution; but they all thought that in such a case a witness of medical skill might be asked, whether in his judgment such and such appearances were symptoms of insanity, and whether a long fast, followed by a draught of strong liquor, was likely to produce a paroxysm of the disorder in a person subject to it? and that by such questions the effect of his testimony might be got in an unexceptionable manner. Several of the judges doubted whether the witness could be asked on the very point which the jury were to decide; viz., whether, from the testimony given in the case, the act with which the prisoner was charged was, in his opinion, an act of insanity? (*r*) In a case of maliciously wounding, where it was proposed to call a physician who had heard the whole evidence, to give his opinion as to the insanity of the prisoner, J. A. Park, J., after referring to the preceding case, allowed the physician to be asked whether the facts and appearances proved showed symptoms of insanity. (*s*)

Where the defence to an indictment for murder was that the prisoner was insane at the time he committed the act, and witnesses were called to prove that insanity had existed in many members of the prisoner's family and that he had been insane for three years, a physician, who had been in court during the whole trial, was asked by the counsel for the prosecution 'whether, from all the evidence he had heard, both for the prosecution and defence, he was of opinion that the prisoner, at the time he did the act, was of unsound mind?' and the opinion of the judges in answer to the fifth question (*t*) was cited in support of the question; Alderson, B., and Cresswell, J., held that the question ought not to be put. The proper mode is to ask what are the symptoms of insanity, or to take particular facts, and assuming them to be true, to ask whether they indicate insanity. To take the course suggested is really to substitute the witness for the jury, and allow him to decide upon the whole case. The jury have the facts before them, and they alone must interpret them by the general opinions of scientific men (*u*)

So on the trial of an ejectment where the question turned on the sanity of the testator, and a physician was asked whether in his opinion, from the facts proved in evidence, the testator was sane or insane; Lord Campbell, C. J., said the witness might give general scientific evidence on the causes and symptoms of insanity, but he must not express an opinion as to the result of the evidence he had heard with reference to the sanity or insanity of the testator; his lordship saying peremptorily that he would not allow a physician to be substituted for a jury. (*v*)

Where the defence of insanity has been set up, it has been the common practice to prove that other members of the prisoner's family have been afflicted with insanity; but it is a matter of fact that insanity is often hereditary in a family, and therefore that fact should be proved, in the first instance, by the testimony of medical men, and

(*r*) *R. v. Wright*, R. & R. 456.

(*s*) *R. v. Searle*, 1 M. & Rob. 75. 1831.

(*t*) *Supra*, 126.

(*u*) *R. v. Frances*, 4 Cox, C. C. 57, S. P.
R. v. Burton, 3 F. & F. 772.

(*v*) *Doe d. Bainbrigge v. Bainbrigge*, 4 Cox, C. C. 454. The verdict was for the plaintiff, which prevented this ruling from being questioned in the court above.

then the inquiry whether another member of the prisoner's family has been insane will be legitimate. (w)¹

Where, in support of a defence of insanity the prisoner's counsel attempted to quote from 'Cooper's Surgery' the author's opinions on the subject, in his address to the jury, on the ground that they were the sentiments of one who had studied the subject, and submitted that it was admissible in the same way as opinions of scientific men on matters appertaining to foreign law; Alderson, B., said: 'I should not allow you to read a work on foreign law. Any person who was properly conversant with it might be examined; but then he adds his own personal knowledge and experience to the information he may have obtained from books. We must have the evidence of individuals, not their written opinions. You surely cannot contend that you may give the book in evidence, and if not, what right have you to quote from it in your address, and do that indirectly which you would not be permitted to do in the ordinary course?' And on its being said that it was certainly done in M'Naghten's case, Alderson, B., added, 'And that shows still more strongly the necessity for a stringent adherence to the rules laid down for our observance. But for the non-interposition of the judge in that case, you would not probably have thought it necessary to make this struggle now.' (x)

The application of the rules and principles laid down in these cases to each particular case as it may arise, will necessarily in many instances be attended with difficulty; more especially with regard to the true interpretation of the expressions, which state that the prisoner, in order to be a proper subject of exemption from punishment on the ground of insanity, should appear to have been unable '*to distinguish right from wrong*,' or to discern '*that he was doing a wrong act*,' or should appear to have been '*totally deprived of his understanding and memory*,' as even in Hadfield's case his expressions when apprehended, that 'he was tired of life,' that 'he wanted to get rid of it,' and that 'he did not intend anything against the life of the King, but knew that the attempt only would answer his purpose,' seem to show that he must have been aware that he was doing a *wrong act*, though the degree of its criminality might have been but imperfectly presented to him, through the morbid delusion by which his senses and understanding were affected. But it is clear that idle and frantic humours, actions occasionally unaccountable and extraordinary, mere dejection of spirits, or even such insanity as will sustain a commission of lunacy, will not be sufficient to exempt a person from punishment who has committed a criminal act. And it seems that though if there be a total permanent want of reason, or if there be a total temporary want

(w) R. v. Tucket, 1 Cox, C. C. 103, Maule, J.

(x) R. v. Crouch, 1 Cox, C. C. 94.

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¹ There appears to be considerable doubt in America as to the admissibility of the opinions of persons not experts on questions of insanity, see *Florey v. Florey*, 24 Ala. 241; *Choice v. S.*, 31 Geo. 424; *Real v. P.*, 42 N. Y. 270. As to admitting medical evidence on hypothetical statements, see *Reed*

r. P., 1 Parker, C. R. 481; *P. v. McCann*, 3 Parker, C. R. 272, as to enquiries into sanity of other members of prisoner's family, *P. v. Smith*, 31 Cal. 466; *Newcomb v. S.*, 7 Miss. 383; *S. v. Felter*, 25 Iowa, 67; *P. v. Garoutt*, 17 Mich. 9; *S. v. Windsor*, 5 Harring. 512.

of it when the offence was committed, the prisoner will be entitled to an acquittal; yet, if there be a partial degree of reason, a competent use of it, sufficient to have restrained those passions which produced the crime; if there be thought and design, a faculty to distinguish the nature of actions, to discern the difference between moral good and evil; then, upon the fact of the offence proved, the judgment of the law must take place. (*y*)

In Alison's Principles of the Criminal Law of Scotland (*z*) (and there is no difference between the law of England and the law of Scotland with reference to insanity), it is said, that 'to amount to a complete bar of punishment, either at the time of committing the offence, or of the trial, the insanity must have been of such a kind as entirely to deprive the prisoner of the use of reason, *as applied to the act in question*, and the knowledge that he was doing wrong in committing it. If, though somewhat deranged, he is able to distinguish right from wrong, *in his own case*, and to know that he was doing wrong in the act which he committed, he is liable to the full punishment of his criminal acts.' (*a*)

If a man in his sound memory commits a capital offence, and before arraignment for it he becomes mad, he ought not to be arraigned for it, because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner become mad, he shall not be tried, as he cannot make his defence. If, after he is tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if after judgment he becomes of non-sane memory, execution shall be stayed; for, peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution. (*b*)

By 7 & 8 Geo. 4, c. 28, s. 2, if any person, being arraigned upon or charged with any indictment or information for treason, felony, piracy, or misdemeanor, shall stand mute of malice, or will not answer directly to the indictment or information, in every such case it shall be lawful for the court, if it shall so think fit, to order the proper officer to enter a plea of 'not guilty,' on behalf of such person; and the plea so entered 'shall have the same force and effect as if such person had actually pleaded the same.' A prisoner, when called upon to plead to an indictment, stood mute, the jury were therefore sworn to try whether he was mute of malice or by the visitation of God. A verdict of mute of malice having been returned, the court ordered a plea of 'not guilty' to be entered on the record. (*c*)

Where, on a prisoner being brought up to plead, his counsel stated

(*y*) Per Yorke, Sol.-Gen., in Lord Ferrers's case, 19 Howell's St. Tri. 947, 948, *et per* Lawrence, J. R. v. Allen, Stafford Lent Assizes, 1807, MS. And see Lord Thurlow's judgment in the Attorney-General v. Parnter, 3 Br. Cha. Ca. 441.

(*z*) P. 654.

(*a*) Cited by Sir J. Campbell, Att.-Gen. in R. v. Oxford, 9 C. & P. 532.¹

(*b*) 4 Blac. Com. 25. 1 Hale, 35.

(*c*) R. v. Schleter, 11 Cox, C. C. 409; as to the mode of proceeding before this statute,

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¹ If the insane delusion has reference to something wholly unconnected with the crime, it will afford no defence. S. v.

Gut, 13 Minn. 341; S. v. Simms, 71 Mo. 538.

that he was insane, and a jury was sworn to try whether he was so or not, Williams, J., held that the counsel for the prosecution should call his witnesses to show that the prisoner was sane and capable of pleading; as this was not so much an issue joined as a preliminary inquiry for the information of the Court. (d) But in a similar case, Cresswell, J., held, notwithstanding the preceding case, that, as the presumption is that a man is sane, if the prisoner's counsel suggested that he was insane, he must give evidence of the fact. (e)

But in case a person in a frenzy happen, by some oversight, or by means of the gaoler, to plead to his indictment, and is put upon his trial, and it appears to the Court upon his trial that he is mad, the judge in his discretion may discharge the jury of him and remit him to gaol to be tried after the recovery of his understanding, especially in case any doubt appear upon the evidence touching his guilt, and this *in favorem vitæ*; and if there be no colour of evidence to prove him guilty, or if there be pregnant evidence to prove his insanity at the time of the fact committed, then upon the same favour of life and liberty it is fit that the trial proceed in order to his acquittal. (f)

The prisoner being arraigned on two indictments for murder, and having with apparent intelligence pleaded to one and declined to plead to the other, the plea of not guilty was entered for him by statute, with the assent of counsel who appeared for him; the case was then opened, and the first witness examined, and it was then set up by his counsel that he was insane and not in a fit state to be tried: held, that the proper time for making that suggestion was before the prisoner pleaded, and that, had it then been made, a jury should have been impanelled to try the question whether he was sane and in a fit state to be tried; but that, as the trial had been begun, and it would be manifestly inconvenient to recommence the trial of the collateral issue, and as, moreover, it appeared that the evidence as to the prisoner's present sanity was very much mixed up with the general question of his sanity, it was open to the Court, under 39 & 40 Geo. 3, c. 94, to take the whole of the evidence, and then leave to the jury both questions as to the prisoner's state of mind at the time of the act, and at the time of trial. (g)

A person deaf and dumb from four years of age was indicted for larceny from the person, and not answering when called upon to plead, the jury found the prisoner 'mute by the visitation of God.' The Court then ordered a plea of 'not guilty' to be entered, and the trial to proceed. A relation of the person, who could in some degree communicate with the prisoner by means of signs, was sworn to interpret the nature of the proceedings and the evidence, and the Court assigned counsel to the prisoner. At the conclusion of the case, after the summing up of the presiding judge, the jury found the prisoner guilty, but in answer to a question left to them in the summing up found that the prisoner 'was not capable of understanding, and, as a fact, had not understood the nature of the proceedings,' — Held, that the

see 1 Hawk. P. C. c. 1, s. 4; Ley's case, 1 Lewin, 239. Hullock, B.; Bac. Abr. Idiot (B). 1 Hale, 33, 35, 36; Somerville's case, 1 And. 107. 1 Sav. 50, 56; Fost. 46. Kel. 13. 1 Lev. 61. 1 Sid. 72.

(d) R. v. Davies, 3 C. & K. 323.

(e) R. v. Turton, 6 Cox, C. C. 385.

(f) Bac. Abr. Idiot (B). 1 Hale, 35, 36, per Foster, J. 18 St. Tri. 411.

(g) R. v. Southey, 4 F. & F. 864.

above finding shewed that the prisoner was at the time of the trial of non-sane mind; therefore, that the Court were wrong in entering a plea of not guilty, and in allowing the trial to proceed. That they ought to have discharged the jury, and ordered the prisoner to be detained during Her Majesty's pleasure, under 39 & 40 Geo. 3, c. 94, s. 2; and the conviction was quashed. (*h*)

By 39 & 40 Geo. 3, c. 94, s. 2, 'if any person indicted for any offence shall be insane, and shall upon arraignment be found so to be by a jury lawfully impanelled for that purpose, so that such person cannot be tried upon such indictment; or if upon the trial of any person so indicted, such person shall appear to the jury charged with such indictment to be insane, it shall be lawful for the Court, before whom any such person shall be brought to be arraigned or tried as aforesaid, to direct such finding to be recorded, and thereupon to order such person to be kept in strict custody till his Majesty's pleasure shall be known.' And it is further enacted, 'that if any person charged with any offence shall be brought before any Court to be discharged for want of prosecution, and such person shall appear to be insane, it shall be lawful for such Court to order a jury to be impanelled to try the sanity of such person; and if the jury so impanelled shall find such person to be insane, it shall be lawful for such Court to order such person to be kept in strict custody, in such place, and in such manner as to such Court shall seem fit, until his Majesty's pleasure shall be known.'

The prisoner was indicted for assaulting one E. Earl, and beating her with intent to murder her. The jury found specially that he was insane at the time of committing the offence, *and also at the time of the trial*, and that they acquitted him on account of such insanity, and the judge ordered him to be kept in custody accordingly. The judges were unanimously of opinion that the second section applies to all cases, though only misdemeanors,—and that though mere insanity at the time of the offence would not have warranted an order, yet insanity found at the time of the trial did warrant it. (*i*)

By the Trial of Lunatics Act, 1883 (46 & 47 Vict. c. 38), s. 2, (1) 'where in any indictment or information any act or omission is charged against any person as an offence, and it is given in evidence on the trial of such person for that offence, that he was insane so as not to be responsible according to law for his actions, at the time when the act was done or omission made, then if it appears to the jury before whom such person is tried, that he did the act or made the omission charged, but was insane as aforesaid at the time when he did or made the same, the jury shall return a special verdict to the effect that the accused was guilty of the act or omission charged against him, but was insane as aforesaid, at the time when he did the act or made the omission.'

(2) 'When such special verdict is found the Court shall order the accused to be kept in custody as a criminal lunatic, in such place and in such manner as the Court shall direct till Her Majesty's pleasure shall be known, and it shall be lawful for Her Majesty thereupon and

(*h*) *R. v. Berry*, 1 Q. B. D. 447; 45 L. J. Summer Assizes, 1820, Hil. T. 1821, MS. M. C. 123; 13 Cox, C. C. 189.

(*i*) *R. v. Little*, *cor.* Wood, B. Surrey

Bayley, J., and Russ. & Ry. 430.

from time to time, to give such order for the safe custody of the said person during pleasure, in such place and in such manner as to Her Majesty may seem fit.'

By the Criminal Lunatics Act, 1884, (*j*) (47 & 48 Vict. c. 64), s. 2 (1), 'where a prisoner is certified in manner provided by this Act to be insane, a Secretary of State may, if he thinks fit, by warrant, (*jj*) direct such prisoner to be removed to the asylum named in the warrant, and thereupon such prisoner shall be removed to and received in such asylum and subject to the provisions of this Act, relating to conditional discharge, or otherwise, shall be detained therein, or in any other asylum to which he may be transferred in pursuance of this Act, as a criminal lunatic until he ceases to be a criminal lunatic.'

(2) 'A person shall cease to be a criminal lunatic if he is remitted to prison, or absolutely discharged in manner provided by this Act, or if any term of penal servitude or imprisonment to which he may be subject determines.'

Sec. 3 makes provision for visiting justices to call to their assistance two medical men to examine any prisoner not under sentence of death, and gives power to them, after due examination, to certify that he is insane.

Sec. 4 provides for an enquiry by the Secretary of State, where a prisoner under sentence of death appears to be insane.

By sec. 3, 'where it is certified by two legally qualified medical practitioners that a person being a criminal lunatic (not being a person with respect to whom a special verdict has been returned, that he was guilty of the act or omission charged against him, but was insane at the time when he committed the act or made the omission) is sane, a Secretary of State, if satisfied that it is proper so to do, may by warrant direct such person to be remitted to prison to be dealt with according to law.'

Where a prisoner, indicted for a misdemeanor in uttering seditious words, upon his arraignment showed symptoms of insanity, and an inquest was forthwith taken under the statute, it was held that the jury might form their judgment of the state of the mind of the prisoner from his demeanor while the inquest was being taken, and might thereupon find him to be insane without any evidence being given as to his present state. And that it was unnecessary to ask him whether he would cross-examine the witnesses or offer any remarks or evidence, as that would be a useless prolongation of a painful proceeding. (*k*) So the jury may take into consideration both the conduct of the prisoner in their presence and the evidence given. (*l*)

Where a prisoner's counsel set up the defence of insanity for him, and the prisoner objected to that defence, asserting that he was not insane, he was allowed to suggest questions to be put to the witnesses for the prosecution, to negative the supposition that he was insane;

(*j*) See also as to disposal of criminal lunatics 23 & 24 Vic., c. 75; 27 & 28 Vic., c. 29; 30 & 31 Vic., c. 12.

(*jj*) As to this being signed by under-secretary, see sec. 15.

(*k*) *R. v. Goode*, 7 Ad. & E. 536. The jury were sworn *in hæc verba*, 'You shall

diligently inquire and true presentment make for and on behalf of our Sovereign Lady the Queen, whether J. G., the defendant, be insane or not, and a true verdict give according to the best of your understanding; so help you God.'

(*l*) *R. v. Davies*, 6 Cox, C. C. 326.

and the judge, at the request of the prisoner, allowed additional witnesses to be called on his behalf for the same purpose. (*m*)

If the jury are of opinion that the prisoner did not in fact do all that the law requires to constitute the offence charged, supposing the prisoner had been sane, they must find him not guilty generally, and the Court have no power to order his detention, although the jury should find that he was in fact insane. Where, therefore, on an indictment for treason, which stated, as an overt act, that the prisoner discharged a pistol loaded with powder and a bullet, the jury found that the prisoner was insane at the time when he discharged the pistol, but whether the pistol was loaded with ball or not there was not satisfactory evidence, the Court expressed a strong opinion that the case was not within the statute. (*n*)

If the acts proved to have been done by the prisoner be such as would have amounted to the crime charged, if they had been done by a person of sane mind, the grand jury are *bound* to find a bill, in order that the prisoner may be confined. (*o*)

If a prisoner have not at the time of the trial, from the defect of his faculties, sufficient intelligence to understand the nature of the proceedings against him, the jury ought to find that he is not sane, and upon such finding he may be ordered to be kept in custody under this Act. (*p*)

Persons drunk.¹ — With respect to a person *non compos mentis* from *drunkenness*, a species of madness which has been termed *dementia affectata*, it is a settled rule, that if the drunkenness be voluntary, it cannot excuse a man from the commission of any crime, (*q*) but on the contrary must be considered as an aggravation of whatever he does amiss. (*r*) Yet if a person, by the unskillfulness of his physician, or by the contrivance of his enemies, eat or drink such a thing as causes frenzy, this puts him in the same condition with any other frenzy, and equally excuses him; also, if by one or more such practices an habitual or fixed frenzy be caused, though this madness was contracted by the vice and will of the party, yet the habitual and fixed frenzy caused thereby puts the man in the same condition as if it were contracted at first involuntarily. (*s*)

In a case of maliciously stabbing, a very learned judge observed, that with regard to the intention, drunkenness might perhaps be adverted to according to the nature of the instrument used. If a man used a stick, a jury would not infer a malicious intent so strongly against

(*m*) *R. v. Pearce*, 9 C. & P. 667. Bosanquet, J.

(*n*) *R. v. Oxford*, 9 C. & P. 525, Lord Denman, C. J., Alderson, B., and Patteson, J.

(*o*) *R. v. Hodges*, 8 C. & P. 195, Alderson, B.

(*p*) *R. v. Dyson*, 7 C. & P. 305, n. S. C., 1 Lewin, 64. Parke, B.

(*q*) Co. Lit. 247. 1 Hale, 32. 1 Hawk. P. C. c. 1, s. 6.

(*r*) 4 Blac. Com. 26. Plowd. 19. Co. Lit. 247. *Nam omne crimen ebrietas incendit et detegit.* And see *Beverley's case*, 4 Co. 125.

(*s*) 1 Hale, 32. Though voluntary drunkenness cannot excuse from the commission of crime, yet where, as upon a charge of

AMERICAN NOTE.

¹ In America the law is to the same effect and drunkenness is no excuse for crime, but it is always an element for the consideration of the jury where the question of intention

enters into the crime. A man labouring under *delirium tremens* or insane from drunkenness is not responsible.

him, if drunk, when he made an intemperate use of it, as they would if he had used a different kind of weapon; but where a dangerous instrument was used, which, if used, must produce grievous bodily harm, drunkenness could have no effect on the consideration of the malicious intent of the party. (t) So drunkenness is often very material where the question is as to the intent with which an act was done.² On an indictment for inflicting a bodily injury dangerous to life, with intent to murder, it appeared that the prisoners were both very drunk at the time, and Patteson, J., told the jury, that 'although drunkenness is no excuse for any crime whatever, yet it is often of very great importance in cases where it is a question of intention. A person may be so drunk as to be utterly unable to form any intention at all, and yet he may be guilty of very great violence.' (u) So where a prisoner was indicted for shooting with intent to murder, and he was shown to have been intoxicated shortly before he fired the shot; Coleridge, J., told the jury, that 'drunkenness is ordinarily neither a defence nor excuse for crime, and where it is available as a partial answer to a charge, it rests on the prisoner to prove it, and it is not enough that he was excited or rendered more irritable, unless the intoxication was such as to prevent his restraining himself from committing the act in question, or to take away from him the power of forming any specific intention.' (v) And where, on an indictment for attempting to commit suicide, it appeared that the prisoner had thrown herself into a well, and the witness who proved this, stated that at the time she did so, she was so drunk as not to know what she was about; Jervis, C. J., said, 'If the prisoner was so drunk as not to know what she was about, how can you say that she *intended* to destroy herself?' (w) So drunkenness may be taken into consideration in cases where what the law deems sufficient provocation has been given, because the question is, in such cases, whether the fatal act is to be attributed to the passion of anger excited by the previous provocation, and that passion is more easily excitable in a person when in a state of intoxication than when he is sober. (x) Where the

murder, the material question is, whether an act was premeditated or done only with sudden heat and impulse, the fact of the party being intoxicated has been holden to be a circumstance proper to be taken into consideration. By Holroyd, J., in *R. v. Grindley*, Worcester Sum. Ass. 1819, MS. But in a case of murder by stabbing with a bayonet, where *R. v. Grindley* was relied upon, J. A. Park, J., in the presence of Littledale, J., said, 'Highly as I respect that late excellent Judge (Holroyd), I differ from him, and my brother Littledale agrees with me. He once

acted upon that case, but afterwards retracted his opinion, and there is no doubt that that case is not law.' *R. v. Carroll*, 7 C. & P. 145.¹

(t) *R. v. Meakin*, 7 C. & P. 297. Alderson, B.

(u) *R. v. Cruse*, 8 C. & P. 541. *R. v. Doherty*, 16 Cox, C. C. 306.

(v) *R. v. Monkhouse*, 4 Cox, C. C. 55.

(w) *R. v. Moore*, 3 C. & K. 319.

(x) *R. v. Thomas*, 7 C. & P. 817. Parke, B. *Pearson's case*, 2 Lewin, 144. J. A. Park, J.

AMERICAN NOTES.

¹ There are many American cases which go to show that an habitual frenzy from drunkenness will excuse crime, Bishop, i. s. 406.

² In America where by statute murder is divided into two degrees, and to constitute murder in the first degree, there must be a

specific intent to take life, intoxication destroying intent will reduce the murder to the second degree, Bishop, i. ss. 409, 410. Mr. Bishop seems of opinion that in larceny there must be a specific intent to steal, and therefore intoxication destroying intent will afford a defence.

question is whether words have been uttered with a deliberate purpose, or are merely low and idle expressions, the drunkenness of the party uttering them is proper to be considered. (y) But if there is really a previous determination to resent a slight affront in a barbarous manner, the state of drunkenness in which the prisoner was, ought not to be regarded; for it would furnish no excuse. (y) So, upon an indictment for stabbing, the jury may take into their consideration, among other circumstances, the fact of the prisoner being drunk at the time, in order to determine whether he acted under a *bona fide* apprehension that his person or property was about to be attacked. (z) So on an indictment for an assault, in considering whether the prisoner apprehended an assault upon himself, the jury may take into consideration the state of drunkenness in which he was. (a) Where a man feloniously wounded another while suffering from *delirium tremens* it was held that he was insane at the time he committed the act. (b)

Subjection to power of others. — III. Persons are properly excused from those acts which are not done of their own free will, but in *subjection to the power of others*. (c) Thus, though a legislator establish iniquity by a law, and command the subject to do an act contrary to religion and sound morality; yet obedience to such laws, while in being, is a sufficient extenuation of civil guilt before the municipal tribunal; though a different decree will be pronounced in *foro conscientiae*. (d) And actual force upon the person and present fear of death may, in some cases, excuse a criminal act. Thus, although the fear of having houses burnt or goods spoiled is no excuse in law for joining and marching with rebels, yet an actual force upon the person and present fear of death may form such excuse, provided they continue all the time during which the party remains with the rebels. (e)¹ And in general the person committing a crime will not be answerable if he was not a free agent, and was subject to actual force at the time the act was done. Thus, if A. by force take the arm of B., in which is a weapon, and therewith kill C., A. is guilty of murder, but not B.: but if it be only a moral force put upon B., as by threatening him with duress or imprisonment, or even by an assault to the peril of his life, in order to compel him to kill C., it is no legal excuse. (f) An idiot or lunatic, or a child so young as not to be punishable for his criminal act, when made use of for the purpose of committing crimes, are merely the instruments of the procurer, who will be answerable as a principal. (g) As to persons in *private relations*, the principal case where constraint of a superior is allowed as an excuse for criminal

(y) R. v. Thomas, *ibid*.(z) Marshall's case, 1 Lewin, 76. J. A. Park, J. Goodier's case, *ibid*. Parke, J.

(a) R. v. Gamlen, 1 F. & F. 90. Crowder, J.

(b) R. v. Davis, 14 Cox, C. C. 563.

(c) 1 Hale, 43. 4 Blac. Com. 27.

(d) 4 Blac. Com. 27.

(e) Per Lee, C. J. 18 Sta. Tri. 393, 394. R. v. Tyler, 8 C. & P. 616.

(f) 1 Hale, 433. 1 East, P. C. c. 5, s. 12, p. 225.

(g) 1 Hawk. P. C. c. 31, s. 7. 1 East. P. C. c. 5, s. 14, p. 228.

AMERICAN NOTE.

¹ See U. S. v. Haskell, 4 Wash. C. C. 102. U. S. v. Vigol, 2 Val. 346.

misconduct proceeds upon the matrimonial subjection of the *wife* to her husband; for neither a *child* nor a *servant* is excused the commission of any crime, whether capital or not capital, by the command or coercion of the parent or master. (*h*)

Feme covert.¹—But a *feme covert* is so much favoured in respect of that power and authority which her husband has over her, that she shall not suffer any punishment for committing a bare theft, or even a burglary, by the coercion of her husband, or in his company, which the law construes a coercion. (*i*) But this is only the presumption of law; so that if upon the evidence it clearly appear that the wife was not drawn to the offence by her husband, but that she was the principal inciter of it, she is guilty as well as the husband. And if she be any way guilty of procuring her husband to commit the offence, it seems to make her an accessory before the fact in the same manner as if she had been sole. (*j*) And if she commit a theft of her own voluntary act, or by the bare command of her husband, or if she be guilty of murder, treason, or robbery, (*k*) in company with, or by coercion of her husband, (*kk*) she is punishable as much as if she were sole. (*l*) And she will be guilty in

(*h*) 1 Hale, 44, 516. 1 Hawk. P. C. c. 1, s. 14. Moor. 813. Kel. 34.

(*i*) 1 Hale, 45. 1 Hawk. P. C. c. 1, s. 9. 4 Blac. Com. 28. Kel. 31. According to some, if a wife commit a larceny by the command of her husband, she is not guilty; which seems to be the law if the husband be *present*, but not if he be absent at the time and place of the felony committed. 1 Hale, 45.

(*j*) 1 Hale, 516. 2 Hawk. P. C. c. 29, s. 24.

(*k*) It seems this is not so as to robbery, see *R. v. Torpey*, 12 Cox, C. C. 45, and *R. v. Dykes*, 15 Cox, C. C. 771, where Stephen, J., directed a wife to be acquitted on an indictment for highway robbery with violence jointly with her husband, the jury having found that she had acted under her husband's compulsion. See note (*l*) *infra*.

(*kk*) *R. v. Buncombe*, 1 Cox, C. C. 183.

(*l*) 1 Hawk. P. C. c. 1, s. 11. 1 Hale, 45, 47, 48, 516. Kel. 31. 2 Blac. Com. 29. The reason given is the heinousness of those crimes. I find no *decision* which warrants the position in the text, as to treason, murder, or robbery. Somerville's case, 1 And. 104, which is the only case where husband and wife have been convicted of treason, only shows that a wife may be convicted of treason with her husband. There Arden and his wife were charged with procuring Somerville to destroy the Queen, and both found guilty, but as none of the evidence is stated, it may have been that the wife was the instigator, and both properly convicted. In Somerset's case, which is the only case of a wife convicted, as well as her husband, as an accessory to a murder, according to 3

Inst. 50, the Earl and Countess were indicted as accessories before the fact, to the murder of Sir T. Overbury, the wife was arraigned alone first, and pleaded guilty, and being asked what she had to say why judgment of death should not be given against her, she said, 'I can much aggravate, but nothing extenuate my fault.' (2 St. Tr. 957.) Assuming, therefore, that the indictment was joint against both, the case only proves that the wife *may* properly be convicted upon her own confession, which indicates that she was the more guilty party; as it is clear she was in this case. See Hume's Hist. Eng. vol. 6, p. 68, &c. But as the Earl and Countess were separately arraigned, and on different days, and as the indictment against the Earl, as recited in his pardon (2 St. Tr. 1014), is against him alone, I infer that the Countess was indicted alone; if so, the case is merely that of a wife pleading guilty to an indictment charging her alone as accessory, and unless in such a case she either pleaded that she committed the offence in company with her husband (as it seems she may, 1 Hale, 47. M. 37, Ed. 3. Rot. 34), or such appeared to be the case upon her trial, no question as to coercion could arise. In *R. v. Alison*, 8 C. & P. 418, Patteson, J., mentions an old case, where a husband and wife, intending to destroy themselves, took poison together; the husband died, but the wife recovered, and was tried for the murder, and 'acquitted solely on the ground that, being the wife of the deceased, she was under his control, and inasmuch as the proposal to commit suicide had been first suggested by him, it was considered that she was not a free agent;' but I know from the very

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¹ See *Davis v. S.*, 15 Ohio, 72; *Freel v. S.*, 21 Ark. 212.

the same manner of all those crimes which, like murder, are *mala in se*, and prohibited by the law of nature. (*m*) And in one case it appears to have been held by all the judges, upon an indictment against a married woman, for falsely swearing herself to be next of kin and procuring administration, that she was guilty of the offence, though her husband was with her when she took the oath. (*n*) But upon an indictment for disposing of forged notes, it was ruled that a woman was protected by being the wife of a man with whom she was indicted, who disposed of them in her presence. (*o*) So, where on an indictment against husband and wife for feloniously wounding with intent to disfigure, the jury found that the wife acted under the coercion of her husband, and did not herself personally inflict any violence upon the prosecutor, it was held, that she ought to have been acquitted. (*p*)

learned judge himself that he guarded against subscribing to the reason given for this decision. Probably the case referred to is an anonymous one, Moor. 754, where it is said, the question was, whether it was murder in the woman, and the recorder caused the special matter to be found, but no decision is stated, nor have I been able to find the case elsewhere. Before Somerville's case, 26 Eliz., and Somerset's case, A.D. 1615, I find no exception to the general rule that the coercion of the husband excuses the act of the wife. (See 27 Ass. 40, Stamf. P. C. 26, 27, 142. Poulton de Pace Regis, 130. Br. Ab. Coron. 108. Fitz. Ab. Coron. 130, 180, 199.) But after those cases I find the following exceptions in the Books:—Bac. Max. 57, except treason only. Dalton, c. 147, treason and murder, citing for the latter Mar. Lect. 12 (which I conceive refers to the reading of Marrow, a Master in Chancery, in the time of Henry VII. See Willes v. Bridger, 2 B. & A. 282). 1 Hale, P. C. pp. 45, 47, treason, murder, and homicide; and p. 484, treason, murder, and manslaughter. Kelyng, 31, an *obiter dictum*, murder only. Hawk. b. 1, c. 1, s. 11, treason, murder, and robbery. Blac. Com. vol. 1, p. 444, treason and murder; vol. 4, p. 29, treason, and *mala in se*, as murder and the like. Hale, therefore, alone excepts manslaughter, and Hawkins introduces robbery, without any authority for so doing; and, on the contrary, in R. v. Cruse, 8 C. & P. 545, a case is cited, where Burrough, J., held that the rule extended to robbery. It seems long to have been considered that the mere presence of the husband was a coercion (see 4 Blac. Com. 28), and it was so contended in R. v. Cruse; and Bac. Max. 56, expressly states that a wife *can* neither be principal nor accessory by joining with her husband in a felony, because the law intends her to have no will: and in the next page he says, 'If husband and wife join in committing treason, the necessity of obedience doth not excuse the wife's offence, *as it does in felony*.' Now if this means that it does not absolutely excuse, as he has stated in the previous page,

it is warranted by Somerville's case, which shows that a wife *may* be guilty of treason in company with her husband, and which would be an exception to the general rule, as stated by Bacon. So also would the conviction of a wife with her husband for murder in *any* case be an exception to the same rule. Dalton cites the exception from Bacon without the rule, and Hale follows Dalton, and the other writers follow Hale; and it seems by no means improbable that the exceptions of treason and murder, which seem to have sprung from Somerville's and Somerset's cases, and which were probably exceptions to the rule as stated by Bacon, have been continued by writers without adverting to their origin, or observing that the presence of the husband is no longer considered an absolute excuse, but only affords a *prima facie* presumption that the wife acted by his coercion. See the learned argument of Mr. Carrington in R. v. Cruse, 8 C. & P. 541. In 1849, G. Manning and his wife were jointly convicted of murder, but the question discussed in this note was not raised, probably because upon the evidence it was plain she was the more active party in the offence. The case as reported 2 C. & K. 887, and 1 D. C. C. R. 467, does not advert to this question, but the charge of the recorder to the grand jury, 2 C. & K. 903, contains some observations upon it. See R. v. Smith, 1 D. & B. 553, which is quite in accordance with this note, *infra*. C. S. G.

(*m*) 4 Blac. Com. 29. This position of Blackstone, J., is obviously much too large, as it includes larceny and burglary. C. S. G.

(*n*) R. v. Dicks, in 1871, 2 M.S. Sum. tit. Of Offenders, and M.S., Bayley, J.

(*o*) R. v. Atkinson, *post*, 154.

(*p*) R. v. Smith, 1 D. & B. 553. The facts of this case (except as above stated) were not submitted to the judges. As the wife met the prosecutor at a railway station, and induced him to go to a lonely spot where her husband wounded him (see the note to the case), it is clear she was an accessory before the fact, and responsible as such for her acts in the absence of her husband, and

Where, on an indictment against husband and wife for jointly receiving stolen goods, it appeared that a burglary was committed by their two daughters, who were traced to Cranbrooke, where their father and mother then lived, with a quantity of the property stolen, with which they went towards their father's house; and on the same night, between nine and ten o'clock, the mother and her two daughters went to the house of a draper, and brought (q) two trunks, a red and a blue one, and a person who lived next door to the prisoners saw them and their two daughters, on the next day, in the kitchen, where the two daughters were packing a blue box, and the two boxes were afterwards found in London, in consequence of a statement made by the wife, who, when the house was searched, denied that any of the stolen goods were in it, and made various other false statements; and a quantity of the stolen property was found concealed in different parts of the house; the jury found both the husband and wife guilty; it was held, that as the charge against the husband and wife was joint, and it had not been left to the jury to say whether she received the goods in the absence of the husband, the conviction of the wife could not be supported, though she had been more active than her husband. (r)

On an indictment against husband and wife for receiving stolen sugar it appeared that the husband received it in the first instance in the absence of his wife. Some remains of the sugar were found on searching in a sink in the kitchen, and the wife stated that she and her daughter had washed all the sugar away, and that they had burnt the bags in which it was contained, and that she thought it a hard case that she and her husband should be at a loss of four or five pounds. Coltman, J., told the jury that 'if the husband received the property, knowing it to be stolen, and if the wife received it from him with the like knowledge, and with the purpose of aiding and assisting him in the object which he had in view in receiving it, by turning it to pecuniary profit or in other like manner, although *prima facie* she might be supposed to be acting under the coercion of her husband, that was rebutted by the active part which she took in the matter with the intention above mentioned. But if the part she took was merely for the purpose of concealing her husband's guilt, and of screening him from the consequences, then she ought to be acquitted. A wife cannot be convicted of harbouring her husband, when he has committed a felony, and the mere circumstance of her attempting to conceal what may lead to his detection appears to come within the same principle.' (s)

On an indictment against a wife for receiving stolen goods, it appeared that her husband stole the goods from a shop, and delivered them into her hands. Whether the articles were stolen at one or at several times, or delivered to the prisoner at one or at different times, did not appear. The husband absconded, his house was searched, and a box taken

under the 11 & 12 Vict. c. 46, s. 1, she ought to have been convicted as such accessory. C. S. G.

(q) So in the report; *quære*, bought.

(r) R. v. Archer, R. & M. 143. The marginal note is 'upon a joint charge against husband and wife, of receiving stolen goods. the wife cannot, properly, be convicted, if the husband is,' which seems not to be war-

ranted by the case, which, at most, only decides that where there is no evidence whatever that the wife was present when the goods were received, or of her conduct when they were received, she ought not to be jointly convicted with her husband. C. S. G.

(s) R. v. M'Clarens, 3 Cox, C. C. 425. The wife was acquitted.

from the prisoner, after a struggle on her part to retain it. It contained pawn-tickets which related to the stolen goods. Several of these tickets had been given for articles pledged by the prisoner, who falsely stated as to some that they were birthday presents, and as to others that they were articles in which she dealt. In two instances the prisoner had sent persons to pledge some of the articles, and had received the pawn-tickets and money lent by the pawnbrokers. The jury were told that, as her husband had delivered the stolen articles to the prisoner, the law presumed that she acted under his control in receiving them; but that this presumption might be rebutted: if therefore they were satisfied that at the time when the prisoner received the articles she knew that they were stolen, and in receiving them acted not by reason of any coercion of her husband, but voluntarily, and with a fraudulent intention, she might be found guilty; and on her being found guilty the questions were reserved, whether the direction was right, and whether on the evidence there was any case for the jury; and it was held that the case failed on both points; if there had been plenty of evidence there would have been no case to go to the jury; but it appeared that there was no evidence at all. (t)

Where, on an indictment for larceny, it appeared that the goods were found in the house of the prisoner's husband, who was a blind man, and when they were found the prisoner said she had bought them a long time before; Erle, J., said that if the prisoner had said nothing, and the goods had simply been found in the house of the husband, there would have been no evidence to go to the jury. But as she said she bought the goods, it must be left to the jury to decide whether the goods were in the possession of the prisoner or her husband; and the jury were told that if they were of opinion that the goods were in the possession of the wife without the consent and control of her husband, they must find her guilty. (u)

The prisoner was indicted together with her husband and one Prishous for burglary and receiving. The jury found Prishous guilty of house-breaking, and the prisoner and her husband of receiving. Part of the stolen property was found in the house where the prisoner and her husband lived together, and the evidence warranted the jury in convicting the husband of receiving; but the only evidence which affected the prisoner was that, some time after the robbery, in the absence of her husband, she produced a quantity of the stolen property, and said it was to be destroyed, and said she had been changing some foreign money, and thought she was going to be taken up for it, and asked a young woman to come down, if she were taken, and say a

(t) *R. v. Brooks*, 1 Dears. C. C. 184. This decision is clearly right on the ground that there was no evidence whatever as to the guilty knowledge or conduct of the prisoner at the time the goods were received. Parke, B., said that, as the prisoner received the goods from her husband, 'it is difficult to see how she could be guilty of this offence.' With all deference, it is perfectly easy to suggest cases where a wife may be convicted of receiving stolen goods from her husband. Suppose she incites him to steal a diamond

necklace for her, and he does so in her absence, delivers it to her, and she wears it; or, suppose a thief brings stolen goods to a house, and the husband declines to receive them, but is induced by the wife so to do, and afterwards the husband delivers them to the wife; it cannot be doubted that in these and the like cases she may be convicted, for the plain reason that she is acting in no way under his coercion. C. S. G.

(u) *R. v. Banks*, 1 Cox, C. C. 238.

foreign captain had given her part of the stolen property. It was contended that there was no evidence that she received the property either in the absence of her husband or from any other person than him; and that if there was evidence for the jury, the question would be whether she received it from him, and if not, whether she received it in his absence; but Martin, B., ruled that there was evidence for the jury, and did not leave either of these questions to them. It was held, however, that the questions ought to have been left to the jury, and it was perfectly consistent with the facts that the goods might have been received by the husband at his own house, and so have come into the possession of the wife through her husband in a manner that did not render her liable to be convicted. (*v*)

Where on an indictment against husband and wife for jointly receiving stolen fowls, it appeared that the fowls were found in the husband's house, and the wife said she had bought part from people who came to the house in his absence, and that her husband bought some at Shrewsbury market on Wednesday; and the husband afterwards said that he was not out of the place where he resided on the Wednesday, and had bought 'the fowls' from the person who stole them; so that the evidence showed either a joint receiving by both or a separate receiving by each in the absence of the other, and the jury found both guilty; it was held that, assuming the receiving to have been joint, the wife was entitled to be acquitted, as the offence was committed in her husband's presence; and assuming the receiving to have been separate, the offence against both was not proved as laid, and that the husband was rightly convicted, but the wife not. (*w*)

Upon an indictment against husband and wife for jointly receiving stolen goods, the jury found that the wife received them without the control or knowledge of and apart from her husband, and that the husband afterwards adopted his wife's receipt; and it was held that, upon this finding, the conviction of the husband could not be supported. The word 'adopted' might mean that the husband passively consented to what his wife had done without taking any active part in the matter, and in that case he would not be guilty of receiving. Or, it might mean that he did take such active part; but this rigid construction ought not to be put upon the word 'adopted.' (*x*) But where the thief delivered the stolen property to the prisoner's wife in his absence, and she then paid sixpence on account, but the amount to be paid was not then fixed; and afterwards the prisoner and the thief met, agreed on the price, and the prisoner paid the balance; it was held that the receipt was not complete till the price was fixed, and the money paid, and consequently that the prisoner was rightly convicted of receiving the stolen property. (*y*)

(*v*) *R. v. Wardroper*, Bell, C. C. 249. Martin, B., at the trial rightly treated the indictment as joint and several. See 14 & 15 Vict. c. 100, s. 14; but there was no evidence of a receipt by the wife in the absence of her husband, so as to bring the case within that clause.

(*w*) *R. v. Matthews*, 1 Den. C. C. 596. There was nothing to show any activity on the part of the wife at the time of the receipt. See now the 24 & 25 Vict. c. 96, s. 94, by which persons charged with a joint re-

ceipt of stolen property may be convicted of separate receipts.

(*x*) *R. v. Dring*, D. & B. 329. It was doubted in this case, whether sec. 14 of the 14 & 15 Vict. c. 100, applied to successive receipts of the *whole* property stolen; but sec. 17 of the Statute of Frauds, 29 C. 2, c. 3, is, 'except the buyer shall accept part of the goods so sold, and actually receive the same,' and no one ever doubted that a receipt of the whole was within this clause.

(*y*) *R. v. Woodward*, 1 L. & C. 122.

Where a jury found a wife guilty of stealing from the person, and her husband guilty of receiving the property stolen knowing it to have been stolen, and also found that the wife acted voluntarily and without any restraint on the part of the husband, and that he received the property from his wife knowing it to have been stolen by her; it was held that the husband was rightly convicted of feloniously receiving the property from his wife. (z)

Where the wife is to be considered merely as the servant of the husband, she will not be answerable for the consequences of his breach of duty, however fatal, though she may be privy to his conduct. *C. Squire* and his wife were indicted for the murder of a boy, who was bound as a parish apprentice to the husband, and it appeared in evidence that both prisoners had used the apprentice in a most cruel and barbarous manner, and that the wife had occasionally committed the cruelties in the absence of the husband. But the surgeon who opened the body deposed that, in his judgment, the boy died from debility and want of proper food and nourishment, and not from the wounds, &c., which he had received. *Lawrence, J.*, directed the jury, that as the wife was the servant of the husband, it was not her duty to provide the apprentice with sufficient food and nourishment, and that she was not guilty of any breach of duty in neglecting to do so; though, if the husband had allowed her sufficient food for the apprentice, and she had wilfully withholden it from him, then she would have been guilty. But that here the fact was otherwise; and therefore, though in *foro conscientie* the wife was equally guilty with the husband, yet in point of law she could not be said to be guilty of not providing the apprentice with sufficient food and nourishment. (a)

In inferior misdemeanors a wife may be indicted, together with her husband; (b) and she may be punished with him for keeping a bawdy house; for this is an offence as to the government of the house in which the wife has a principal share; and also such an offence as may generally be presumed to be managed by the intrigues of the sex. (c) So a wife might be jointly convicted with her husband of an assault,

(z) *R. v. M'Athey*, 1 L. & C. 250.

(a) *R. v. Squire and his wife*, *Stafford Lent Assizes*, 1799. MS.

(b) See *R. v. Martin*, 8 A. & E. 481, where husband and wife were convicted of obtaining goods by false pretences, and the judgment reversed on another ground. There is no doubt that in all misdemeanors a wife may be jointly convicted with her husband, as she may be proved to have acted voluntarily; but I find no authority that the same rule as to coercion, which applies to felonies, does not extend to misdemeanors. On the contrary, *R. v. Price*, 8 C. & P. 19, and *Anon.*, *Matth. Dig. Cr. Law*, 262, show that the rule applies to the misdemeanor of uttering base coin; and the reason given in *R. v. Dixon*, 10 Mod. 335, and *R. v. Williams*, *Salk.* 384, as to the keeping of gaming and bawdy houses, that the wife may probably have as great, nay, a greater share in the criminal management of the house, than the husband, tends to show, that, in order to convict the wife she must be acting

voluntarily, and not under coercion. In *R. v. Cruse*, 8 C. & P. 541, the wife had taken a very active part. *R. v. Williams*, and *R. v. Ingram*, *Salk.* 384, were in arrest of judgment, and therefore the Court would presume, if necessary, that the wife had acted voluntarily; and *R. v. Dixon* was on demurrer, and the Court would, and it seems did, hold the indictment good, because it might be proved that the wife was not under coercion. There is no authority, therefore, that the rule does not extend to misdemeanors, and the tendency of the authorities certainly is that it does. C. S. G. See *R. v. Torpey*, 12 Cox, C. C. 45, where it was so ruled.

(c) 1 *Hawk. P. C. c. 1, s. 12*. *Williams's* case, 10 Mod. 63. *Salk.* 384. S. C., in arrest of judgment. So also for keeping a gaming house. *R. v. Dixon and wife*, 10 Mod. 335, on demurrer, where by the indictment the husband and wife, *et uterque eorum* were charged with the offence. See 1 *Bur. R.* 600.

upon an indictment against both, for feloniously inflicting a bodily injury dangerous to life, under 1 Vict. c. 88, s. 5. (*d*) But where the husband and wife were indicted for a misdemeanor, in uttering counterfeited coin, it was held that the same rule which applied to felonies should apply to that case. (*e*) A prosecution for a conspiracy is not maintainable against a husband and wife only; because they are esteemed but as one person in law, and are presumed to have but one will. (*f*)

In all cases where the wife offends alone without the company or coercion of her husband, she is responsible for her offence as much as any feme sole. (*g*) Thus she may be indicted alone for a riot; (*h*) may be convicted of selling gin against the injunctions of the 9 Geo. 2, c. 23, (*i*) or for recusancy. (*j*) And she may be indicted for being a common scold; (*k*) for assault and battery; (*l*) for forestalling; (*m*) for forcible entry; (*n*) or for keeping a bawdy house, if her husband do not live with her; (*o*) and for trespass or slander. (*p*) And she may also be indicted for receiving stolen goods of her own separate act without the privity of her husband; or if he, knowing thereof, leave the house and forsake her company, she alone shall be guilty as accessory; (*q*) and though in a serious offence, such as that of sending threatening letters, the husband be an agent in the transaction, yet, if he be so ignorantly, by the artifice of the wife, she alone is punishable. (*r*) And generally a feme covert shall answer as much as if she were sole for any offence not capital against the common law or statute; and if it be of such a nature that it may be committed by her alone, without the concurrence of the husband, she may be punished for it without the husband, by way of indictment; which being a proceeding grounded merely on the breach of the law, the husband shall not be included in it for any offence to which he is in no way privy. (*s*)

It is no excuse for the wife that she committed the offence by her husband's order and procurement, if she committed it in his absence; at least it is not to be presumed in such case that she acted by coercion. S. Morris was tried for uttering a forged order, knowing it to be forged, and her husband for procuring her to commit the offence; and it appeared that her husband ordered her to do it, but that she uttered the instrument in his absence. Upon a case

(*d*) R. v. Cruse, 2 Moo. C. C. R. 53; S. C., 8 C. & P. 541.

(*e*) R. v. Price, 8 C. & P. 19. Mirehouse, C. S., after consulting Bosanquet and Coltman, JJ.; and *vide* Matth. Dig. Cr. Law, 262. Anon., S. P. per Bayley, J.

(*f*) 1 Hawk. P. C. c. 72, s. 8. 38 E. 3, 3.

(*g*) 4 Blac. Com. 29. See R. v. Robson, L. & C. 93, as to a wife being guilty of larceny of goods of which she is a bailee.

(*h*) Dalt. 447.

(*i*) Croft's case, Str. 1120. See R. v. Ellen Taylor, 3 Burr. 1679.

(*j*) Hob. 96. Foster's case, 11 Co. 62. 1 Sid. 410. Sav. 25.

(*k*) Foxley's case, 6 Mod. 213, 239.

(*l*) Salk. 384.

(*m*) Sid. 410. 2 Keb. 634. *Qu.* and see Bac. Ab. *Baron and Feme* (G) notes.

(*n*) 1 Hale, 21. Co. Lit. 357. 1 Hawk. c. 64, s. 35. That is in respect of such actual violence as shall be done by her in person, but not in respect of what shall be done by others at her command, because such command is void.

(*o*) 1 Hawk. P. C. c. 1, s. 13, n. 11, where 1 Bac. Abr. 294, is cited.

(*p*) 1 Bac. Abr. *Baron and Feme* (G) notes.

(*q*) 22 Ass. 40. Dalt. c. 157.

(*r*) Hammond's case, 1 Leach, 447.

(*s*) 1 Hawk. P. C. c. 1, s. 13. 1 Bac. Abr. *Baron and Feme* (G), where it is said in the notes, that she cannot be indicted for barratry, and Roll. Rep. 39 is cited. But *qu.* and see 1 Hawk. P. C. c. 81, s. 6, and *post*, Book 2, chap. 22, Barratry.

reserved, the judges held that the presumption of coercion at the time of the uttering did not arise, as the husband was absent at that time; and that the wife was properly convicted of the uttering, and the husband of the procuring. (*t*) In a previous case, where the prisoner was indicted for forgery and uttering Bank of England notes, the principal witness stated, that, in consequence of a conversation which he had had some time before with the prisoner's husband, he went to the husband's shop; that the husband was not present, but that he saw the prisoner, who beckoned him to go into an inner room; that she followed him into the room, and that he there told her what her husband had said to him; upon which they agreed about the business, and he bought of her three two pound notes, at one pound four shillings each; that he paid her for the notes, and was to receive eight shillings in change; and that when he was putting the notes into his pocket-book, and before he had received the change, the husband looked into the room, but did not come in or interfere with the business further than by saying, 'Get on with you.' After this the witness and the prisoner returned into the shop where the husband was; the prisoner gave him the change, and both the prisoner and her husband cautioned him to be careful. The counsel for the prisoner objected that she acted under the coercion of her husband; that the evidence would have been sufficient to have convicted the husband, if both the husband and wife had been upon their trial; and that therefore the prisoner ought to be acquitted. (*u*) But Thomson, B., said, 'I am very clear as to the law on this point. The law, out of tenderness to the wife, if a felony be committed in the presence of the husband, raises a presumption *prima facie*, and *prima facie* only, as is clearly laid down by Lord Hale, that it was done under his coercion: (*v*) but it is absolutely necessary that the husband should in such case be actually present, and taking a part in the transaction. Here it is entirely the act of the wife; it is indeed in consequence of a communication previously with the husband, that the witness applies to the wife; but she is ready to deal, and has on her person the articles which she delivers to the witness. There was a putting off before the husband came: and it was sufficient if before that time she did that which was necessary to complete the crime. The coercion must be at the time of the act done, and then the law out of tenderness refers it *prima facie* to the coercion of the husband. But when the crime has been completed in his absence, no subsequent act of his (although it might possibly make him an accessory to the felony of the wife) can be referred to what was done in his absence.' (*w*) And it seems that the correct rule is, that if a felony be shown to have been committed by the wife in the presence of the husband, the *prima facie* presumption is that it was done by his coercion; but such presumption may be rebutted by proof that the wife was the more active party, or by showing an incapacity in the husband to coerce. Thus, if the husband were a cripple, and confined to his bed, his presence then

(*t*) R. v. Morris, East. T. 1814. MS. Bayley, J., and Russ. & Ry. 270.

(*u*) He referred to 2 East, P. C. c. 16, a. 8, p. 559. 1 Hale, 46. Kel. 37.

(*v*) 1 Hale, 516. See R. v. Cohen, 11

Cox, C. C. 99; R. v. Torpey, 12 Cox, C. C. 45.

(*w*) R. v. Martha Hughes, *coram* Thomson, B., Lancaster Lent Assizes, 1813. MS. 2 Lewin, 229, S. C.

would not be sufficient to exonerate the wife. (x) Where, therefore, in a case of arson, a husband and wife were tried together, and it appeared that the husband, though present, was a cripple and bed-ridden in the room; it was held that the circumstances under which the husband was, repelled the presumption of coercion. (y)

A feme covert is not guilty of felony in stealing her husband's goods while they are living together; because a husband and wife are considered but as one person in law, and the husband, by endowing his wife at the marriage with all his worldly goods, gives her a kind of interest in them: for which cause it was at one time held that even a stranger could not commit larceny in taking the goods of the husband by the delivery of the wife. (z)

By the Married Women's Property Act, 1882: (a) Sec. 12. 'Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband (subject as regards her husband to the proviso hereinafter contained), the same remedies and redress by way of criminal proceedings for the protection and security of her own separate property as if such property belonged to her as a feme sole. In any indictment or other proceeding under this section, it shall be sufficient to allege such property to be her property, and in any proceeding under this section a husband or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding, provided always, that no criminal proceeding shall be taken by any wife against her husband by virtue of this Act while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife unless such property shall have been wrongfully taken by the husband when leaving or deserting or about to leave or deserting his wife.' (b)

(z) Per Tindal, C. J., in *R. v. Cruse*, 2 M. C. C. R. 53.

(y) *R. v. Henry & Elizabeth Pollard*, Maidstone Sp. Ass. 1838, before Vaughan, J., who so held, after consulting Tindal, C. J.; cited in *R. v. Cruse*, 2 M. C. C. R. 53.

The following positions seem fairly deducible from the cases upon this subject:— 1st. There is no objection on demurrer to an indictment, which charges husband and wife jointly with the commission of an offence; for the indictment is joint and several, and both may be convicted, if it appear the wife was not acting under the coercion of the husband, or either of them. 2ndly. There is no objection, either in arrest of judgment, or on error, to the joint conviction of husband and wife of the same offence; for she may have been the instigator, and both guilty. 3rdly. Upon the trial of husband and wife, the *prima facie* presumption is, that she acted under his coercion, provided he were actually present at the time the felony was committed. If, therefore, nothing appear but that the felony was committed while they were both together, the jury ought to be directed to acquit the wife. 4thly. This presumption is *prima facie* only, and may be rebutted, either by showing that the wife was the in-

stigatator or more active party, or that the husband, though present, was incapable of coercing, as that he was a cripple, and bed-ridden, or that the wife was the stronger of the two. C. S. G. In *R. v. William & Emma Jones*, Gloucester Sum. Ass. 1841, Coltman, J., after attentively reading this note, said that it was quite correct. MSS. C. C. G.

(z) 1 Hale, 514, where it is put thus: 'If she take or steal the goods of her husband and deliver them to B., who knowing it, carries them away, this seems no felony in B.; for they are taken *quasi* by the consent of her husband. Yet trespass lies against B. for such taking; for it is a trespass; but *in favorem vite* it shall not be adjudged a felony, and so I take the law to be, notwithstanding the various opinions.' And he cites Dalton, cap. 104, p. 268, 269, *ex lectione Cooke* (new edit. c. 157, p. 504). And see 1 Hawk. P. C. c. 33, s. 32. 3 Inst. 110. 2 East, P. C. 558.

(a) 45 & 46 Vict. c. 75.

(b) A wife could not before the Act and cannot now take criminal proceedings against her husband for defamatory libel. *R. v. Lord Mayor of London*, 18 Q. B. D. 772.

By sec. 16. 'A wife doing any act with respect to any property of her husband which if done by the husband with respect to property of the wife would make the husband liable to criminal proceedings by the wife under this Act, shall in like manner be liable to criminal proceedings by her husband.'

Before the 31 & 32 Vict. c. 116 (which see, vol. 2, Larceny), a wife was not guilty of larceny if she stole money in her husband's custody, the joint property of him and others. (c)

Where the prisoner was an apprentice to the prosecutor, and the prosecutor's wife had continual custody of the key of the closet where her husband's plate was usually locked up, and she had pawned some articles of it in order to supply the prisoner with pocket-money, but the articles she pawned were not those which the prisoner was charged with stealing; and the prisoner confessed that he took the articles mentioned in the indictment from the closet, and a pawnbroker proved that he received them in pledge from the prisoner, but it did not appear by what means the prisoner had gained access to the closet from which they were taken; the Court held, that the prosecutor's wife, having the constant keeping of the key of the closet where the plate was usually locked up, and it appearing that the prisoner could not have taken it without her *privity or consent*, it may be presumed that he had received it from her, and therefore he ought to be acquitted. (d) But if the wife steal the goods of her husband, and deliver them to B., who knowing it carries them away, *B. being the adulterer of the wife*, this, according to a very good opinion, would be felony in B.; for in such case no consent of the husband can be presumed. (e)

Thus, where the prosecutor left his wife in the care of his house and property, and during his absence the prisoner, who had lodged for some time previously in the house, took a great many boxes, &c., from the house, and left them at a house to which he had gone a day or two before with the prosecutor's wife, passing her for his own, and where he had hired lodgings; and he soon afterwards brought her with him to the lodgings, where they lived together till he was apprehended, and the wife, who took a small basket with her, swore that there was none of the property but what she had herself taken, or given to the prisoner to take; and the jury found that the prisoner stole the property jointly with the wife; it was held that this was larceny in the prisoner; for though the wife consented, it must be considered that it was done *invito domino*. (f)

So where the prisoner, who lodged at the house of the prosecutor, went away with the prosecutor's wife to Birmingham, where they lived together as man and wife for more than a year; they took with them from the prosecutor's house a box belonging to the prisoner, containing the wife's wearing apparel and a coffee-pot and two candlesticks, the property of the prosecutor. The coffee-pot and candlesticks were used by them at Birmingham, and afterwards sold by the wife, and the prisoner there pledged some articles of wearing apparel, and applied the money to his own use. The jury were directed to

(c) R. v. Willis, R. & M. C. C. R. 375. Dalt. c. 157.

(d) Harrison's case, 1 Leach, 47. 2 East, P. C. 559.

(e) Dalton, cap. 104, pl. 268, 269 (new edit. c. 157, p. 504).

(f) R. v. Tolfree, R. & M. C. C. R. 242, overruling R. v. Clark, R. & M. 376 n. (a).

find the prisoner guilty, if they thought either that the prisoner, going away with the prosecutor's wife for the purpose of an adulterous intercourse, was engaged jointly with her in taking the goods, or that, not being a party to the original taking, the prisoner, after arriving at Birmingham, appropriated any part of the goods to his own use. The jury having found the prisoner guilty, on the ground that there was a joint taking by the prisoner and the wife, the judges were unanimously of opinion that the conviction was right. (*g*)

So, where the prosecutor and his wife were on bad terms, and she arranged with the prisoner to elope with him and live together as man and wife, and the prisoner desired her to bring all the money she could, and to get the money and boxes of clothes ready by a particular night, when he would come for them and take her away; and she put £17 into the boxes, which already contained her clothes, two watches, some silk handkerchiefs, and about £4, and sat up after her husband had gone to bed till the prisoner came, took him into the room where her husband was asleep, and he took the boxes away, and, if her husband had remained asleep, she would have gone off with the prisoner, but, as her husband awoke, she was obliged to stay. It did not appear that any adultery had been committed. The boxes were locked by the wife, and were found in that state in the possession of the prisoner, and were unlocked with keys produced by the wife. Coleridge, J., directed the jury that, if the prisoner took any of the husband's property, there then being an intention to commit adultery with the wife, he was guilty of larceny; and that, having told the wife to bring all the money that she could, it was for them to consider whether he did not intend to steal the property taken away, although he might not, at the time of the taking, know exactly of what that property consisted. (*h*)

Where the prisoner lodged at the prosecutor's house, and knew that he would have to go out very early in the morning, and engaged a porter to be near the house at seven o'clock with his cart; the prisoner and the wife of the prosecutor were then jointly engaged in the house in packing up the articles alleged to be stolen in boxes, and when so packed the prisoner brought the boxes out, and they were put in the cart and driven to the station, the prisoner, the wife, and her three children accompanying them, and all went by the train to Leeds. A fortnight afterwards the prisoner and the wife were found living together at Leeds, in a house which she had taken in her own name, and all the property taken was found there. The wife was called as a witness for the prisoner, and swore that they neither had committed adultery, nor gone away for that purpose. The jury were told that, if they were satisfied that the prisoner and the wife, when they took the property, went away for the purpose of having adulterous intercourse, and had afterwards effected that purpose, they ought to convict; but that if they believed the wife, that they did not go away with any such purpose, and had never committed adultery, they ought to acquit. The jury found the prisoner guilty of larceny, and the conviction was affirmed. (*i*)

(*g*) *R. v. Thompson*, 1 Den. C. C. R. M. C. 70. Where the prosecutor's wife, taking with her articles of her wearing apparel, eloped with the prisoner, the clothes were found in a trunk belonging to the prisoner, 549.

(*h*) *R. v. Tollett*, C. & M. 112.

(*i*) *R. v. Berry*, Bell, C. C. 95; 28 L. J.

Where the prosecutor's wife, taking with her articles of her wearing apparel, eloped with the prisoner, the clothes were found in a trunk belonging to the prisoner,

On an indictment for larceny it appeared that the prisoner was a servant of the prosecutor, and that he was seen to bring a box out of the house of his master on the 28th of July, and that on the night of that day the prisoner and the prosecutor's wife occupied the same bedroom at Bath, and that in that room a police constable found them together, and charged the prisoner with stealing spoons and a watch of the prosecutor. He said, 'I've not stolen anything; what I have taken away is with her consent' (nodding to the wife). She said, 'Yes; I told him to get a fly, and take the boxes.' The constable pointed out a box, and said, 'That is the prosecutor's.' She said, 'Yes, that is the only thing which I have got of his.' The constable took the watch from the prisoner's person. The constable examined a box which the prisoner admitted to be his, and found on the top several articles of female apparel, and under these some silver spoons and sugar tongs of the prosecutor. The prisoner said, 'I did not know the silver was there; the watch is Mrs. F.'s; I got it from her.' The wife proved that she ordered the prisoner to get a fly and take away the boxes, and that the prisoner was not there when she was packing. He did not know of her putting in the spoons or sugar tongs. It was objected that the charge against the prisoner could not be maintained, as he was acting under the control of his mistress, and that she could not be legally charged with stealing from her husband; the jury were directed that, if the prisoner and the wife went away with the intention of carrying on an adulterous intercourse, and if he, when so going away, was concerned in taking away the property of the prosecutor, he was guilty; and, on a case reserved upon the point so raised, Erle, C. J., after argument for the prisoner, said, 'Upon these facts the taking of the box *animo adulterii* was evidence of larceny. The prisoner took his master's property, and with it his master's wife, with the intention of committing adultery. The conviction must therefore be affirmed.' (j)

So, where a wife took thirty-five sovereigns and some clothes from her husband's bedroom, and as she left the house said to the prisoner, 'It's all right, come on;' and he left in a few minutes after, and they were traced to a public house, where they slept together, and when taken into custody the prisoner had twenty-two sovereigns upon him: the jury found him guilty of larceny, on the ground that he received the sovereigns from the wife, knowing that she took them without the authority of her husband; and the conviction was held right; for when a wife becomes an adulteress, she thereby determines her quality of wife, and her property in her husband's goods ceases; and in this case the prisoner was the accomplice of the wife, assisted her, and took the sovereigns, knowing that she had taken them without the husband's consent. (k)

The prisoner, having lodged in the prosecutor's house about a year,

of which the wife had the key, which the prisoner had given her, and she said she put them there; the name of the wife was changed, and a passage ticket taken out in the joint name of Walker. Lefroy, C. J., left the case to the jury, and the prisoner was convicted. *R. v. Glassie*, 7 Cox, 1. This case is extremely ill-reported, and very

little reliance can be placed on it. The facts above stated are taken from the different parts of the report. C. S. G.

(j) *R. v. Mutters*, 34 L. J. M. C. 54; L. & C. 511.

(k) *R. v. Featherstone*, Dears. C. C. R. 369; 23 L. J. M. C. 127.

left, but there was no evidence as to the time or manner of his leaving. The next day the prosecutor's wife left, with only a small bundle under her arm. The prisoner was apprehended on board a vessel bound to Quebec, in company with the wife, who was passing under the name of Mrs. Deer, and the prisoner had tickets for Quebec in the names of Mr. and Mrs. Deer. A great quantity of the prosecutor's property, very much more than could have been comprised in the wife's bundle, and not confined to the wife's clothes, was found in the prisoner's cabin and on his person, on the 10th of April, and it had been missed on the evening of the 9th of that month. There was no other evidence who had taken the articles from the house. The jury found the prisoner guilty of receiving, knowing the goods to have been stolen; and it was held that there was 'some evidence to support the conviction.' (l)

It was held before the Married Women's Property Act that where adultery was neither committed nor intended, a person was not guilty of larceny in aiding a wife in taking away her husband's goods. (m) Now, however, by the combined effect of ss. 12 and 16 of that Act, (n) a wife can be convicted of taking her husband's goods when about to leave or desert him, and her accomplice would therefore be equally guilty.

Where a wife took her husband's goods from a place within the jurisdiction of the Central Criminal Court, and was found committing adultery with the prisoner at Liverpool, the husband's goods being then in the prisoner's possession, but there was no evidence that the goods had been under the prisoner's control at any place within the jurisdiction of the Central Criminal Court, it was held that the prisoner could not be indicted in that court for larceny. (o)

Where the prisoner was charged with receiving stolen goods, and it appeared that they had been brought to him by the prosecutor's wife, who had committed adultery with him, it was held before the Married Women's Property Act, 1882, that he could not be convicted because a wife could not steal her husband's goods. (p) It would seem, however, that since that Act he might be convicted in such a case. (q)

A feme covert shall not be deemed accessory to a felony for receiving the husband who has been guilty of it, as her husband shall be for receiving her; nor shall be a principal in receiving her husband when his offence is treason; for she is *sub potestate viri*, and bound to receive

(l) *R. v. Deer*, L. & C. 240; 32 L. J. M. C. 33. The case was not argued, and no grounds are given for the decision. As the only possible inferences from the facts are either that the prisoner took the goods, or joined with the wife in taking them, or that the wife took them or part of them, and afterwards delivered them to the prisoner, it is clear that he was guilty of stealing and

not of receiving, and therefore this decision is wrong. C. S. G.

(m) *R. v. Avery*, Bell, C. C. 150, 20 L. J. M. C. 85.¹

(n) *Ante*, pp. 154, 155.

(o) *R. v. Prince*, 11 Cox, C. C. 145.

(p) *R. v. Kenny*, 2 Q. B. D. 307.

(q) 45 & 46 Vict. c. 75, ss. 12 and 16, *ante*.

AMERICAN NOTE.

¹ In *R. v. Avery* it is clear that the thief knew he was taking the goods without the consent of the husband, but it was held there was no larceny. In New York, however, it was held that apart from any question of

adultery, if a man takes the goods of the husband, knowing that he does so without his consent, he is guilty of larceny. *P. v. Cole*, 43 N. Y. 508, 511.

him. (r) Neither is she affected by receiving, jointly with her husband, any other offender. (s)

It is no ground for dismissing an indictment for burglary or larceny as to the wife, that she is charged with her husband and described as his wife; for the indictment is joint and several according as the facts may appear; and on such an indictment the wife may be convicted, and the husband acquitted. (t)

In burglary or larceny, if a man and woman are indicted, and the woman pretends to be the man's wife, but is not so described in the indictment, the onus of proving that she is his wife is upon her. Thus where Thomas Wharton and Jane Jones were indicted for burglary, and the woman pleaded that she was married to Wharton, and would not plead to the name of Jones, the grand jury who found the bill was sent for, and in their presence, and with their consent, the Court inserted the name Jane Wharton, otherwise Jones, not calling her the wife of Thomas Wharton, but giving her the addition of spinster, upon which she pleaded; and the Court told her that if she could prove that she was married to Wharton before the burglary, she should have the advantage of it: but on the trial she could not, and was found guilty, and judgment given upon her. (u) If a woman be indicted as a single woman, and pleads to the felony, that is *prima facie* evidence that she is not a feme covert, but is not conclusive of the fact. (v) And in such a case such evidence must be given as to satisfy the jury that the prisoners are in fact husband and wife, in the same way as to convince them of any other fact. (w) But cohabitation and reputation will be sufficient evidence upon such point. William and Mary Atkinson were indicted for disposing of forged country bank notes; and it appeared that the man disposed of them in the presence of the woman, at a public-house, to which they went together to meet the person to whom they were disposed of; that the man went thither by appointment, and the woman had a bundle of the same notes in her pocket. There was evidence, on the part of the prosecution, that they had lived and passed for man and wife for some months; upon which it was put to Gibbs, C. B., whether the woman was not entitled to an acquittal, and he thought she was; and the counsel for the prosecution at once acquiesced. (x) Where, upon an indictment against a woman for harbouring a murderer, knowing him to have committed the murder, it was probable that a marriage had taken place between the parties, in Ireland, at a place where the registers were very imperfectly kept, and the parties had for many years considered each other as man and wife, no evidence was offered for the prosecution, with the sanction of the Court. (y)

(r) 1 Hale, 47. 1 Hawk. P. C., c. 1, s. 10.

(s) 1 Hale, 48, 621. But if the wife alone, the husband being ignorant, do knowingly receive B., a felon, the wife is accessory and not the husband. 1 Hale, 621.

(t) 1 Hale, 46.

(u) R. v. Jones, Kel. 37.

(v) Quinn's case, 1 Lewin, 1. Reg. v. Woodward, 8 C. & P. 561. Patteson, J.

(w) R. v. Hassall, 2 C. & P. 434. Garrow, B. *Quære*, whether the proper course for a woman so indicted is not to plead the

wrong addition on arraignment, as by pleading to the felony she answers to the name by which she is indicted. C. S. G.

(x) R. v. Atkinson, O. B. Jan. Sess. 1814. MS. Bayley, J.

(y) R. v. Good, 1 C. & K. 185. Alderson, B., observed, 'If the prisoner went through the ceremony of marriage, and it should have turned out that there was some irregularity in the marriage, nevertheless if it appeared that she had acted under the supposition that she was the wife of the murderer, and according to the duty which

Where, however, the indictment states the woman to be the wife of the person with whom she is jointly indicted, no evidence is necessary to show that she is the wife. (2)

Ignorance.¹ — IV. Upon the plea or excuse of ignorance, it may be shortly observed, that it will apply only to ignorance or mistake of fact, and not to any error in point of law. For ignorance of the municipal law of the kingdom is not allowed to excuse any one that is of the age of discretion and *compos mentis* from its penalties when broken. (a) And it is no defence for a foreigner charged with a crime committed in England, that he did not know he was doing wrong, the act not being an offence in his own country. (b) Where, therefore, two Frenchmen were committed on a charge of murder in a duel, and alleged that they were ignorant of the law of England, and believed that acting as seconds in a fair duel was not punishable here, as it was not punishable in France, and that this was a fair duel, it was held that they were precisely in the same position as if they were native subjects of England, and the Court refused to bail them. (c) And as a ship, public or private, on the high seas, is, for the purpose of jurisdiction over crimes committed therein, a part of the territory to which the ship belongs, a person voluntarily coming on board an English ship, is as much amenable to the criminal law of England as if he came voluntarily into an English county, and ignorance of the law is no more an excuse in the one case than in the other. (d) But in some instances an ignorance or mistake of the fact will excuse; which appears to have been ruled in cases of misfortune and casualty; as if a man, intending to kill a thief or housebreaker in his own house, by mistake kills one of his own family, this will not be a criminal action. (e)

It is a principle of natural justice and of our law, that *actus non facit reum, nisi mens sit rea*. This maxim was much discussed in the recent case of *R. v. Prince*, 44 L. J. M. C. 122, noticed *post*, in this vol.

As to statutes binding *aliens*, see the Year Book, 13 Ed. 4, p. 9, pl. 5.

she considered to be cast upon her, the Court would have felt it right to have inflicted a very slight punishment upon her.' As in every case, except bigamy and criminal conversation, living together as man and wife is sufficient evidence of a marriage, *Morris v. Miller*, 1 Bl. R. 632; (*Woodgate v. Potts*, 2 C. & K. 457), there seems to have been abundant evidence in this case of a marriage between the parties; but, assuming that not to be so, it is deserving of consideration whether, if a woman received and comforted a felon, honestly believing him to be her husband, that would not entitle her to an acquittal, upon the ground that no guilty intention could exist under such circumstances, but, on the contrary, she was doing that which she honestly believed to be her duty to do. C. S. G.

(2) *R. v. Knight*, 1 C. & P. 116. J. A. Park, J.

(a) 1 Hale, 42. 4 Blac. Com. 27, *ignorantia juris, quod quisque tenetur scire, neminem excusat*, is a maxim as well of our own law as it was of the Roman. Plowd. 343. Ff. 22, 6, 9.

(b) *R. v. Esop*, 7 C. & P. 456. Bosanquet and Vaughan, JJ.

(c) Barronet's case, 1 E. & B. 1. 1 Dears. C. C. R. 51. This is in accordance with the Mosaic Law: 'Ye shall have one manner of law as well for the stranger as for one of your own country.' (Levit. xxiv. 22; Exod. xii. 49.)

(d) *R. v. Sattler*, *R. v. Lopez*, D. & B. C. C. 525.

(e) Levett's case, Cro. Car. 533. See this case *post*. 4 Blac. Com. 27. 1 Hale, 42, 43.

AMERICAN NOTE.

¹ In America it has been laid down that the essence of an offence is the intention to commit it. See *Duncan v. S.*, 6 Humph.

148; *Tardiff v. S.*, 23 Texas, 169; *Winehart v. S.*, 6 Ind. 30.

CHAPTER THE THIRD.

OF PRINCIPALS AND ACCESSORIES.

WHERE two or more are to be brought to justice for one and the same felony, they are considered in the light either — I. Of principals in the first degree. II. Principals in the second degree. III. Accessories before the fact; or IV. Accessories after the fact. And in either of these characters they will be *felons* in consideration of law; for he who takes any part in a felony, whether it be a felony at common law or by statute, is in construction of law a felon, according to the share which he takes in the crime. (a)

Principals in the first degree. — I. Principals in the first degree are those who have *actually and with their own hands committed the fact*; and it does not appear necessary to say anything in this place by way of explanation of the nature of their guilt, which will be detailed in treating of the different offences in the course of the work.

Principals in the second degree.¹ — II. Principals in the second degree are those who were *present, aiding and abetting* at the commission of the fact. They are generally termed *aiders and abettors*, and sometimes accomplices: but the latter appellation will not serve as a term of definition, as it includes all the *participes criminis*, whether they are considered in strict legal propriety as principals in the first or second degree, or merely as accessories before or after the fact. (b) The distinction between principals in the first, and principals in the second degree; or, to speak more properly, the course and order of proceeding against offenders founded upon that distinction, appears to have been unknown to the most ancient writers on our law, who considered the persons present aiding and abetting in no other light than as *accessories at the fact*. (c) But as such accessories they were not liable to be brought to trial till the principal offenders should be convicted or outlawed; a rule productive of much mischief, as the course of justice was frequently arrested by the death or escape of the principal, or from his remaining unknown or concealed. And with a view to obviate this mischief the judges by degrees adopted a different rule: and at length it became settled law that all those

(a) Fost. 417.

(b) Fost. 341.

(c) Fost. 347.

AMERICAN NOTE.

¹ As to aiding and abetting in America, see *C. v. Chapman*, 11 Cush. 422; *S. v. McGregor*, 41 N. H. 407; *S. v. Wilson*, 30 Conn. 500; *S. v. Fley*, 2 Brevard, 338; *M'Gowan v. S.*, 9 Yerg. 184; *C. v. Knapp*, 6 Pick. 496; *Grier v. S.*, 13 Mo. 382. As to employing agent, see *P. v. Adams*, 3 Denio, 190; 1 Comst. 173; *S. v. Colman*, 5 Porter, 32.

who are present, aiding and abetting, when a felony is committed, are principals in the second degree. (*d*)

In order to render a person a principal in the second degree, or an aider and abettor, he must be *present aiding and abetting* at the fact, or ready to afford assistance if necessary; but the *presence* need not be a strict actual immediate presence, such a presence as would make him an eye or ear witness of what passes, but may be a constructive presence. So that if several persons set out together, or in small parties, upon one common design, be it murder or other felony, or for any other purpose unlawful in itself, and each takes the part assigned him; some to commit the fact, others to watch at proper distances and stations to prevent a surprise, or to favour, if need be, the escape of those who are more immediately engaged; they are all, provided the fact be committed, in the eye of the law present at it; for it was made a common cause with them; each man operated in his station at one and the same instant, towards the same common end, and the part each man took tended to give countenance, encouragement and protection to the whole gang, and to insure the success of their common enterprise. (*e*) But there must be some participation; therefore if a special verdict against a man as a principal does not show that he did the act, or was present when it was done, or did some act at the time in aid which shows that he was present, aiding and assisting, or that he was of the same party, in the same pursuit, and under the same expectation of mutual defence and support with those who did the fact, the prisoner cannot be convicted. (*f*) So, if several are out for the purpose of committing a felony, and upon alarm and pursuit run different ways, and one of them maim a pursuer to avoid being taken, the others are not to be considered as principals in that maiming. (*g*) And it is not sufficient to make a man a principal in uttering a forged note, that he came with the utterer to the town where it was uttered, went out with him from the inn where they put up a little before he uttered it, joined him again in the street a short time after the uttering, and at a little distance from the place of uttering, and ran away when the utterer was apprehended. (*h*) The general rule applies to offences by statute as well as at common law, viz., that all present at the time of committing an offence are principals, although one only acts, if they are confederates, and engaged in a common design, of which the offence is part. (*i*) And it has been considered, in a case where three persons were charged with uttering a forged note, that other acts done by all of them jointly, or by any of them separately, shortly before the offence, may be given in evidence to show the confederacy and common purpose, although such

(*d*) Coal-heaver's case. 1 Leach, 66. And see Fost. 423, and R. v. Towle, Russ. & Ry. 314. This law was by no means settled till after the time of Ed. 3; and so late as the first of Queen Mary a chief justice of England strongly doubted of it, though indeed it had been sufficiently settled before that time.

(*e*) Fost. 350, 2 Hawk. P. C. c. 29, ss. 7, 8; see R. v. Howell, 9 C. & P. 437; Little-dale, J.; R. v. Vanderstein, 10 Cox, C. C. (Irish) 177.

(*f*) R. v. Borthwick, Dougl. 207.

(*g*) R. v. White & Richardson, R. & R. 99.

(*h*) R. v. Davis & Hall, East. T. 1806. MS. Bayley, J.; and R. & R. 113. See per Graham, B., in the case of Brady and others, O. B. June, 1813, 1 Stark. Crim. Plead. 80, in the note.

(*i*) R. v. Tattersal, Sedgewick & Hodgson, East. T. 1801. MS. Bayley, J.

acts constitute distinct felonies. (*j*) And also that what was found upon each may be proved against each to make out such confederacy, although it were not found until some interval after the commission of the offence. (*k*)

Kelly and McCarthy were indicted for stealing oats, and it appeared that Kelly was hired by the prosecutor to draw oats in sacks from a vessel to the prosecutor's warehouse, and McCarthy was employed by the prosecutor to load the sacks out of the vessel into the trams on which they were carried. The trams belonged to Kelly. Whilst one load was being conveyed to the warehouse, Kelly said to McCarthy, 'It's all right,' and shortly afterwards McCarthy emptied some oats out of two sacks which were on a tram close to the vessel, into a nosebag which he then placed under the tram. Kelly, at this time, was absent with a load; but returned in a few minutes to the vessel with an empty tram, took the nosebag from under the tram, where McCarthy had placed it, and put it on the tram, and drove off with it, McCarthy being, at the time Kelly took the nosebag from under the tram, on the vessel, which lay close to the tram, and within three or four yards of Kelly. It was submitted that Kelly was entitled to be acquitted, as he was not present at the time when the oats were stolen. Maule, J.: 'I think the evidence shows that this was all one transaction, in which both concurred; and I think both having concurred, and both being present at some parts of the transaction, both may be convicted.' (*l*)

Upon an indictment for larceny against Hornby and W. G., it appeared that W. G. was the foreman of the prosecutor, a canvas manufacturer, but had no authority to sell any yarn. On one occasion Hornby sent his servants to the warehouse of the prosecutor to bring away yarn, and W. G. delivered with the yarn an invoice made out in the name of the prosecutor. Subsequently, Hornby sent two of his men to the warehouse of the prosecutor, and, on arriving, they found Hornby and W. G. there. Some yarn was pointed out as the yarn which they were to take to Hornby's premises: and they thereupon, in the presence of Hornby and W. G., carried away the yarn in question. When Hornby was charged he produced the invoice which W. G. gave him on the first occasion, and stated that, except on that occasion, he had had no dealings with him. It was submitted that Hornby was only guilty of receiving the yarn, knowing it to have been stolen, but Coltman, J., held that if Hornby knew that in the transaction in question W. G. was, in fact, committing a felony, he, as well as W. G., was guilty of the same felony; and, therefore, the question for the jury was whether, at the time of the pretended sale by W. G., Hornby knew that W. G. was exceeding his authority and defrauding his master. (*m*)

Going towards the place where a felony is to be committed in order to assist in carrying off the property, and assisting accordingly, will not make the party a principal if he was at such a distance, at the time of the felonious taking, as not to be able to assist in it. The

(*j*) *Id. ibid.*

(*k*) *Id. ibid.*

(*l*) *R. v. Kelly*, 2 C. & K. 379. Maule,

J., refused to reserve the point, and the prisoners were convicted.

(*m*) *R. v. Hornby*, 1 C. & K. 305.

prisoner and J. S. went to steal two horses; J. S. left the prisoner half a mile from the place in which the horses were, and brought the horses to him, and both rode away with them. Upon a case reserved, the judges thought the prisoner an accessory only, not a principal, because he was not present at the original taking. (*n*) So, where a servant let a person into his master's house, in order that he might steal his master's money, and he continued in the house till the robbery, but the servant left the house before the robbery was committed, it was held that the servant was an accessory before the fact. (*o*) So, where on an indictment for stealing in a dwelling-house, it was proved that a servant had unlocked the door of the house, in order that another person might get in and steal the property, which he did about twenty minutes after the servant had left the house, it was contended that, as it was clear that if the servant had been indicted for house-breaking and stealing he might have been convicted, (*p*) that showed that he was guilty of stealing the money, for that could not depend upon the form of the indictment. But it was held that the servant was only an accessory before the fact to the offence charged in this indictment. (*q*) So, where three prisoners were jointly indicted for maliciously wounding with intent to maim, &c., and one of them did not come up and take any part until the wound had been inflicted by the others, it was held that the latter only could be convicted, though the former kicked the prosecutor several times after he came up. (*r*) So, if two prisoners go to a house, intending to commit a theft in it, and one enters first and is apprehended, and then the other enters and commits the theft, the former is only an accessory before the fact. (*s*)

But where a man committed a larceny, in a room of a house, in which room he lodged, and threw a bundle containing the stolen property out of the window to an accomplice who was waiting to receive it, the judges came to a different conclusion. The accomplice was indicted and convicted as a receiver; and the learned judge before whom he was tried was of opinion, that as the thief stole the property in his own room, and required no assistance to commit the felony, the conviction of the accomplice as a receiver might have been supported, if the jury had found that the thief had brought the goods out of the house, and delivered them to the accomplice; but as the jury had found that the thief threw the things out of the window, and that the accomplice was in waiting to receive them, he thought the point fit for consideration. And the judges were of opinion that the accomplice in this case was a principal, and that the conviction of him as a receiver was wrong. (*t*)

(*n*) *R. v. Kelly*, MS. Bayley, J., and R. & R. 421.

(*o*) *R. v. Tuckwell*, C. & M. 215. — *Cole-ridge, J.* It is not stated how long before the theft the servant left.

(*p*) *R. v. Jordan*, 7 C. & P. 432.

(*q*) *R. v. Jefferies & Bryant*, Gloucester Spr. Ass. 1848. *Cresswell and Patteson, JJ.* MSS. C. S. G. 3 Cox, C. C. 85. This case

may possibly be supported on the ground that the servant had left the house twenty minutes before the thief came.¹

(*r*) *R. v. M'Shane*, C. & M. 212. *Tindal, C. J.*

(*s*) *R. v. Johnson*, C. & M. 218. *Maule, J., and Rolfe, B.*

(*t*) *R. v. Owen*, R. & Mood. C. C. R. 96. *R. v. Coggins*, 12 Cox, C. C. 517.

AMERICAN NOTE.

¹ See *Bishop*, i. s. 650, note (1), and s. 676 (3).

So, where on an indictment against George P. for stealing, and Henry P. for receiving pork, it appeared that the prisoners were seen conversing together near the prosecutor's premises, and went together to his warehouse, and George went into the warehouse and took the pork out of a tub, and brought it out of the warehouse and gave it to Henry, who had remained on the outside, and who was not in a position to see what George did in the warehouse, but was sufficiently near to have rendered him aid in case he had been taken into custody; that is to say, the evidence was sufficient to have convicted him as a principal in the second degree; and the jury having found Henry guilty, upon a case reserved upon the question whether a person who was a principal in the second degree could, under the above circumstances, be convicted as a receiver of the goods stolen, the judges were unanimously of opinion that he could not; and, therefore, the conviction of Henry was wrong. (u)

But in order to make a person who is present when a felony is committed a principal in the second degree, there must be a community of purpose with the party actually committing the felony, at the time when the felony is committed. One count charged Hilton and M'Evin with stealing from the person; another charged them with feloniously receiving the stolen property. Hilton was walking by the side of the prosecutrix, and M'Evin was seen just previously following behind her. The prosecutrix felt a tug at her pocket, found her purse was gone, and, on looking round saw Hilton behind her, walking with M'Evin in the opposite direction, and saw her hand something to M'Evin. The jury were directed that, if they did not think, from the evidence, M'Evin was participating in the actual theft, it was open to them on these facts to find him guilty of receiving. The jury found Hilton guilty of stealing and M'Evin guilty of receiving; and it was held that the direction was right, as to make M'Evin a principal in the second degree there must have been a community of purpose with Hilton in the actual stealing. (v)

When an offence is committed through the medium of an innocent agent, the employer, though absent when the act is done, is answerable as a principal. Thus, if a child under years of discretion, a madman, or any other person of defective mind, is incited to commit a murder or other crime, the incitor is the principal *ex necessitate*, though he were absent when the thing was done. (w) Where, therefore, on an indictment for larceny it appeared that the prisoner had induced a child of the age of nine years to take money from his father's till and give it him, Wightman, J., left it to the jury to say whether the child was an innocent agent, that is, whether he knew that he was doing wrong or was acting altogether unconsciously of guilt and at the dictation of the prisoner. (x) And if a man give another a forged note that the other may utter it, if the latter be ignorant of the note being forged, the uttering by the latter is the uttering of the former,

(u) *R. v. Perkins*, 2 Den. C. C. 459. This case must not be taken to decide that a principal cannot, under any circumstances, be a receiver, as the marginal note would seem to indicate. If a principal were to deliver the goods to another, and afterwards at a distance from the place where the felony was

committed were to receive them again, there can be no doubt that he might be convicted as a receiver. C. S. G.

(v) *R. v. Hilton*, 1 Bell, C. C. 20.

(w) *Fost.* 349. *Kel.* 52. *Post*, title Murder.

(x) *R. v. Manley*, 1 Cox, C. C. 104.

though the former were absent at the time of the actual uttering. (y) But if the person who received the note knew that it was forged, the person who gave it would not be punishable as a principal. (z) For where a person, having incited another to lay poison, is absent at the time of laying it, he is an accessory only, though he prepared the poison, if the person laying it is amenable as a principal; but is punishable as a principal if the person laying the poison is not so amenable. (a)

Where a prisoner went to a die-sinker and ordered four dies of the size of a shilling to be made, stating them to be for two whist clubs. One die was to be exactly like the obverse side of a shilling, another with an inscription, a third exactly like the reverse side of a shilling, and the fourth with an inscription; and before making them, the diesinker communicated with the officers of the Mint, who directed him to execute the prisoner's order, which he did by making the first and third dies, and from these counterfeit shillings could be coined; it was held that the prisoner was the principal felon, as the die-sinker was an innocent agent. (b) So, where the prisoners had applied to an artist to engrave a copy of the coupons of the Netherlands Bank, and the artist suspecting that there was an intention to defraud, communicated with the Dutch consul, and under his direction, employed persons to engrave the plate in pursuance of the orders given him; it was held that the authority given was better than the one held sufficient in the preceding case, and that the artist was an innocent agent. (c)

Where poison is laid for a man, and all who were present and concurred in laying it are absent at the time it is taken by the party killed by taking it, all are principals; otherwise all would escape punishment. (d)

Bull in London, and Schmidt on the Continent, were engaged in planning the forgery of a plate, as appeared by letters which had passed between them. The order for the plate was, however, given by Bull to an innocent agent before Schmidt came to England. On his arrival he and Bull went to the manufacturer, and the plate was given to them. It was contended that Bull was the principal, and that Schmidt was only an accessory before the fact. That it was precisely the same as if Bull had engraved the plate, and, if so, Schmidt was only an accessory. Tindal, C. J.: 'That reasoning would be good if the actual maker had been a guilty party, because he would stand in a different position to those who had counselled him to the commission of the crime. But it altogether fails where the

(y) *R. v. Palmer & Hudson*, 1 New Rep. 96. *Post*, Vol. II., title Forgery.¹

(z) *R. v. Soares*, R. & R. 25.

(a) *Post*. 349.

(b) *R. v. Bannen*, 2 M. C. C. 309. 1 C. & K. 295.

(c) *R. v. Valler*, 1 Cox, C. C. 84. *Gurney, B., and Wightman, J.*

(d) *Post*. 349. *Kel.* 52. 4 Co. 44 b.

AMERICAN NOTE.

¹ So in America it has been held that a man who employs an innocent agent to write what is a forgery, is guilty of forgery. *Gregory v. S.* 26, Ohio St. 510, 20 Am. R. 774; *C. v. Foster*, 114 Mass. 311; 19 Am. R. 353; *McGuire v. Tobey*, 62 Mich. 252, 4 Am. St. R. 848.

immediate agent is an innocent one. Then, those who have plotted and arranged that he should do the particular act are themselves principals. Suppose the prisoners had been both abroad, and that, having planned the forgery, one of them had given the order for the plate by letter, can it be doubted that they would be indictable as principals; and can it make any difference that one of them is in this country? It seems to me, then, that the circumstance of the immediate agent in this forgery being an innocent person renders the rule of law as to principal and accessory inapplicable.' Alderson B.: 'If a person does an act of this kind, with a guilty intent, he is not the agent of any one. If he does it innocently, he is the agent of some person or persons; and if two have agreed to employ him, he is the agent of both. In this case, therefore, it is a question for the jury whether the prisoners were jointly acting in procuring this plate to be made. If they were, then the engraver acts on behalf of both. It makes no difference whether they were in England or elsewhere; when they have once agreed to do the thing, the act of one is the act of all, although the rest be absent at the time.' (e)

It has been held, that to aid and assist a person to the jurors unknown to obtain money by the practice of *ring-dropping* is felony, if the jury find that the prisoner was confederating with the person unknown to obtain the money by means of this practice. (f) And if several act in concert to steal a man's goods, and he is induced by fraud to trust one of them in the presence of the others with the possession of the goods, and then another of the party entice the owner away, in order that the party who has obtained such possession may carry the goods off, all will be guilty of felony, the receipt by one, under such circumstances, being a felonious taking by all. (g) So, where a prisoner asked a servant, who had no authority to sell, the price of a mare, and desired him to trot her out, and then went to two men, and having talked to them, went away, and the two men then came up and induced the servant to exchange the mare for a horse of little value, it was held that if the prisoner was in league with the two men to obtain the mare by fraud and steal her he was a principal. (h)

If a fact amounting to murder should be committed *in prosecution of some unlawful purpose* though it were but a bare trespass, all persons who had gone in order to give assistance, if need were, for carrying such unlawful purpose into execution, would be guilty of murder. But this will apply only to a case where the murder was committed *in prosecution of some unlawful purpose*, some common design in which the combining parties were united, and for the effecting whereof they had assembled; for unless this shall appear, though the person giving the mortal blow may himself be guilty of murder, or manslaughter, yet the others who came together for a different purpose will not be

(e) *R. v. Bull*, 1 Cox, C. C. 281. It follows from this case that the trial of the guilty parties may be where the innocent agent made the plate, although they may be in another county, or even out of the kingdom when the plate is made. In point of law the act of the innocent agent is as much the act of the procurer as if he were present

and did the act himself. See *R. v. Brisac*, 4 East R. 163.

(f) *Moore's case*, 1 Leach, 314.

(g) *R. v. Standley*, MS. Bayley, J., and R. & R. 305. *R. v. County*, MS. Bayley, J.

(h) *R. v. Sheppard*, 9 C. & P. 121. Coleridge, J.

involved in his guilt. (i) Thus where three soldiers went together to rob an orchard: two got upon a pear-tree, and the third stood at the gate with a drawn sword in his hand; and the owner's son coming by collared the man at the gate, and asked him what business he had there, whereupon the soldier stabbed him; it was ruled to be murder in the man who stabbed, but that those on the tree were innocent. It was considered that they came to commit a small, inconsiderable trespass, and that the man was killed upon a sudden affray without their knowledge. But the decision would have been otherwise if they had all come thither with a general resolution against all opposers; for then the murder would have been committed in prosecution of their original purpose. (j)

Where on a trial for murder the case on the part of the Crown was, that the prisoner and Jackson had followed the deceased for the purpose of robbing him, and that, in pursuance of that object, one or both of them struck the deceased on the head and killed him, and the preceding passage was cited for the prisoner; Bramwell, B., told the jury, 'The rule of law is this: if two persons are engaged in the pursuit of an unlawful object, the two having the same object in view, and, in the pursuit of that common object, one of them does an act which is the cause of death under such circumstances that it amounts to murder in him, it amounts to murder in the other also. The cases which have been referred to may be explained in this way. The object for which the parties went out was a comparatively trifling one, and it is almost impossible to suppose that if one had committed a murder whilst engaged in the pursuit of such an object, the act could have been done in furtherance of the common object they had in view, which was comparatively so unimportant.' 'Suppose two men go out together, and one of them holds a third man for the purpose of enabling his companion to cut that man's throat, and his companion does so, no one could doubt that they were both equally guilty of murder. Therefore, if you find the common unlawful object in the two prisoners, and death ensuing from the act of Jackson in pursuance of that common unlawful object, under such circumstances that it was murder in him, it is your duty to find the prisoner guilty.' (k)

Where there is a *general resolution against all opposers*, whether such resolution appears upon evidence to have been actually and explicitly entered into by the confederates, or may be reasonably collected from their number, arms, or behaviour, at or before the scene of action, and

(i) Fost. 351, 352. 2 Hawk. P. C. c. 29, s. 9. See *R. v. Howell*, 9 C. & P. 437. per Littledale, J.

(j) Fost. 353. Case at Sarum Lent Assizes, 1697, MS. Denton & Chapple, 2 Hawk. P. C. c. 29, s. 8. *R. v. Skeet*, 4 F. & F. 931. And see *R. v. Hodgson and others*, 1 Leach, 6; and an Anon. case at the Old Bailey, in December Sessions, 1664, 1 Leach, 7, note (a), where several soldiers, who were employed by the messengers of the Secretary of State to assist in the apprehension of a person, unlawfully broke open the door of a house where the person was supposed to be; and having done so, some of the

soldiers began to plunder, and stole some goods. The question was, whether this was felony in all; and Holt, C. J., citing the case, says, 'That they were all engaged in an unlawful act is plain, for they could not justify breaking a man's house without making a demand first; yet all those who were not guilty of the stealing were acquitted, notwithstanding their being engaged in one unlawful act of breaking the door; for this reason, because they knew not of such intent, but it was a chance opportunity of stealing, whereupon some of them did lay hands.'

(k) *R. v. Jackson*, 7 Cox, C. C. 357.

homicide is committed by any of the party, every person present in the sense of the law when the homicide is committed will be involved in the guilt of him that gave the mortal blow. (*l*) Thus where several persons are together for the purpose of committing a breach of the peace, assaulting persons who pass, and, while acting together in that common object, a fatal blow is given, it is immaterial which struck the blow, for the blow given under such circumstances is in point of law the blow of all, and it is unnecessary to prove which struck the blow. (*m*)

But it must be observed that this doctrine respecting the whole party being involved in the guilt of one or more, will apply only to such assemblies as are formed for carrying some common purpose, *unlawful in itself*, into execution. For if the original intention was lawful, and prosecuted by lawful means, and opposition is made by others, and one of the opposing party is killed in the struggle, in that case the person actually killing may be guilty of murder or manslaughter, as circumstances may vary the case; but the persons engaged with him will not be involved in his guilt, *unless they actually aided and abetted him in the fact*; for they assembled for another purpose which was lawful, and consequently the guilt of the person actually killing cannot by any fiction of law be carried against them beyond their original intention. (*n*)

It is submitted that the true rule of law is, that where several persons engage in the pursuit of a common unlawful object, and one of them does an act which the others ought to have known was not improbable to happen in the course of pursuing such common unlawful object, all are guilty.

When several are present and abet a fact, an indictment may lay it generally as done by all, or specially, as done by one and abetted by the rest. (*o*) And even in offences in which there could have been only one principal in the first degree, as in rape, a charge against all as principals in the first degree is valid, if there be no difference in the punishment between the principals in the first and those in the second degree; though it should seem that the more correct form in a case of this kind would be to charge the parties according to the facts as they will be proved. (*p*)

An indictment against the principal in the second degree in murder should show distinctly that he was present when the mortal stroke was given; and it should seem that it would not be sufficient to state that both of their malice aforethought made the assault; that the principal in the first degree then and there gave the mortal stroke, and so that both murdered; at least it would not be sufficient if, before the allegation that both murdered, it is stated that the one (the principal in the second degree) counselled and incited the other to do the act. (*q*)

(*l*) Post. 353, 354. 2 Hawk. P. C. c. 29, s. 3. See *post*, title Murder.

(*m*) R. v. Harrington, 5 Cox, C. C. 231. Martin, B. See the Sissinghurst case and others cited *post*, title Murder.

(*n*) Post. 354, 355. 2 Hawk. P. C. c. 29, s. 9.

(*o*) 2 Hawk. P. C. c. 23, s. 76, and c. 25, s. 64. R. v. Young, 3 T. R. 98.

(*p*) R. v. Vide, Fitz. Corone, pl. 86. R. v. Burgess, Tr. T. 1813. *Post*, Book III., ch. 5.

(*q*) R. v. Winifred & Thomas Gordon, 1 Leach, 515. 1 East, P. C. 352.

Accessories before the fact.¹ — III. *An accessory before the fact* is he who, being absent at the time of the offence committed, doth yet procure, counsel, command, or abet another to commit a felony. (*r*) And it seems that those who by hire, command, counsel, or conspiracy, and those who by showing an express liking, approbation, or assent to another's felonious design of committing a felony, abet and encourage him to commit it, but are so far absent when he actually commits it that he could not be encouraged by the hopes of any immediate help or assistance from them, are accessories before the fact. (*s*) But words that amount to bare permission will not make an accessory, as if A. says he will kill J. S., and B. says, 'You may do your pleasure for me,' this will not make B. an accessory. (*t*) And it seems to be generally agreed that he who barely conceals a felony which he knows to be intended is guilty only of misprision of felony, and shall not be adjudged an accessory. (*u*) The same person may be a principal and an accessory in the same felony, as where A. commands B. to kill C., and afterwards actually joins with him in the fact. (*v*)

Probably, in point of law, any degree of incitement, with the actual intent to procure the commission of the crime, is sufficient, and it is no defence to show that the crime was not committed in consequence of the incitement, but from some other motive (see 2 Stark. Ev. 8, 2nd ed.). But there must be some degree of direct incitement. A woman who was pregnant took a dose of corrosive sublimate and died. The dose was procured at her desire by the prisoner, who knew the purpose for which it was to be used. The jury found that the prisoner did not administer the poison, or cause it to be taken, but that he had delivered it with knowledge of the purpose to which she intended to apply it, and was, therefore, an accessory before the fact to murder. But the Court held that he was not an accessory before the fact. He was unwilling that she should take the poison. He procured it at her instigation, and under a threat by her of self-destruction; and the facts were consistent with the supposition, that he hoped and expected that she would change her mind and not resort to it. (*w*) The facts of the above case would, however, have been sufficient to convict the prisoner upon a charge of procuring or supplying poison, under 24 & 25 Vict. c. 100, s. 59.

(*r*) 1 Hale, 615.

(*s*) 2 Hawk. P. C. c. 29, s. 16.

(*t*) 1 Hale, 616.

(*u*) 1 Hale, 616. 2 Hawk. P. C. c. 29, s. 23.

(*v*) 2 Hawk. P. C. c. 29, s. 1, where it is said also that he may be charged as principal and accessory in the same indictment; but this was not allowed, *R. v. Madden*, R. & M., C. C. R. 277; *R. v. Galloway*, ibid. 234, until the 11 & 12 Vic. c. 46, s. 1.

In *Atkins'* case who was tried for the murder of Sir E. Godfrey, two indictments were found against him, one as principal, the other as accessory; and he was arraigned upon both at the same time. But the first was abandoned, and evidence given only in support of the second; the verdicts appear however to have been pronounced successively. 7 Howell's St. Tri. 231.

(*w*) *R. v. Fretwell*, L. & C. 161.²

AMERICAN NOTES.

¹ The difference between accessories before the fact and principals has been abolished in some States of America. See *Shannon v. P.*, 5 Mich. 71; *P. v. Bigler*, 5 Cal. 23. As to other States, see *Jones v. S.*, 13 Texas, 168; *Brennan v. P.*, 15 Ill. 511; *McCarty v. S.*, 26 Miss. 299; *Hately v. S.*, 15 Geo. 346; *U. S. v. Ramsey*, 1 Hemp. 481.

² See as to incitement, *Bishop*, i. 763 (2).

So also, where the prisoner held the stakes for a prize fight, Cockburn, C. J., delivering the judgment of the Court, said: 'To support an indictment for being accessory before the fact to manslaughter, there must be an active proceeding on the part of the prisoner. He is perfectly passive here, all he does is to accept the stakes.' (x)

The offence of an accessory before the fact differs so much from that of a principal in the second degree, that where a person was indicted as an accessory before the fact, it was held that she could not be convicted of that charge upon evidence proving her to have been present aiding and abetting; it being clearly admitted to be necessary to charge a principal in the second degree with being *present*, aiding and abetting. (y)

Where Danelly was indicted for a burglary with intent to steal, and with stealing certain goods in the house, and Vaughan as an accessory to 'the said burglary,' and Danelly had been acquitted of the burglary, but found guilty of the larceny, and Vaughan found guilty as accessory, it was objected that as the jury had acquitted the principal of the burglary, the accessory must be acquitted altogether. But a great majority of the judges were of opinion that, as Danelly acted in order to detect the other prisoner, he was free from any felonious intent, and therefore the charge against Vaughan, as accessory, of course could not be supported. (z)

It is to be observed, that the Legislature, in statutes made from time to time concerning accessories before the fact, has not confined itself to any certain mode of expression; but has rather chosen to make use of a variety of words all terminating in the same general idea. Thus some statutes make use of the word accessories, singly, without any words descriptive of the offence; (a) others have the words abetment, procurement, helping, maintaining, and counselling; (b) or aiders, abettors, procurers, and counsellors. (c) One describes the offence by the words command, counsel, or hire; (d) another calls the offenders procurers or accessories. (e) One having made use of the words comfort, aid, abet, assist, counsel, hire, or command, immediately afterwards, in describing the same offence in another case, uses the words counsel, hire, or command only. (f) One statute calls them counsellors and contrivers of felonies; (g) and many others make use of the terms counsellors, aiders, and abettors, or barely aiders and abettors. Upon these different modes of expression, all plainly descriptive of the same offence, Foster, J., thinks it may safely be concluded that in the construction of statutes we are not to be governed by the bare sound, but by the true legal import of the words; and that every person who comes within the description of these statutes, various as they are in point of expression, is in the judgment of the Legislature an accessory before the fact; unless he is present at the fact, and in that case he is

(x) *R. v. Taylor*, 44 L. J. M. C. 67; L. R. 2 C. C. R. 148. 13 Cox, C. C. 68.

(y) *R. v. Winifred & Thomas Gordon*, 1 Leach, 515. S. C. 1 East, P. C. 352. And see *Haydon's case*, 4 Co. 42 b.

(z) *R. v. Danelly & Vaughan*, 2 Marsh, 571, and R. & R. 810.

(a) 31 Eliz. c. 12, s. 5. 21 Jac. 1, c. 6.

(b) 28 Hen. 8, c. 1, s. 3.

(c) 1 Ed. 6, c. 12, s. 13.

(d) 4 & 5 Ph. & M. c. 4.

(e) 39 Eliz. c. 9, s. 2.

(f) 3 & 4 Will. & M. c. 9.

(g) 1 Ann. st. 2, c. 9.

undoubtedly a principal. (*h*) See the present general enactment, 24 & 25 Vict. c. 94, s. 2, noticed *post*.

Whoever procures a felony to be committed, though it be by the intervention of a third person, is an accessory before the fact; for there is nothing in the notion of commanding, hiring, counselling, aiding, or abetting, which may not be effected by the intervention of a third person without any direct immediate connection between the first mover and the actor. It is a principle in law which can never be controverted, that he who procures a felony to be done is a felon. So that if A. bid his servant to hire somebody, no matter whom, to murder B. and furnish him with money for that purpose, and the servant procure C., a person whom A. never saw nor heard of, to do it, A., who is manifestly the first mover or contriver of the murder, is an accessory before the fact. (*i*) And a nobleman was found guilty of murder, by his peers, upon evidence which satisfied them that he had contributed to the murder, by the intervention of his lady and of two other persons who were themselves no more than assessories, without any sort of proof that he had ever conversed with the person who was the only principal in the murder, or had corresponded with him directly by letter or message. (*j*) For with respect to an accessory before the fact, it is not necessary that there should be any direct communication between the accessory and the principal.

In *high treason* there are no accessories, but all are principals, on account of the heinousness of the crime. (*k*) But in *murder*, and felonies in general, there may be accessories, except only in those offences which by judgment of law are sudden and unpremeditated; such are some cases of manslaughter and the like, where there cannot be any accessories before the fact. (*l*) But there are other cases of manslaughter where there may be accessories before the fact. Upon an indictment for manslaughter it appeared that the death of the prisoner's wife was caused by swallowing sulphate of potash for the purpose of procuring abortion, she believing herself to be pregnant, although in reality she was not. The prisoner purchased the sulphate of potash, and gave it to his wife in order that she might swallow it for the above-mentioned purpose, but he was absent at the time when

(*h*) That is, a principal in the first degree if the actual perpetrator, or a principal in the second degree if only an aider and abettor, Fost. 131. And see Fost. 130, where, speaking of a case in 1 And. 195, in which an indictment was held to be sufficient, though the words of the statute of Ph. & M. were not pursued, the words *excitavit, movit, et procuravit*, being deemed tantamount to the words of the statute and descriptive of the same offence, he says that he takes that case to be good law, though he confesses it is the only precedent he has met with where the words of the statute have been totally dropped.

(*i*) See the case of M'Daniel, Egan, and Berry, Fost. 125; 2 Hawk. P. C. c. 29, s. 1, 10; 19 Howell's St. Tri. 746, 789. A soliciting and inciting a person to commit a felony when no felony is committed, is a misdemeanor only. R. v. Gregory, 10 Cox, C. C. 459.

(*j*) The case of the Earl of Somerset, indicted as an accessory before the fact to the murder of Sir Thomas Overbury. 19 St. Tri. 804. R. v. Cooper, 5 C. & P. 535, per Parke, J.

(*k*) 2 Hawk. P. C. c. 29, s. 2, 5. 1 Hale, 613. Fost. 341. 4 Blac. Com. 35.

(*l*) Bibitthe's case, 4 Rep. 43, Moor, 461. Cro. Eli. 540. 4 Blac. Com. 36. 1 Hale, 615. 2 Hawk. P. C. c. 29, s. 24. There may be accessories after in manslaughter, and if the principal be found guilty of manslaughter, upon an indictment for murder, a party charged as accessory after the fact to the murder, may be found guilty as accessory to the manslaughter. R. v. Greenacre, 8 C. & P. 35. Tindal, C. J., Coleridge and Coltman, JJ. Approved in R. v. Richards, 2 Q. B. D. 311.

she swallowed it. For the prosecution, it was contended that the wife committed a felony in swallowing the sulphate of potash, and as death ensued therefrom, she also committed murder; (*m*) that the prisoner was an accessory before the fact to this felony, and to the consequent murder, and might be tried under the 11 & 12 Vict. c. 46, s. 1, and that, although the evidence showed his offence was murder, yet that would support an indictment for manslaughter. For the prisoner it was contended that there could not be an accessory before the fact in manslaughter; but it was held, upon the facts of this case, that the prisoner might be convicted of manslaughter. (*n*)

In *forgery* it is laid down generally in the books that all are principals, and that whatever would make a man accessory before the fact in felony would make him a principal in forgery; (*o*) but it is conceived that this must be understood of forgery at common law, and where it is considered only as a misdemeanor. (*p*)

If several combine to forge an instrument, and each executes by himself a distinct part of the forgery, they are all principals, though they are not together when the instrument is completed. On an indictment for forgery against Bingley, Dutton, and Batkin, it appeared that Bingley and Dutton bought the paper, and cut it into pieces of the proper size at their house; it was then taken to Batkin, who struck off in blank all the printed part of the note except the date line and the number, and impressed on the paper the wavy horizontal lines. The blanks were then brought back to the house of Bingley and Dutton, where the water-mark was introduced into the paper; after which Bingley, in the presence of Dutton, impressed the date line and number, and Dutton added the signature. It did not appear that Batkin was present at this time. The jury found that all three concurred and co-operated in the design and execution of the forgery, each taking his own part, and that Bingley and Dutton acted together in completing the notes. The judges were of opinion that, as each of the prisoners acted in completing some part of the forgery, and in pursuance of the common plan, each was a principal in the forgery; and that although Batkin was not present when the note was completed by the signature, he was equally guilty with the others. (*q*)

So if several make distinct parts of a forged instrument, each is a principal, though he does not know by whom the other parts are executed, and though it is finished by one alone in the absence of the others. (*r*) On an indictment against Dade, Kirkwood, and Stansfield, for forging a note, and against Collins and Campbell as accessories before the fact, it appeared that Stansfield made the paper, Kirkwood

(*m*) *R. v. Russell*, R. & M. C. C. 356.

(*n*) *R. v. Gaylor*, 1 D. & B. 288. During the argument, Bramwell, B., said, 'Suppose a man for mischief gives another a strong dose of medicine, not intending any further injury than to cause him to be sick and uncomfortable, and death ensues, would not that be manslaughter? Suppose, then, another had counselled him to do it, would not he who counselled be an accessory before the fact?' See *R. v. Smith*, 2 Cox, C. C. 233, per Parke, B., S. P. See the observations on this subject, Greaves' Cr.

Acta, 43, 2nd ed.; and see *R. v. Wilson*, 1 D. & B. 127; and *R. v. Farrow*, *ibid.* 164.

(*o*) *Bothe's case*, Moor, 666. 1 Sid. 312. 2 Hawk. c. 29, s. 2, and authorities cited in 2 East, P. C. 973.

(*p*) 2 East, P. C. 973; and see vol. 2, *Forgery*; and see *Morris's case*, 2 Leach, 1096, note (*a*).

(*q*) *R. v. Bingley*, R. & R. 446.

(*r*) *R. v. Kirkwood*, R. & M. 304. *R. v. Dade*, *ibid.* 307. *R. v. Bingley*, R. & R. 446.

engraved the plate, and struck off the impression; and Dade, in the absence of Stansfield and Kirkwood, filled up and finished the note. Stansfield, when he made the paper, did not know that Kirkwood or Dade were to have anything to do with the forgery; nor did Kirkwood know, when he engraved the plate and made the impression, that Dade or Stansfield were, or were to be, concerned. Collins and Campbell were the movers, and through them all the parties were set to work. Dade was not upon his trial, and Collins and Campbell could not properly be tried, unless Stansfield and Kirkwood were to be deemed principals. The judges were unanimous that Kirkwood and Stansfield were principals, and that the ignorance of Stansfield and Kirkwood of those who were to effect the other parts of the forgery was immaterial: it was sufficient if they knew it was to be effected by somebody. (s) There was another indictment against Dade and Kirkwood for forgery, and against Collyer and Calvert as accessories before the fact. Kirkwood engraved the plate, and worked off the impression from it, and Dade, in his absence, filled up the notes; Dade was not on his trial. It was held, that Kirkwood was a principal. (t)

It follows, from the two last cases, that those who procure and cause an instrument to be forged, but execute no part of the forgery, and are not present when it is executed, are accessories before the fact, and not principals.

Where three persons agreed to utter a forged bank note, and one uttered it at Gosport, and the other two, by previous concert, waited at Portsmouth; the two latter were held to be accessories. (u)

In *crimes under the degree of felony* there can be no accessories;¹ but all persons concerned therein, if guilty at all, are principals. (v)

It should be observed, as to felonies created by Acts of Parliament, that regularly if an Act of Parliament enact an offence to be felony, though it mention nothing of accessories before or after, yet virtually and consequentially those that counsel or command the offence are accessories before the fact, (w) and those who knowingly receive the offender are accessories after. (x)

It is a maxim that *accessorius sequitur naturam sui principalis*; (y) and therefore an accessory cannot be guilty of a higher crime than his principal. Certain accessories after the fact, namely receivers of stolen goods, are in some instances punished with more severity than the principal offenders. (z)

(s) R. v. Kirkwood, 3 Burn, J. D. & W. Ed. 286, MSS. Bayley, B.; S. C., R. v. Dade, R. & M. 307.

(t) R. v. Kirkwood, 3 Burn, J. D. & W. Ed. 286, MSS. Bayley, B.; S. C., R. & M., C. C. R. 304.

(u) R. v. Soares, Atkinson and Brighton, MS.; S. C., 2 East, P. C. 974. R. & R. 25; and see R. v. Badcock, R. & R. 249.

(v) 4 Blac. Com. 36. 1 Hale, 613. R.

v. Burton, 13 Cox, C. C. 71.

(w) R. v. James, 24 Q. B. D. 439.

(x) 1 Hale, 613, 614, 704. 3 Inst. 59. See 24 & 25 Vict. c. 94, p. 2.

(y) 3 Inst. 139. 4 Blac. Com. 36.

(z) Fourteen years' penal servitude, by 24 & 25 Vict. c. 96, s. 91.

AMERICAN NOTE.

¹ This is so also in America, where those who aid in the commission of misdemeanors are principals. *Williams v. S.*, 11 S. & M. 58. *Baker v. S.*, 12 Ohio (N. S.) 214. But it is maintained by Mr. Bishop, in Vol. i.

§ 226, and other passages, that in small misdemeanors one who does some slight act, or stands by and urges the act, is not punishable.

It has been occasionally much considered how far an accessory is involved in the guilt of the principal when the principal does not act in conformity with the plans and instructions of the accessory. With regard to this, it appears that *if the principal totally and substantially varies* from the terms of the instigation, if being solicited to commit a felony of one kind, he wilfully and knowingly commit a felony of another, he will stand single in that offence, and the person soliciting will not be involved in his guilt. (a) Thus if A. command B. to burn C.'s house, and he in so doing commits a robbery; now A., though accessory to the burning, is not accessory to the robbery, for that is a thing of a distinct and unsequential nature. (b) And if A. counsels B. to steal goods of C. on the road, and B. breaks into C.'s house and steals them there, A. is not accessory to the breaking the house, because that is a felony of another kind. (c) He is, however, accessory to the stealing. (d) But if *the principal complies in substance* with the instigation of the accessory, varying only in circumstances of time or place, or in the manner of execution, the accessory will be involved in his guilt: as if A. command B. to murder C. by poison, and B. does it by a sword or other weapon or by any other means, A. is accessory to this murder; for the murder of C. was the object principally in contemplation, and that is effected. (e) And it seems that if A. counsels B. to steal goods in C.'s house, but not to break into it, and B. does break into it, A. is accessory to the breaking. (f) And where *the principal goes beyond* the terms of the solicitation, yet if, in the event, the felony committed was a probable consequence of what was ordered or advised, the person giving such orders or advice will be an accessory to that felony. As if A. advise B. to rob C., and in robbing him B. kills him, either upon resistance made, or to conceal the fact, or upon any other motive operating at the time of the robbery; or if A. solicit B. to burn the house of C., and B. does it accordingly; and the flames taking hold of the house of D., that likewise is burnt: in these cases A. is accessory to B. both in the murder of C. and in the burning of the house of D. The advice, solicitation, or orders were pursued in substance, and were extremely flagitious on the part of A.; and the events, though possibly falling out beyond his original intention, were, in the ordinary course of things, the probable consequences of what B. did under the influence and at the instigation of A. (g)

Where A. counselled a pregnant woman to murder her child when it should be born, and she murdered it accordingly, A. was held to be accessory to the murder; the procurement before the birth being considered as a felony continued after the birth, and until the murder was perpetrated by reason of that procurement. (h)

But more difficult questions arise where the principal *by mistake commits a different crime* from that to which he was solicited by the accessory. It has been said, that if A. orders B. to kill C., and he by mistake kills D., or aiming a blow at C. misses him and kills D., A.

(a) Fost. 369.

(b) 1 Hale, 617. 4 Blac. Com. 37.

(c) Plowd. 475.

(d) 1 Hale, 617.

(e) Fost. 369, 370. 2 Hawk. P. C. c. 29, s. 20.

(f) Bac. Max. Reg. 16.

(g) Fost. 370.

(h) R. v. Parker, Dy. 186, a. pl. 2.

will not be accessory to this murder, because it differs in the person. (i) And in support of this position *Saunders'* case (j) is cited; who, with the intention of destroying his wife, by the advice of one Archer, mixed poison in a roasted apple, and gave it her to eat; and the wife, having eaten a small part of it, and having given the remainder to their child, Saunders (making only a faint attempt to save the child whom he loved, and would not have destroyed) stood by and saw it eat the poison, of which it soon afterwards died. And it was held, that though Saunders was clearly guilty of the murder of the child, yet Archer was not accessory to that murder. But Foster, J., thinks that this case of Saunders does not support the position (which he calls a merciful opinion) to its full extent; and he proposes the following case as worthy of consideration: 'B. is an utter stranger to the person of C.; A. therefore takes upon him to describe him by his stature, dress, age, complexion, &c., and acquaints B. when and where he may probably be met with. B. is punctual at the time and place; and D., a person possibly in the opinion of B. answering the description, unhappily comes by and is murdered, upon a strong belief on the part of B. that this is the man marked out for destruction. Here is a lamentable mistake, — but who is answerable for it? B. undoubtedly is; the malice on his part *egreditur personam*. And may not the same be said on the part of A.? The pit which he, with a murderous intention, dug for C., D. *through his guilt* fell into and perished. For B., not knowing the person of C., had no other guide to lead him to his prey than the description A. gave of him. B. in following this guide fell into a mistake, which it is great odds any man in his circumstances might have fallen into. I therefore, as at present advised, conceive that A. was answerable for the consequence of the flagitious orders he gave, since that consequence appears, in the ordinary course of things, to have been highly probable.' (k)

Foster, J., then proposes the following *criteria*, as explaining the grounds upon which the several cases falling under this head will be found to turn: 'Did the principal commit the felony he stands charged with under the influence of the flagitious advice; and was the event, in the ordinary course of things, a probable consequence of that felony? or did he, following the suggestions of his own wicked heart, wilfully and knowingly commit a felony of another kind, or upon a different subject?' (l)

A. commands B. to kill C., but before the execution thereof repents and countermands B., yet B. proceeds in the execution thereof; A. is not accessory, for his consent continues not, and he gave timely countermand to B.: but though A. had repented, yet if B. had not been actually countermanded before the fact committed, A. had been accessory. (m)

Accessories after the fact.¹ — IV. *An accessory after the fact* is a person who, knowing a felony to have been committed by another

(i) 1 Hale, 617. 3 Inst. 51.

(l) Fost. 372.

(j) Plowd. 475. 1 Hale, 431.

(m) 1 Hale, 617.

(k) Fost. 370, 371.

AMERICAN NOTE.

¹ As to accessories after the fact in America, see *Harrill v. S.*, 29 Miss. 702.

receives, relieves, comforts or assists the felon. (*n*) And it seems to have been agreed, that any assistance given to one known to be a felon, in order to hinder his being apprehended or tried, or suffering the punishment to which he is condemned, is a sufficient receipt to make a man an accessory of this description: as where one assists a felon with a horse to ride away, or with money or victuals to support him in his escape, or where one harbours and conceals in his house a felon under pursuit, by reason whereof the pursuers cannot find him; and much more where one harbours in his house and openly protects such a felon, by reason whereof the pursuers dare not take him. (*o*) If A. has his goods stolen by B., and C. knowing they were stolen receives them, this simply of itself makes not an accessory; but if B. come to C. and deliver him the goods to keep for him, C. knowing that they were stolen, and that B. stole them, or if C. receive the goods to facilitate the escape of B., or if C. knowingly receives them upon agreement to furnish B. with supplies out of them, and accordingly supplies him, this makes C. an accessory. But the bare receiving of stolen goods, knowing them to be stolen, makes not an accessory; for he may receive them to keep for the true owner, or till they are recovered or restored by law. (*p*)

Where, after setting out the conviction of a principal for a robbery of a £100 note, an indictment alleged that the prisoner did receive, harbour, maintain, relieve, aid, comfort, and assist the principal, knowing him to have committed the robbery, and it appeared that shortly after the robbery the prisoner applied to his landlady to change the note, but did not succeed, and that the principal went to a shop to purchase some articles, for the payment of which he tendered the note, and received a large part of it in change, and that during the time he was in the shop the prisoner was waiting outside; Maule, J., held that there was evidence of comforting and assisting. If a man stole a horse, and another assisted him in colouring and disguising him, so that he could not be known again, that would make him an accessory. Here the prisoner assists the party who has stolen the note to get rid of it, and thus evade the justice of the country. (*q*)

Where a lad robbed a banking house, in which he was clerk, and the same evening went to the room of the prisoner, a man, where he stayed twenty minutes, and both of them proceeded together that evening, by coach, to Bristol, and thence to Liverpool, where they were apprehended before they set sail for America, whither the prisoner had said they were going: it was held that this was evidence to go to the jury, upon an indictment charging the prisoner with harbouring, receiving, and maintaining the boy, although the places in the coaches were paid for by the boy. (*r*) So a man who employs another person to harbour the principal may be convicted as an accessory after the fact, although he himself did no act of relieving or assisting the principal. (*s*)

Also, whoever rescues a felon from an arrest for the felony, or

(*n*) 1 Hale, 618. 4 Blac. Com. 37.
 (*o*) 2 Hawk. P. C. c. 29, s. 26. 1 Hale,
 618, 619. 4 Blac. Com. 38.
 (*p*) 1 Hale, 619.

(*q*) R. v. Butterfield, 1 Cox, C. C. 39.
 (*r*) R. v. Lee, 6 C. & P. 536, Williams, J.
 (*s*) R. v. Jarvis, 2 M. & Rob. 40,
 Gurney, B.

voluntarily and intentionally suffers him to escape, is an accessory to the felony: (*t*) and it has been said, that those are in like manner guilty who oppose the apprehending of a felon. (*u*) A man may be an accessory after the fact by receiving one who was an accessory before, as well as by receiving a principal. (*v*) And a man may make himself an accessory after the fact to a larceny of his own goods, or to a robbery on himself, by harbouring or concealing the thief, or assisting in his escape. (*w*)

In order to support a charge of receiving, harbouring, comforting, assisting and maintaining a felon, there must be some act proved to have been done to assist the felon personally; it is not enough to prove possession of various sums of money derived from the disposal of the property stolen. (*x*)

Where an indictment alleged that Mills sent letters demanding money with menaces, and that the prisoner did 'feloniously receive, harbour, maintain, and assist' the said Mills, knowing her to have committed the said felony, and the letters contained threats of exposing the immorality of the prosecutor, and one of them threatened to insert a paragraph in the 'Satirist;' and immediately afterwards articles reflecting on the prosecutor appeared in that paper of which the prisoner was the proprietor, and on being cautioned as to the course he was pursuing, the prisoner said he could not stop the publication of such articles in future, and referred to Mills, and gave her address, and on being told that the prosecutor would submit to a little extortion rather than have his character assailed, the prisoner consented to wait a week that the prosecutor might be spoken to on the subject. Notices, however, that further articles of the same nature would be published continued to appear in the 'Satirist.' It was contended that there was no evidence to prove that the prisoner was an accessory; it was answered that any assistance given to the principal to enable her to carry out the object with which the felony was committed was sufficient. Erle, J.: 'I do not agree to that proposition; the assistance must tend to prevent the principal felon from being brought to justice. The question is, did he, after the felony was complete, assist the felon to elude justice? It is no part of this felony that the money should be paid: the crime is complete as soon as the demand is made. Can it be said, then, that by assisting in a fresh attempt to obtain money, he aided her in concealing or even carrying out the one completed?' Erle, J., however, left the case to the jury, intending to reserve the point; but the jury acquitted the prisoner. (*y*)

Where an Act of Parliament enacts an offence to be felony, though it mentions nothing of accessories, yet virtually and consequentially those that knowingly receive the offender are accessories *after*. (*z*) It has, however, been said, that if the Act of Parliament that makes

(*t*) 2 Hawk. P. C. c. 29, s. 27. 1 Hale, 619; but not the merely suffering him to escape, where it is a bare omission. 1 Hale, 619. 2 Hawk. P. C. c. 29, s. 29.

(*u*) 2 Hawk. P. C. c. 29, s. 27.

(*v*) 2 Hawk. P. C. c. 29, s. 1.

(*w*) Fost. 128. Crompt. Just. 41 b, pl. 4 and 5.

(*x*) R. v. Chapple, 9 C. & P. 355. Law, R., after consulting Littledale, J., and Alderson, B.

(*y*) R. v. Hansill, 3 Cox, C. C. 597.

(*z*) 1 Hale, 613. *Ante*, p. 174.

the felony in express terms, comprehend accessories *before*, and make no mention of accessories *after*, it seems there can be no accessories *after*; the expression of procurers, counsellors, abettors, all which import accessories *before*, making it evident that the Legislature did not intend to include accessories *after*, whose offence is of a lower degree than that of accessories *before*. (a) But by others it is considered to be settled law, that in all cases where a statute makes any offence treason, or felony, it involves the receiver of the offender in the same guilt with himself, in the same manner as in treason or felony at common law, unless there be an express provision to the contrary. (b) And although it be generally true, that an Act of Parliament creating a felony renders consequentially accessories *before* and *after*, within the same penalty, yet the special penning of the Act sometimes varies the case: thus the 3 Hen. 7, c. 2 (now repealed), for taking away women, made the taking away, the procuring and abetting, and also the wittingly receiving, all equally felonies and excluded from clergy. So that Acts of Parliament may diversify the offences of accessory or principal according to their various penning, and have done so in many cases. (c)

There is no doubt but that it is necessary for a receiver to have had notice, either express or implied, of the felony having been committed, in order to make him an accessory by receiving the felon; (d) and it is also agreed, that the felony must be complete at the time of the assistance given, else it makes not the assistant an accessory. So that if one wound another mortally, and after the wound given, but before death ensues, a person assists or receives the delinquent; this does not make him accessory to the homicide, for till death ensues there is no felony committed. (e)

The law has such a regard to the duty, love, and tenderness, which a wife owes to her husband, that it does not make her an accessory to felony by any receipt whatever which she may give to him; considering that she ought not to discover her husband. (f)

It is not thought necessary to discuss further the general principles of law relating to accessories after the fact, since prosecutions against such persons grounded on the common law are seldom instituted at the present time; nor do they appear to have been frequent for many years past, nor to have had any great effect. (g) It should seem, however, that the 7 & 8 Geo. 4, c. 28, ss. 8, 9 will apply to accessories after the fact, where no punishment is specially provided for their felony. (h) The Consolidation Acts of the 24 & 25 Vict. make accessories after the fact to felonies punishable under those Acts respectively liable to imprisonment for any term not exceeding two years. (i)

(a) 1 Hale, 614.

(b) 2 Hawk. P. C. c. 29, s. 14.

(c) 1 Hale, 614.

(d) 2 Hawk. P. C. c. 29, s. 32.

(e) 2 Hawk. c. 29, s. 35. 4 Blac. Com. 38; but I apprehend it would make him accessory to the felony of maliciously wounding. C. S. G.

(f) 2 Hawk. c. 29, s. 34. 1 Hale, 621. *Ante*, p. 158. But this applies to no other relation besides that of a wife to her husband; and the husband may be an accessory for the receipt of his wife. 1 Hale, 621.

(g) Fost. 372.

(h) See *ante*, p. 65.

(i) See *post*, p. 184.

Proceedings against accessories.¹—The principal and accessory may be indicted in the same indictment, and tried together, which is the best and most usual course. Formerly the accessory could not, without his own consent, have been brought to trial till the guilt of the principal was legally ascertained by conviction or outlawry, unless they were tried together. (*j*) And an accessory could not in such case have been tried, unless the principal had been attainted, so that if the principal stood mute of malice, or challenged peremptorily above the legal number of jurors, or refused to answer directly to the charge, the accessory could not have been put upon his trial. (*k*) But the 24 & 25 Vict. c. 94, has made the following salutary provisions for the effectual prosecution of accessories.

As to accessories before the fact:—(*l*)

Sec. 1. 'Whosoever shall become an accessory before the fact to any felony, whether the same be a felony at common law or by virtue of any Act passed or to be passed, may be indicted, tried, convicted, and punished in all respects as if he were a principal felon.'

Sec. 2. 'Whosoever shall counsel, procure, or command any other person to commit any felony, whether the same be a felony at common law or by virtue of any Act passed or to be passed, shall be guilty of felony, and may be indicted and convicted either as an accessory before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in the same manner as any accessory before the fact to the same felony, if convicted as an accessory, may be punished.' (*m*)

Sec. 1 is taken from the 11 & 12 Vict. c. 46, s. 1, upon which it was held, that it was no objection to an accessory before the fact being convicted that his principal had been acquitted. Hall and Hughes were jointly indicted for stealing certain cotton. Hall was acquitted and called as a witness against Hughes; and it clearly appeared that Hall had stolen the cotton at the instigation of Hughes, and in his absence. It was contended, that as Hall had been acquitted, Hughes must be so also; for the statute had only altered the form of pleading, and not the law, as to accessories before the fact; but it was held, that the statute had made the offence of the accessory before the fact a substantive felony, and that the old law, which made the conviction of the principal a condition precedent to the conviction of the accessory, was done away by that enactment. (*n*)

In every case where there may be a doubt whether a person be a principal or accessory before the fact, it may be advisable to prefer

(*j*) 1 Hale, 623. 2 Hawk. c. 29, s. 45. tion acts as to punishment, &c., of accessories, noticed *post*.
Fost. 360.

(*k*) Fost. 362, and see 1 Hale, 625. 1 (*m*) This clause is taken from the 7 Geo. 4, c. 64, s. 9; and 9 Geo. 4, c. 54, s. 23 (1.).
St. Tr. 314.

(*l*) See the enactments in the consolidation. (*n*) *R. v. Hughes*, Bell C. C. 242.

AMERICAN NOTE.

¹ As to the trial in America of accessories, see *S. v. Taylor*, 2 Bailey, 49; *U. S. v. Crane*, 4 McLean, 317; *S. v. Phillips*, 24 Mo. 475; *Kerthler v. S.*, 10 Sm. & Marsh. 192. See also *May's Criminal Law*, ss. 69-75.

the indictment under this section, as such an indictment will be sufficient, whether it turn out on the evidence that such person was a principal or accessory before the fact, as well as where it is clear that he was either the one or the other, but it is uncertain which he was; although in cases of accessories after the fact they must be indicted as such, and not as principals. (See *R. v. Fallon*, post.)

It may be well to observe, however, that there are cases in which it is not clear that an indictment under this section would suffice. Suppose, for instance, that the offence of the principal be local; e. g., a burglary committed in the county of Worcester, and that the accessory is indicted in the county of Stafford, on the ground that the evidence shows that the acts, by which he became accessory, were done in the latter county, it may be questionable whether the accessory could be indicted and tried under this section in that county; for it only authorizes the accessory to be indicted and tried 'as if he was a principal felon,' and the principal could only be indicted and tried in Worcestershire. Possibly if such an objection were taken on the trial, it might be held that sec. 7 of this Act authorised the indictment and trial in Staffordshire, on the ground that the evidence showed the party to have become an accessory before the fact in that county. But supposing that to be so, the same question might be raised in arrest of judgment or on error, and on the face of the record all that would appear would be that the prisoner was indicted and tried as a principal in Staffordshire for a burglary committed in Worcestershire; but even here it might be held that the effect of the 24 & 25 Vict. c. 94, s. 1, is to make every indictment which charges a person as principal contain a charge of being accessory before the fact also, and consequently that there was nothing on the face of the record inconsistent with the facts having proved that the prisoner was such an accessory in Staffordshire. However, in any such case, it would be prudent to insert a count framed under the second section.

In order to bring a case within secs. 1 and 2 of 24 & 25 Vict. c. 94, a felony must have been actually committed, otherwise an inciting to commit a felony is a misdemeanor only. Thus, where the prisoner was indicted for the misdemeanor of soliciting and inciting a man to commit a felony, but without effect; it was held that he was rightly convicted of such misdemeanor; but that to make a conviction good under the above statute, it must be shown that a felony was committed, and instead of the words 'soliciting and inciting,' the words of the statute should be followed, and the offence should be alleged to have been done feloniously. (*o*)

In *R. v. Chadwick*, (*p*) the prisoner was indicted as a principal for murder by arsenic, and the jury found that he procured the arsenic, and caused it to be administered by another person, but was absent when it was administered; and thereupon it was objected that the 11 & 12 Vict. c. 46, s. 1, did not apply to murder; but Williams, J., overruled the objection; and refused to reserve the point. And this decision was clearly right; for it has been held that a commission to the ordinary to receive all clerks indicted for felony, but not for

(*o*) *R. v. Gregory*, L. R. 1 C. C. R. 77.
36 L. J. M. C. 60.

(*p*) *Stafford. Sum. Ass.* 1850, MSS.,
C. S. G.

murder, gave authority to the ordinary to receive a person indicted for murder; and all the justices said that murder is felony, and if a commission be made to two to enquire of all felonies, they can well take indictments of murder, although a pardon of all felonies is not available for one indicted of murder; for that is by statute 13 R. 2, st. 2, c. 1. (*q*)

As to accessories after the fact: — (*r*)

(24 & 25 Vict. c. 94) s. 3. 'Whosoever shall become an accessory after the fact to any felony, whether the same be a felony at common law or by virtue of any Act passed or to be passed, may be indicted and convicted either as an accessory after the fact to the principal felony together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in like manner as any accessory after the fact to the same felony, if convicted as an accessory, may be punished.' (*s*)

Upon an indictment against a prisoner as a principal he cannot be convicted under this section as an accessory after the fact. The prisoner was indicted for stealing from the person; there was no evidence to prove that charge, but there was ample evidence to prove that he was an accessory after the fact to the stealing from the person; it was held that he could not be convicted as such accessory upon this indictment. (*t*)

Sec. 4. 'Every accessory after the fact to any felony (except where it is otherwise specially enacted), (*u*) whether the same be a felony at common law or by virtue of any Act passed or to be passed, shall be liable, at the discretion of the Court, to be imprisoned in the common gaol or house of correction for any term not exceeding two years, with or without hard labour, and it shall be lawful for the Court, if it shall think fit, to require the offender to enter into his own recognizance and to find sureties, both or either, for keeping the peace, in addition to such punishment: Provided that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year.'

As to accessories generally: —

Sec. 5. 'If any principal offender shall be in anywise convicted of any felony, it shall be lawful to proceed against any accessory, either before or after the fact, in the same manner as if such principal felon had been attainted thereof, notwithstanding such principal felon shall die, or be pardoned, or otherwise delivered before attainder; and every such accessory shall upon conviction suffer the same punishment as he would have suffered if the principal had been attainted.' (*v*)

Sec. 6. 'Any number of accessories at different times to any felony,

(*q*) Anonymous, Keilw. 91, *b*; and see 2 Hale, 45. 3 Inst. 236, and Greaves' Cr. St. 20, 2nd edit.

(*r*) See the enactments in the consolidation Acts as to the punishment, &c., of accessories, noticed *post*.

(*s*) This clause is taken from the 11 & 12 Vict. c. 46, s. 2.

(*t*) R. v. Fallon, 1 L. & C. 217. 32 L. J. M. C. 66.

(*u*) See 24 and 25 Vict. c. 100, s. 67, *post*, p. 184.

(*v*) This clause is taken from the 7 Geo. 4, c. 64, s. 11, and 9 Geo. 4, c. 54, s. 25 (1.).

and any number of receivers at different times of property stolen at one time, may be charged with substantive felonies in the same indictment, *and may be tried together*, notwithstanding the principal felon shall not be included in the same indictment, or shall not be in custody or amenable to justice.' (*w*)

Sec. 7. 'Where any felony shall have been wholly committed within England or Ireland, the offence of any person who shall be an accessory either before or after the fact to any such felony may be dealt with, inquired of, tried, determined, and punished by any court which shall have jurisdiction to try the principal felony, or any felonies committed in any county or place in which the act, by reason whereof such person shall have become such accessory, shall have been committed: and in every other case the offence of any person who shall be an accessory either before or after the fact to any felony may be dealt with, inquired of, tried, determined, and punished by any court which shall have jurisdiction to try the principal felony *or any felonies committed in any county or place in which such person shall be apprehended or be in custody*, whether the principal felony shall have been committed on the sea or on the land, or begun on the sea and completed on the land, or begun on the land and completed on the sea, and whether within Her Majesty's dominions or without, or partly within Her Majesty's dominions and partly without; provided that no person who shall be once duly tried either as an accessory before or after the fact, or for a substantive felony under the provisions hereinbefore contained, shall be liable to be afterwards prosecuted for the same offence.'

This clause is taken from the 7 Geo. 4, c. 64, ss. 9, 10; 9 Geo. 4, c. 54, ss. 23, 24 (I); and 11 & 12 Vict. c. 46, s. 2.

Under those enactments accessories might be tried by any court which had jurisdiction to try the principal, whether the principal felony had been committed on the sea or on land, and whether within the Queen's dominions or without, and where the principal felony was committed in one county, and the act by which the person became an accessory was done in another county, the accessory might be tried in either.

By the earlier part of this clause, where the principal felony is wholly committed in England or Ireland, the accessory may be tried either in the county where the principal felony may be tried, or in the county where the act by which he became an accessory was done. But where the principal felony is not committed wholly in England or Ireland, the accessory may be tried by any court which has jurisdiction to try the principal, or in any county in which the accessory may be apprehended or be in custody. The object of

(*w*) This clause is framed from the 14 & 15 Vict. c. 100, s. 15, and the words in italics inserted. The Committee of the Commons who sat on the 14 & 15 Vict. c. 100, struck out those words, not perceiving that they were the only important words in the clause: for there never was any doubt that separate accessories and receivers might be included in the same indictment under the circumstances referred to in the clause; the doubt was, whether they could be com-

pelled to be tried together in the absence of the principal, where they separately became accessories, or separately received.

The marginal note was erroneously altered after the Bill went to the House of Lords. It began 'separate accessories,' because the clause applies only to accessories at different times. 'Several' persons may become accessories at one and the same time and place. C. S. G.

this latter provision is to meet cases where the principal felony may have been committed, either on land or sea, out of England and Ireland; in such cases no court had jurisdiction to try the principal until he was apprehended in England or Ireland, and consequently where the principal in such cases had not been apprehended, the accessory would not have been triable at all under the former enactments. The words in italics cure this defect.

By 24 & 25 Vict. c. 100, (x) s. 67, 'In the case of every felony punishable under this Act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act (except murder) shall be liable to be imprisoned for any term not exceeding two years with or without hard labour; and every accessory after the fact to murder shall be liable, at the discretion of the Court, to be kept in penal servitude for life or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour; and whosoever shall counsel, aid, or abet the commission of any indictable misdemeanor punishable under this Act shall be liable to be proceeded against, indicted, and punished as a principal offender.'

As to abettors in misdemeanors:—

By 24 & 25 Vict. c. 94, s. 8, 'Whosoever shall aid, abet, counsel, or procure the commission of any misdemeanor, whether the same be a misdemeanor at common law or by virtue of any Act passed or to be passed, shall be liable to be tried, indicted, and punished as a principal offender.'

This clause is framed from the similar clauses in the 7 & 8 Geo. 4, c. 30, s. 26; 9 Geo. 4, c. 56, s. 33 (I.), &c., and is really only a declaration of the common law on the subject; by which all persons, who would be accessories in felony, are principals in misdemeanor, (y) and hence it follows that a person indicted for committing a misdemeanor may be convicted, if it appear that he caused it to be committed, although he is absent when it is committed. (z)

As to other matters:—

Sec. 9. 'Where any person shall, within the jurisdiction of the Admiralty of England or Ireland, become an accessory to any felony, whether the same be a felony at common law or by virtue of any Act passed or to be passed, and whether such felony shall be committed within that jurisdiction or elsewhere, or shall be begun within that jurisdiction and completed elsewhere, or shall be begun elsewhere and completed within that jurisdiction, the offence of such person shall be felony; and in any indictment for any such offence the venue in the margin shall be the same as if the offence had been committed in the county or place in which such person shall be indicted, and his offence shall be averred to have been committed "on the high seas," provided that nothing herein contained shall alter or affect any of the laws relating to the government of Her Majesty's land or naval forces.'

(x) This is the Act relating to offences against the person.

(y) See *ante*, p. 174.

(z) *R. v. Clayton*, 1 C. & K. 128. *R. v. Moland*, 2 M. C. C. R. 276.

The object of the earlier part of this clause is to remove a doubt whether a person who became an accessory on the sea in the cases mentioned in it, was a felon; it may be that this was an unfounded doubt, but it was thought better to prevent the question arising. The 7 Geo. 4, c. 64, s. 9, contained a similar enactment.

The latter part of the clause is framed on the 7 & 8 Vict. c. 2, and provides for the form of indictment against accessories on the sea. (a)

An accessory before the fact to the crime of self-murder was not triable at common law, because the principal could not be tried; and such an accessory was not triable under the 7 Geo. 4, c. 64, s. 9 (now repealed), which did not make accessories triable except in cases where they might have been tried before. Russell was tried on an indictment which charged S. Wormsley with murdering herself with arsenic, and Russell with inciting her to commit the said murder. It appeared that Wormsley, who was about four months advanced in pregnancy, but not quick with child, died from taking arsenic, which she had received from Russell, for the purpose of procuring a miscarriage, and that she knowingly took it with intent to procure a miscarriage, in the absence of Russell. It was objected that there was no evidence to prove that she was *felo de se*; that the 9 Geo. 4, c. 31, s. 13, did not apply to a woman administering poison to herself, and that assuming her to have taken arsenic knowingly, and with intent to procure miscarriage, she was not guilty of any offence; and, consequently, if there were no principal there could be no accessory. Secondly, that the 7 Geo. 4, c. 64, s. 9, did not apply to the case of a principal who was *felo de se*. It was held that she was *felo de se*; that Russell was an accessory before the fact, but that he could not be tried as an accessory under the 7 Geo. 4, c. 64, s. 9, as he could not have been tried at all before that statute, which was to be considered as extending to those persons only, who, before the statute, were triable either with or after the principal, and not to make those triable who before could never have been tried. (b)

On a trial for murder, it appeared that the deceased had died from the effects of corrosive sublimate taken to procure abortion, in July, 1861. She had endeavoured to purchase corrosive sublimate herself, but the druggists having refused to furnish it to her, she had urged the prisoner to procure it, which he did with the full knowledge of the purpose to which it was to be applied; but there was ground for believing that the prisoner, in procuring the poison, had acted under the influence of threats by the deceased of self-destruction if the means of procuring abortion were not supplied to her. She was a married woman, living separately from her husband, and pregnant by the prisoner. The jury expressly negatived the fact of the prisoner having administered the poison to, or caused it to be taken by, the deceased. They found that the prisoner procured the poison, and delivered it to the deceased, with a knowledge of the purpose to which she intended to apply it, and that he was, therefore, accessory before the fact of her taking poison to procure abortion. Cockburn, C. J., thereupon, on the authority of the preceding

(a) By sec. 10, nothing in this Act contained shall extend to Scotland, except as hereinbefore otherwise expressly provided.

(b) *R. v. Russell*, R. & M. 356. R. v. Leddington, 9 C. & P. 79. *Alderson*, B.

case, directed the jury to return a verdict of guilty; but it appearing doubtful to him how far the ruling in that case, that if poison be taken by a woman to procure abortion, and death ensues, she is *felo de se*, could be upheld: and still more so, how far a man, accessory to the misdemeanor of a woman taking poison to procure abortion, can be held to be accessory to her self-murder, if, contrary to the intention of the parties, death should be the consequence, his Lordship reserved these points: and it was held that the conviction was wrong, and that there was a very marked distinction between the two cases. In the one the prisoner persuaded the woman to take the arsenic; in the other the prisoner was unwilling that the woman should take the poison. The facts of the case were quite consistent with the supposition that he hoped and expected that she would change her mind, and would not resort to it. Then the cases being distinguishable, it was unnecessary to decide whether the woman was *felo de se*. (c)

Where an indictment stated that Lowe cast away a vessel, and that the prisoner incited him to commit the said felony, it was objected that the indictment was not properly framed as for a substantive offence, under the 7 Geo. 4, c. 64, s. 9, but was in the form of an indictment at common law against principal and accessory, and as the principal had not been convicted, and was not on his trial, the accessory could not be tried. But it was held that the description of the offence was not altered by the statute. It might have been put in a different shape, but every allegation in this indictment would have been included in any other. (d) So where Mills was indicted for sending letters demanding money with menaces, and Hansill with receiving, harbouring, &c., Mills, knowing her to have committed the said felony, Erle, J., held that Hansill might be tried before Mills on this indictment under the 11 & 12 Vict. c. 46, s. 2 (now repealed, but re-enacted by the 24 & 25 Vict. c. 94, s. 3), as that clause was only intended to alter the course of trial, and not the mode of describing the offence. (e) But in one case an indictment alleging that a certain evil-disposed person feloniously stole, and that before the said felony was done the prisoner did feloniously incite the said evil-disposed person to commit the said felony, was held bad as being too uncertain. (f)

Where the proceedings are against the accessory alone for receiving stolen goods, the name of the principal need not be stated. (g) So where the proceedings are against both principal and accessory, the indictment may contain counts for a substantive felony in receiving stolen goods without naming the principal, and upon such an indict-

(c) *R. v. Fretwell*, 1 L. & C. 161. But now by the 24 & 25 Vict. c. 100, s. 58, any woman taking poison to procure abortion is guilty of felony, which materially alters the character of such cases for the future, and the difficulty as to the trial of the accessory is got rid of by sec. 1 of the 24 & 25 Vict. c. 94. See *R. v. Gayler*, 1 D. & B. 288, *ante*, p. 173.

(d) *R. v. Wallace*, 2 M. C. C. 200, C. & M. 200. But see *R. v. Ashmall*, 9 C. & P. 237.

(e) *R. v. Hansill*, 3 Cox, C. C. 597.

(f) *R. v. Caspar*, 2 M. C. C. R. 101.

(g) *R. v. Jervis*, 6 C. & P. 156. Tindal, C. J. *R. v. Wheeler*, 7 C. & P. 170. Coleridge, J. *R. v. Caspar*, 2 M. C. C. R. 101; S. C., 9 C. & P. 289.

ment the receiver may be convicted, although the person indicted as principal be acquitted. (*h*)

A count charging a person with being accessory before the fact may be joined with a count charging the same person with being accessory after the fact to the same felony, and the prosecutor cannot be compelled to elect upon which he will proceed, and the party may be found guilty upon both. (*i*) A case has occurred, in which a party was indicted for receiving stolen goods, and also for receiving, harbouring and comforting, the felon, and the prisoner was convicted. (*j*)

Where a count charged a prisoner with stealing certain cotton, and another count charged him with receiving the property aforesaid, and it was proved that the prisoner had solicited a servant to rob his master; which he did, and took the cotton to the prisoner, in whose possession it was afterwards found, and he stated that he had got it from the servant, and the jury found a general verdict of guilty; it was held, on a case reserved, that the jury might upon this evidence reasonably convict the prisoner as an accessory before the fact upon the count for stealing, under sec. 1 of the 11 & 12 Vict. c. 46, and that there was no inconsistency in finding that he was guilty of being an accessory before the fact, and that he received the goods knowing them to have been stolen. (*k*) But where one count charged the prisoner with stealing sheep, and another with receiving the said sheep knowing them to have been stolen, and the jury found a verdict of guilty on both counts, the Court of Queen's Bench in Ireland set aside the verdict and judgment on the ground that this was an inconsistent verdict. The Court assumed that the counts were inserted under the 11 & 12 Vict. c. 46, s. 3, and held that that statute only authorised the jury to convict either of stealing or receiving, and not of both. (*l*)

(*h*) *R. v. Pulham*, 9 C. & P. 280. *Gurney*, B. *R. v. Austin*, 7 C. & P. 796. *Parke* and *Bolland*, B.

(*i*) *R. v. Blackson*, 8 C. & P. 43. *Parke*, B., and *Patteson*, J., after full consideration.

(*j*) *Ibid.* per *Parke*, B.

(*k*) *R. v. Hughes*, Bell, C. C. 242.

(*l*) *R. v. Evans*, 7 Cox, C. C. 151. The Court said that 'it might be possible that a man may have stolen goods, and, after disposing of them, may afterwards get them into his hands knowing them to be stolen, and be thus guilty of stealing and receiving the same goods.' Now, suppose, on the trial of this indictment, the facts had been as thus stated, it seems plain that the jury ought to have found the verdict they did, and upon the finding as it stood the Court were bound to presume that the evidence proved both counts. But the Court add, 'The statements in this record negative such a state of facts;' and 'the unity of the offence in the ordinary language is put beyond doubt, the stealing and receiving are of the same chattel, laid as the property of the same person, on the same day.' This is a plain error; the property must be the same, and the time laid is per-

fectly immaterial; but even if it were material, a man may on the same day steal goods at one place, part with them, and receive them again at another place. Again, the 11 & 12 Vict. c. 46, s. 3, only says, 'it shall be lawful' for the jury to convict either of stealing or receiving; but it does not forbid them to convict of both. Suppose a written confession of the prisoner proved both offences, how can a jury on their oaths acquit of either? In point of law there never was any objection to the insertion of several distinct felonies in one indictment; it was no ground of demurrer, arrest of judgment or error (1 Chitt. Cr. L. 253), but it was mere matter for the discretion of the judge to put the prosecutor to elect on which charge he would proceed. The 11 & 12 Vict. c. 46, s. 3, had taken away that discretion in this case, and made a prisoner triable at the same time for stealing and receiving, and as the Act contains no prohibitory words, the necessary consequence follows that the jury may convict of both if the evidence prove both offences. If it were otherwise, they must find a false verdict either on the one or other count, and thereby

An indictment against an accessory should state that the principal committed the offence; and it is not sufficient merely to state, that he was indicted for it. (*m*)

Before the 11 & 12 Vict. c. 46, it was settled, that if a man were indicted as accessory to two or more persons, and the jury found him accessory to one, it was a good verdict, and judgment might pass upon him. (*n*)

If A. be indicted as principal, and B. as accessory, and both be acquitted, or if B. only be acquitted, yet B. may be indicted as principal in the same offence, and his former acquittal is no bar. (*o*) So if A. were indicted as principal and acquitted, he might formerly have been afterwards indicted as accessory before the fact. (*p*) But now an acquittal as principal is clearly a bar to an indictment for being accessory before the fact; for on an indictment as principal an accessory before the fact may be convicted under the 24 & 25 Vict. c. 94, s. 1. So if a man be indicted as principal and acquitted, he may be indicted as accessory after the fact; and so if he be indicted as accessory before the fact and acquitted, he may be indicted as accessory after the fact. (*q*) The late statute, as we have seen, enacts, that no person who shall be once duly tried for any offence of being an accessory shall be liable to be again indicted or tried for the same offence. (*r*)

The indictment charged all four prisoners with feloniously inciting a certain evil-disposed person to forge a will; the evidence did not show any joint act done by the prisoners, but only separate and independent acts at separate and distinct times and places. After all the evidence on the part of the prosecution had been given, one of the prisoners pleaded guilty; it was thereupon urged that all the other prisoners were entitled to an acquittal; that the indictment charged a joint inciting, and there being no evidence of any joint acting, and one prisoner being convicted, the others could not be convicted jointly with her; but Williams, J., overruled the objection. (*s*)

Where the principal and accessory are tried together upon the same indictment, there is no doubt but that the accessory may enter into the full defence of the principal, and avail himself of every matter of fact and every point of law tending to his acquittal; for the accessory is in this case to be considered as *particeps in lite*; and this sort of defence necessarily and directly tends to his own acquittal. And where the accessory is brought to his trial after the conviction of the principal, and it comes out in evidence upon the trial of the accessory that the offence of which the principal was convicted *did not amount to felony in him, or not to that species of felony with which he was charged*, the

save the prisoner from the punishment of one of the two offences he had committed See *post*. C. S. G.

(*m*) Lord Sanchar's case, 9 Co. 117 a. R. v. Read, 1 Cox, C. C. 65. R. v. Butterfield, 1 Cox, C. C. 39.

(*n*) Fost. 361, 9 Co. 119. 1 Hale, 624. 2 Hawk. P. C. c. 29, s. 46. Plowd. 98, 99. Fost. 361.

(*o*) 1 Hale, 625. R. v. Winifred &

Thomas Gordon, 1 Leach, 515; S. C., 1 East, P. C. 35.

(*p*) R. v. Birchenough, R. & M. 477, overruling 1 Hale, 626; 2 Hale, 244, *ante*, p. 48.

(*q*) 1 Hale, 626.

(*r*) 24 & 25 Vict. c. 94, s. 7, *ante*, p. 183, as to plea of *autrefois acquit*, see *ante*, p. 38.

(*s*) R. v. Barber, 1 C. & K. 442. R. v. Messingham, R. & M. 257.

accessory may avail himself of this, and ought to be acquitted. (t) For though it is not necessary upon such trial on the part of the prosecution to enter into a detail of the evidence on which the conviction was founded, and the record of the conviction is deemed sufficient evidence against the accessory to put him upon his defence; (u) yet the presumption raised by the record that everything in the former proceeding was rightly and properly transacted must, it is conceived, give way to facts manifestly and clearly proved; and that as against the accessory the conviction of the principal will not be conclusive, being as to him *res inter alios acta*. (v) This was the opinion of Foster, J., and upon this opinion the Court, in a case at the Old Bailey, permitted the counsel for an accessory to controvert the propriety of the conviction of the principal by *viva voce* testimony, and to show that the act done by the principal did not amount to a *felony*, and was only a *breach of trust*. (w) And in a later case, in the same Court, it was also admitted that the record of the conviction of the principal was not *conclusive* evidence of the felony against the accessory, and that he has a right to controvert the propriety of such conviction. (x)

It seems that the accessory may insist upon the *innocence of the principal*. Foster, J., says, 'If it shall manifestly appear, in the course of the accessory's trial, that in point of fact the principal was innocent, common justice seems to require that the accessory should be acquitted. A. is convicted upon circumstantial evidence, strong as that sort of evidence can be, of the murder of B.; C. is afterwards indicted as accessory to this murder; and it comes out upon the trial, by incontestable evidence, that B. is still living (Lord Hale somewhere mentions a case of this kind). Is C. to be convicted or acquitted? The case is too plain to admit of a doubt. Or, suppose B. to have been in fact murdered, and that it should come out in evidence, to the satisfaction of the Court and jury, that the witnesses against A. were mistaken in his person (a case of this kind I have known), and that A. was not, nor could possibly have been, present at the murder.' (a)

Upon an indictment against an accessory, a confession by the principal is not admissible to prove the guilt of the principal; it must be proved *aliunde*, especially if the principal be alive, and could be called as a witness; and it seems that even the conviction of the principal would not be admissible to prove the guilt of the principal. The prisoner was indicted for receiving sixty sovereigns, which had been stolen by H. Rich. A confession by H. Rich, made before a magistrate in the presence of the prisoner, in which she stated various facts implicating the prisoner, was tendered in evidence. Patteson, J., refused to receive anything that was said by H. Rich, respecting the prisoner, but admitted what she said respecting herself only.

(t) *Fost.* 365. *R. v. M'Daniel* and others, 19 *Sta. Tri.* 806.

(u) But see *R. v. Turner*, *post*.

(v) *Fost.* 365.

(w) *Smith's case*, 1 *Leach*, 288.

(x) *Prosser's case* (mentioned in a note to *Smith's case*, 1 *Leach*, 290). *Cor. Gould*, *J. R. v. Blick*, 4 *C. & P.* 377. *S. P. Bosanquet, J.* And see *R. v. M'Daniel* and others, 19 *St. Tri.* 806.

(a) *Fost.* 367, 368; and see 3 *Esp. R.* 184 (in the case of *Cook v. Field*), where it was stated by Bearcroft, and assented to by Lord Kenyon, that where the principal has been convicted, it is nevertheless on the trial of the accessory competent to the defendant to prove the principal innocent. And see *R. v. M'Daniel* and others, 19 *St. Tri.* 806.

H. Rich had been found guilty on another indictment, but had not been sentenced, and might have been called as a witness. The judges (except Lord Lyndhurst, C. B., and Taunton, J.) (*b*) were of opinion that Rich's confession was no evidence against the prisoner; and many of them appeared to think that had Rich been convicted, and the indictment against the prisoner stated not her conviction, but her guilt, the conviction would not have been any evidence of her guilt, which must have been proved by other means. (*c*) And upon the authority of this case, where an accessory before the fact to a murder was tried after the principal had been convicted and executed, Parke, B., ordered the proceedings to be conducted in the same manner as if the principal was then on his trial. (*d*) Where two persons were indicted together, one for stealing and the other for receiving, and the principal pleaded guilty, Wood, B., refused to allow the plea of guilty to establish the fact of the stealing by the principal as against the receiver. (*e*)

The prisoner was indicted as an accessory after the fact to one Mills, who was charged with sending letters demanding money with menaces, and Erle, J., held that these letters were admissible in evidence against the accessory, for it was necessary to prove a demand of the money, and these letters constituted the demand. They were, therefore, evidence of acts done. (*f*) Where Read was indicted as accessory before the fact to Simpson, and conversations with Simpson in the absence of Read were offered in evidence, Maule, J., refused to admit them. (*g*) And where, on an indictment against Hawkey and Pym for murder, Pym was tried first, and Hawkey was alleged to have fired the fatal shot in a duel, it was held that it might be proved that Hawkey on the morning before the duel had said, 'I will shoot him as I would a partridge.' Erle, J., saying, 'This statement is an act indicating malice aforethought in Hawkey, and that is a fact which the jury have to ascertain. The intentions of a person can only be inferred from external manifestations, and words are some of the most usual and best evidence of intention. It is not a declaration after the act done narrating the past, but it shows the mind of the party.' (*h*) In the same case, Erle, J., held that what Hawkey said after the duel relating to what passed at the spot where the duel took place was not admissible.

As to harbouring thieves, &c., in public-houses and brothels, see 34 & 35 Vict. c. 112, ss. 10-11, Prevention of Crimes Act (1871), and 39 & 40 Vict. c. 20 § 5.

Punishment of principals in the second degree and accessories under the Consolidation Acts. — By the 24 & 25 Vict. c. 96 (the Larceny Consolidation Act), s. 98, in case of every felony punishable under this Act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act (except only a receiver of stolen property) shall, on conviction, be

(*b*) Who were absent.

(*c*) *R. v. Turner*, R. & M. 347. 1 Lewin, 119. *supra*.

(*d*) Ratcliffe's case, 1 Lewin, 121.

(*e*) Anonymous, cited in *R. v. Turner*,

(*f*) *R. v. Hansill*, 3 Cox, C. C. 597.

(*g*) *R. v. Read*, 1 Cox, C. C. 65.

(*h*) *R. v. Pym*, 1 Cox, C. C. 339.

liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and every person who shall aid, abet, counsel, or procure the commission of any misdemeanor punishable under this Act shall be liable to be indicted and punished as a principal offender.

Each of the Consolidation Acts, 24 & 25 Vict. c. 97 (Malicious Injuries to Property Act), s. 56; c. 98 (Forgery Act), s. 49, contains the following clause:—

‘In the case of every felony punishable under this Act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act shall, on conviction, be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and every person who shall aid, abet, counsel, or procure the commission of any misdemeanor punishable under this Act, shall be liable to be proceeded against, indicted, and punished as a principal offender.’

As to the punishment of principals in the second degree and accessories under the Act relating to coin, see 24 & 25 Vict. c. 99, s. 35, *post*—under the 24 & 25 Vict. c. 100 (the Offences against the Persons Act), sec. 67, *ante*, p. 184—under the Act relating to piracy, see 7 W. 4 & 1 Vict. c. 88, s. 4, *post*—under the Act relating to the Post Office, see 7 W. 4 & 1 Vict. c. 36, s. 35—under the Explosive Substances Act, see 46 Vict. c. 3, s. 7, *post*.

CHAPTER THE FOURTH.

OF INDICTABLE OFFENCES.

OFFENCES which may be made the subject of indictment, and are below the crime of treason, may be divided into two classes, *felonies* and *misdemeanors*.

Felony defined.¹ — The term *felony* appears to have been long used to signify the degree or class of crime committed, rather than the penal consequence of forfeiture occasioned by the crime, according to its original signification. The proper definition of it, however, as stated by an excellent writer, recurs to the subject of forfeiture, and describes the word as signifying — an offence which occasions a total forfeiture (a) of either lands or goods, or both, at the common law; and to which capital or other punishment *may be* superadded according to the degree of guilt. (b) Capital punishment does by no means enter into the true definition of felony: but the idea of felony is so generally connected with that of capital punishment, that it is hard to separate them; and to this usage the interpretations of the law have long conformed. Therefore, formerly, if a statute made any new offence felony, the law implied that it should be punished with death as well as with forfeiture, unless the offender prayed the benefit of clergy, which all felons were entitled once to have, unless the same was expressly taken away by statute. (c)

What words in a statute create a felony. — With regard to felonies created *by statute*, it seems clear that not only those crimes which are made felonies in express words, but also all those which are decreed to have or undergo judgment of life and member by any statute, become felonies thereby, whether the word '*felony*' be omitted or mentioned. (d) And where a statute declares that the offender shall,

(a) This forfeiture is now abolished, 33 & 34 Vict. c. 23, noticed *ante*, p. 108.

(b) 4 Blac. Com. 95, and see 1 Hawk. c. 25, s. 1. 'The higher crimes, rape, robbery, murder, arson, &c., were called felony, and being interpreted want of fidelity to his lord made the vassal lose his fief.' 2 Hume, App. ii. p. 129. As to the derivation of

the word *felony*, from *feah* or *fee*, the fief or estate, and *lon*, the price or value; and ascribing to it the meaning of *pretium feudi*, see Spelm. Gloss. *Felon*, 4 Blac. Com. 95.

(c) 4 Blac. Com. 98. R. v. Johnson, 3 M. & S. 549.

(d) 1 Hale, 703. 1 Hawk. P. C. c. 40, s. 2. R. v. Horne, 4 Cox, C. C. 263.

AMERICAN NOTE.

¹ As to felonies in America, see *Weaver v. C.*, 5 Casey, 445; *Wilson v. S.*, 1 Wis. 184; *S. v. Decon*, 65 N. C. 572. It seems that different States in America have different rules. In some States there is no such division of

crimes as "felony" and "misdemeanor," and in other States different rules of construction of statutes upon this matter appear to prevail. See Bishop, i. s. 618 *et seq.* May's Criminal Law, s. 10.

under the particular circumstances, be deemed to have *feloniously* committed the act, it makes the offence a felony, and imposes all the common and ordinary consequences attending a felony. (e) So where a statute says that an offence, previously a misdemeanor, 'shall be deemed and construed to be a felony,' instead of declaring it to be a felony in distinct and positive terms, the offence is thereby made a felony. (f) An enactment that an offence shall be felony, which was felony at common law, does not create a new offence. (g) An offence shall never be made felony by the construction of any doubtful and ambiguous words of a statute; and therefore, if it be prohibited under 'pain of forfeiting all that a man has,' or of 'forfeiting body and goods,' or of being 'at the king's will for body, land, and goods,' it shall amount to no more than a high misdemeanor. (h) And though a statute make the doing of an act *felonious*, yet if a subsequent statute make it *penal* only, the latter statute is considered as a virtual repeal of the former, so far as relates to the punishment of the offence. (i) Where therefore a statute made an offence punishable with death and a subsequent statute imposed a forfeiture of twenty pounds for the same offence when first committed, recoverable before justices of the peace, and made the second offence felony, the latter statute was held to be a virtual repeal of the former. (k) If also a later statute expressly alters the quality of an offence by making it a misdemeanor instead of a felony, the offence cannot be prosecuted under a former statute, and the same consequence follows from altering the procedure and the punishment. (l)

And where a statute makes a second offence felony, or subject to a heavier punishment than the first, it is always implied that such second offence ought to be committed after a conviction for the first; from whence it follows, that if it be not so laid in the indictment, it shall be punished but as the first offence: for the gentler method shall first be tried, which perhaps may prove effectual. (m) Where a statute makes an offence felony which was before only a misdemeanor, an indictment would not lie for it as a misdemeanor. (n)

Misdemeanors defined.—The word *misdemeanor*, in its usual acceptation, is applied to all those crimes and offences for which the law has not provided a particular name; and they may be punished, according to the degree of the offence, by fine or imprisonment, or both. (o) A misdemeanor is, in truth, any crime less than a felony; and the word is generally used in contradistinction to felony; misdemeanors comprehending all indictable offences which do not amount

(e) By Bayley, J., in *Johnson's case*, 3 M. & S. 556.¹

(f) *R. v. Salomons*, R. & M. 292, overruling *R. v. Cale*, R. & M. 11.

(g) Per Patteson, J., *R. v. Williams*, 7 Q. B. 253.

(h) 1 Hawk. P. C. c. 40, s. 3.

(i) 1 Hawk. P. C. c. 40, s. 5.

(k) *R. v. Davis*, 1 Leach, 271.

(l) *Michell v. Brown*, 2 E. & E. 267, and see *R. v. Cator*, 4 Burr. R. 2026.

(m) 1 Hawk. P. C. c. 40, s. 4.

(n) *R. v. Cross*, 1 Ld. Raym. 711, 3 Salk. 193. See *R. v. Gregory*, L. R. 1 C. C. R. 77; but it must be clear that the same offence is intended.

(o) 3 Burn. Just., tit. *Misdemeanor*, citing *Barlow's Justice*, tit. *Misdemeanor*.

AMERICAN NOTE.

¹ It would seem that the word 'feloniously' in a statute in America will not of itself make the crime a felony. *C. v. Barlow*, 4 Mass. 439. See *Mead v. Boston*, 3 Cush. 404.

to felony, as perjury, battery, libels, conspiracies, and public nuisances. (p) Misdemeanors have been sometimes termed *misprisions*: indeed, the word *misprision*, in its larger sense, is used to signify every considerable misdemeanor which has not a certain name given to it in the law; and it is said that a *misprision* is contained in every treason or felony whatsoever, and that one who is guilty of felony, or treason may be proceeded against for a *misprision* only, if the king please. (q) But generally *misprision of felony* is taken for a concealment of felony, or a procuring the concealment thereof, whether it be felony by the common law, or by statute; (r) and silently to observe the commission of a felony, without using any endeavours to apprehend the offender, is a *misprision*; a man being bound to discover the crime of another to a magistrate with all possible expedition. (s) If this offence were accompanied with some degree of maintenance given to the felon, the party committing it might be liable as an accessory after the fact. (t)

Indictable offences.¹—It is clear that all *felonies*, and all kinds of *inferior crimes of a public nature*, as *misprisions*, and all other contempt, all disturbances of the peace, oppressions, misbehaviour by public officers, and all other misdemeanors whatsoever of a *public evil* example against the common law, may be indicted. (u) It has recently been held that an indictment will always lie for contempt of court, (v) but it seems doubtful whether every contempt is indictable. In an early case, Holt, C. J., said, 'If a witness be insolent we may commit him for the immediate contempt or bind him to his good behaviour, but we cannot indict him.' (w) It seems, however, to be an established principle, that whatever openly outrages decency and is injurious to public morals, is a misdemeanor at common law. (x) Thus the exposure of a man's person

(p) 4 Blac. Com. 5, note 2. 3 Burn. Just. tit. *Misdemeanor*.

(q) 1 Hawk. c. 20, s. 2, and c. 50, ss. 1, 2. Burn. Just. tit. *Felony*.

(r) 1 Hawk. P. C. c. 59, s. 2. *Post*, Book II. Chap. xiii.

(s) 3 Inst. 140. 1 Hale, 371-375.

(t) 1 Hawk. P. C. c. 59, s. 6. The concealment of *treasure trove* is *misprision of felony*. 4 Blac. Com. 121; 3 Inst. 133. R. v. Thomas, vol. ii.

(u) 2 Hawk. P. C. c. 25, s. 4. As to misbehaviour by public officers, see *post*.

(v) R. v. Judge of Brompton County Court (1893), 2 Q. B. 195. As to what conduct amounts to contempt, see *In re Bahamas* (1893), A. C. 188.

(w) R. v. Rogers, 7 Mod. 28. See R. v. Nun, 10 Mod. 186.

(x) Blac. Com. 65 (n.), 13th edit. 1 Hawk. P. C. c. 5, s. 4. 1 East, P. C. c. 1, s. 1, and see R. v. Sir Charles Sedley, Sid. 168. 1 Keb. 620, and R. v. Crunden, 2 Campb. 89. Cases of men indecently exposing their naked persons.

AMERICAN NOTE.

¹ In America, whatever amounts to a public wrong is indictable. See R. v. Teischer, 1 Dall. 385. As to offences by public officers, see S. v. Williams, 12 Ired. 172; S. v. Buxton, 2 Swan, 67. Among many acts which have been held to be indictable at common law in America, are the exhibition of obscene pictures, C. v. Sharpless, 2 Serg. & R. 91; uttering obscene words, Bell v. S., 1 Swan, 42; casting a corpse into a river, Kanavan's case, 1 Greenl. 226; repeated drunkenness, Hutchinson v. S., 5 Humph. 142; throwing a carcass into a well, S. v. Bachman, 8 N. H. 203; keeping a dangerous amount of gunpowder, P. v. Sands, 1 Johns. 78; terrifying women, Hen-

derson's case, 8 Gratt. 708; C. v. Taylor, 5 Binn. 281; selling unwholesome meat, Goodrich v. P., 3 Parker, C. R. 622; disobeying an order of legislature, Keller v. S., 11 Md. 525; Moon v. S., 9 Yer. 353; misconduct by justices of the peace, Wickersham v. P., 1 Scam. 123; S. v. Johnson, 1 Brev. 155; soliciting a witness not to give evidence, S. v. Keyes, 8 Vt. 57; S. v. Carpenter, 20 Vt. 9; challenging to fight a duel, C. v. Tibbs, 1 Dana, 524. But private injuries are not indictable. See Smith v. C., 4 P. F. Smith, 209 (soliciting to commit adultery); S. v. Wheeler, 3 Vt. 344; Illies v. Knight, 4 Tex. 312; P. v. Smith, 5 Cowan, 258; C. v. Warren, 6 Mass. 72.

in a public place is indictable. (y) Also it seems to be a good general ground that wherever a statute prohibits a matter of public grievance to the liberties and security of a subject, or commands a matter of public convenience, as the repairing of the common streets of a town, an offender against such statute is punishable not only at the suit of the party aggrieved, but also by way of indictment for his contempt of the statute, unless such method of proceeding do manifestly appear to be excluded by it. (z) But no injuries of a *private* nature are indictable, unless they in some way concern the king. (a)

Attempts to commit crimes.¹—So long as an act rests in *bare intention*, it is not punishable: but immediately when an act is done, the law judges not only of the act done, but of the intent with which it is done; and if accompanied with an unlawful and malicious intent, though the act itself would otherwise have been innocent, the intent being criminal, the act becomes criminal and punishable. (b) Therefore an attempt to commit a felony is, in many cases, a misdemeanor. (c)

(y) *R. v. Holmes*, Dears. C. C. R. 207, and other cases, *post*, *Nuisance*.

(z) 2 Hawk. P. C. c. 25, s. 4, and see 1 Hawk. P. C. c. 22, s. 5. 2 Hawk. P. C. c. 25, s. 4.

(a) 2 Hawk. P. C. c. 25, s. 4. *R. v. Richards*, 8 T. R. 687. This distinction is stated also to have been taken in *R. v. Bembridge & Powell* (cited in *R. v. Southerton*, 6 East, 136), who were indicted for enabling persons to pass their accounts with the pay-office in such a way as to enable them to defraud the Government. It was objected, that this was only a private matter of account, and not indictable: but the Court held otherwise, as it related to the public revenue.

(b) Per Lord Mansfield, C. J., in Schofield's case, Cald. 397. The ancient writers in treating of felonious homicide, considered the felonious intention in the same light in point of guilt as homicide itself. *Voluntas reputabatur pro facto*; a rule which has long been laid aside as too rigorous in the case of common persons, though retained in the statute of Treasons, 25 Ed. 3, st. 5, c. 2. But when the rule prevailed, it was necessary that the intention should be manifested by plain facts, not by bare words of any kind. *Hæc voluntas non intellecta fuit de voluntate nudis verbis aut scriptis propalata*,

sed mundo manifestata fuit per apertum factum. 3 Inst. 5. *Fost.* 193. See as to Attempts, *ante*, p. 63.

(c) Higgins's case, 2 East, R. 21. *R. v. Kinneraley & Moore*, 1 Str. 196. 1 Hawk. P. C. c. 25, s. 3. The question of intent is one which is very liable to be misunderstood. In order to constitute an attempt there must be an act done towards the commission of something prohibited by the law, and it must be an act intentionally done. There are, however, many cases in which by statute a certain act is made a felony if done with a certain intent, but if without that intent it is a misdemeanor. Thus it is a felony to wound with intent to do grievous bodily harm, and it is a misdemeanor to inflict grievous bodily harm. If a man in a sudden passion struck at another with a knife, and his hand was arrested, it would be an attempt to inflict grievous bodily harm, and yet there might be no intent to inflict grievous bodily harm, but the intent might be to prevent apprehension or otherwise. There is in short such an offence as attempting to wound with intent to do grievous bodily harm, and another offence of attempting to inflict grievous bodily harm without that particular intent. So also by statute a felony is committed by any one who throws a stone upon a railway

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¹ See *S. v. Swaits*, 8 Ind. 524; *S. v. Stanton*, 37 Conn. 421; *S. v. Ruhl*, 8 Clarke, 447; *Miller v. P.*, 2 Scam. 235; *Sutton v. S.*, 9 Ohio, 133. It would seem that the law in America may be thus stated: An attempt is an intent to do a particular criminal thing with an act towards it falling short of the thing intended. A man is not guilty of an attempt where the complete doing of all that is meant would not constitute the substantive crime. See

Bishop, i. ss. 728, 747. Mr. Bishop further remarks, 'As a man will not in fact attempt, so neither will the law treat him as attempting, what he knows he cannot do. And since all are conclusively presumed to know the law, no one can legally intend what is legally impossible; for example, a boy too young to commit a rape cannot, in legal contemplation, be guilty of an attempt to do so.' *Bishop*, i. s. 753. See also *May's Criminal Law*, s. 18.

Thus abandoning a child without food with intent that it may die, is indictable, (d) and an attempt to commit even a misdemeanor has been decided in many cases to be itself a misdemeanor. (e) Thus if a party makes a false oath before a surrogate to procure a marriage license, that is an act done and a misdemeanor. (f) And the mere *soliciting* another to commit a felony is a sufficient act or attempt to constitute the misdemeanor. Thus, to solicit a servant to steal his master's goods is a misdemeanor, though it be not charged in the indictment that the servant stole the goods, nor that any other act was done except the soliciting and inciting. (g) It was held not to be necessary, in order to show that this was only a misdemeanor, to negative the commission of the felony; as none of the precedents of indictments for attempts to commit rape or robbery contain any such negative averment: but it is left to the defendant to show, if he please, that the misdemeanor was merged in the greater offence. But a person cannot be guilty of inciting another to commit a felony unless the party incited knows that the act intended is a felony. (h) And it has been held, that the completion of an act, criminal in itself, is not necessary to constitute criminality. (i) And the general rule is, that 'an attempt to commit a misdemeanor is a misdemeanor, whether the offence is created by statute, or was an offence at common law.' (j)

But an act is not indictable as *an attempt* to commit an offence, unless it is an act directly approximating to the commission of that

line with intent to obstruct an engine, and a person might be found guilty of attempting to commit that felony. But by the same statute a misdemeanor is committed by any one who obstructs an engine, and a person might be found guilty of attempting to obstruct an engine, although he had no intent to obstruct it; but if he has attempted to do an act which would end if uninterfered with in an offence within the section, he has committed an attempt to obstruct, and his attempt involves no doubt an intentional act, but it is not a felonious 'intent to obstruct' within the meaning of the felony-section, but an implied intent to do what is forbidden by the misdemeanor section. And see 1 Hawk. P. C. c. 55. Some boys were indicted at Derby March Assizes, 1875, for throwing the coping-stone off a bridge upon a railway, with intent to obstruct an engine. They were only 'larking,' and the jury negatived the 'intent to obstruct.' They were also indicted for obstructing, but as it happened the stone fell so as not to obstruct the line, the learned counsel for the prosecution submitted that they might be found guilty of attempting to obstruct; but the learned commissioner thought that as the jury had negatived the intent to obstruct, they could not be found guilty of the attempt. But it is submitted that if the jury thought the prisoners willfully tried to throw the stone upon the line, they might have been found guilty of the

attempt, as the probable consequence of throwing the stone on the line would be the obstruction of the engine. See *R. v. Holroyd*, *post*. MSS. H. S.

(d) *R. v. Renshaw*, 2 Cox, C. C. 285.

(e) Per Grose, J., in *Higgins's case*, 2 East, R. 8; and see *R. v. Phillips*, 6 East, 464, where an *endeavour* to provoke another to commit the misdemeanor of sending a challenge to fight was held to be an indictable misdemeanor. And by Lawrence, J., in *Higgins's case*, 'All such acts or attempts as tend to the prejudice of the community are indictable.'

(f) *R. v. Chapman*, 1 Den. C. C. 432. 2 C. & K. 357.

(g) *Higgins's case*, 2 East, R. 5.

(h) *R. v. Welham*, 1 Cox, C. C. 192. Parke B., and Patteson, J. *Sed quære*, for how can the guilt of the inciter depend on the state of mind of the incited? The inciting and the intention of the inciter constitute the offence. C. S. G. An attempt to incite a boy to commit a felony by sending him a letter which he did not read has been held to be an indictable misdemeanor. *R. v. Ransford*, 13 Cox, C. C. 9.

(i) By Lord Mansfield, in *R. v. Schofield*, Cald. 400.

(j) Per Parke, B., *ibid*. *R. v. Chapman*, 1 Den. C. C. 432. 2 C. & K. 357. *R. v. Butler*, 6 C. & P. 368. *Patteson, J.*, *R. v. Roderick*, 7 C. & P. 795. *R. v. Cartwright*, East. T. 1806, Russ. & Ry. 107.

offence. (*k*) In many cases, however, acts in furtherance of a criminal purpose may be sufficiently proximate to an offence, and may sufficiently show a criminal intent to support an indictment for a misdemeanor, although they may not be sufficiently proximate to the offence to support an indictment for an attempt to commit it; as where a prisoner procures dies for the purpose of making counterfeit foreign coin, (*l*) or where a person gives poison to another, and endeavours to procure that person to administer it. (*m*)

Upon the same principles some earlier cases appear to have proceeded. Thus, it was held indictable to attempt to bribe a cabinet minister and a member of the privy council to give the defendant an office in the colonies. (*n*) And an information was granted against a man for promising money to a member of a corporation, to induce him to vote for the election of a mayor; (*o*) an information also appears to have been exhibited against a person for attempting by bribery to influence a jurymen in giving his verdict. (*p*) And it is laid down generally that if a party offers a bribe to a judge, meaning to corrupt him in the cause depending before him, and the judge takes it not, yet this is an offence punishable by law in the party that offers it. (*q*) And an attempt to suborn a person to commit perjury, upon a reference to the judges, was unanimously holden by them to be a misdemeanor. (*r*) All who endeavour to stifle the truth and prevent the due execution of justice are highly punishable. Public cheats which are levelled against the public justice of the kingdom are indictable at common law (*s*) The defendant was tried and convicted upon a count of an indictment alleging in substance: That by the terms of a contract for the purchase of a cargo of wheat, to be shipped by the sellers from a port in the Black Sea to the buyer at the port of Bristol, it was provided that any dispute arising under the contract should be referred to two arbitrators, whose award should be final and conclusive, and might upon the application of either contracting party be made a rule of the court in England; that the defendant was appointed by the sellers to take samples of the cargo upon the arrival of the ship at Bristol; that such samples were then taken and placed in bags sealed with the seals of the buyer and seller of the cargo, in accordance with the custom of merchants at the port, and for the purpose of being used as evidence before the

(*k*) *R. v. Eagleton*, Dears. C. C. 515. *R. v. Roberts*, *ibid.* 539.

(*l*) *R. v. Roberts*, *supra*.

(*m*) *R. v. Williams*, mentioned in *R. v. Eagleton*, Dears. C. C. 547.¹

(*n*) *Vaughan's case*, 4 Burr. 2494; and see *R. v. Pollman and others*, 2 Campb. 229, where a conspiracy to obtain money, by procuring from the Lords of the Treasury the appointment of a person to an office in the Customs, was held to be a misdemeanor at common law.

(*o*) *Plympton's case*, 2 Lord Raym. 1377.

(*p*) *Young's case*, cited in *Higgins's case*, 2 East, R. 14, 16.

(*q*) 3 Inst. 147; and see *R. v. Cassano*, 5 Esp. 231, an information for attempting to bribe an officer of the Customs.

(*r*) *Anon.* before Adams, B., at Shrewsbury, cited in *Schofield's case*, Cald. 400, and in *Higgins's case*, 2 East, R. 14, 17, 22. This case is probably the same as *R. v. Edwards*, MS. Sum. tit. Perjury.

(*s*) 1 Hawk. P. C. c. 21, s. 15. East. P. C. c. 18, s. 4.

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¹ In America it seems that the remoteness does not affect the question. Bishop, i. s. 435 and ss. 764-768.

arbitrators; that the defendant afterwards, intending to deceive the arbitrators to be appointed under the contract and wrongfully to make it appear to them that the bulk of the cargo was of better quality than it really was, so as to pervert the due course of law and justice, unlawfully and designedly removed the contents of the sealed bags and altered their character, and returned to the bags a quantity of wheat in a different condition, and altered in character and value, with intent thereby to pass the same off as true and genuine samples of the bulk of the cargo; and that afterwards the defendant forwarded the samples so altered to the London Corn Trade Association, with intent that the same should be used as evidence before such arbitrators, and thereby to injure and prejudice the buyer, and to pervert the due course of law and justice. It was held that the count stated an indictable misdemeanor at common law. (*z*)

Where the defendant was indicted for having coining instruments in his custody, with *intent* to coin half guineas, shillings and sixpences, and to utter them as and for the current coin, Lord Hardwicke doubted what the offence was. But the Court of King's Bench held the offence to be a misdemeanor; Lee, C. J., saying, that 'all that was necessary in such a case was an act charged, and a criminal intention joined to that act.' (*u*) But though this doctrine be correct, it does not appear to have been applicable to the facts of the case as charged, which did not amount to a criminal *act* by the defendant. And this case was considered untenable in a case, in which it was holden that having counterfeit silver in possession with intent to utter it as good is no offence, there being no criminal act done. The prisoner had been found guilty of unlawfully having in possession counterfeit silver coin with intent to utter it as good: but the judges were of opinion that there must be some *act* done to constitute a crime, and that the having in possession only was not an act. (*v*) And this distinction was acted upon in a case where some counts charged the prisoner with preserving and keeping in his possession obscene prints, with intent unlawfully to utter the same, and others charged the prisoner with obtaining and procuring obscene prints with a like intent; and it was held that the former counts were bad, for they were consistent with the possibility that the prisoner might have originally had the prints in his possession with an innocent intention, and there was no act shown to be done which could be considered as the first step in the commission of a misdemeanor; but that the latter counts were good, for the procuring of such prints was an act done in the commencement of a misdemeanor. (*w*) But the having a large quantity of counterfeit coin in

(*z*) *R. v. Vreones* (1891), 1 Q. B. 360. See *R. v. Hall*, *ibid.* 747.

(*u*) *Sutton's case*, Rep. temp. Hardw. 370; 2 St. 1074. In this case there were cited, in support of the prosecution, a case of a conviction of three persons for having in their custody divers picklock keys *with intent* to break houses, and steal goods; *R. v. Lee & others*, Old Bailey, 1689; and a case of an indictment for making coining instruments, and having them in possession *with intent* to make counterfeit money.

Brandon's case, Old Bailey, 1698; and also a case where the party was indicted for buying counterfeit shillings with an intent to utter them in payment, *Cox's case*, Old Bailey, 1690. See *post*, as to the unlawful possession of coining implements.

(*v*) *R. v. Stewart*, Mich. T. 1814, R. & R. 288. *S. P. Rex v. Heath*, East. T. 1810. R. & R. 184. See 24 & 25 Vict. c. 99, s. 11, as to this offence.

(*w*) *R. v. Dugdale*, 1 E. & B. 435. *Dears. C. C. R.* 64.

possession, under suspicious circumstances and unaccounted for, is evidence of having procured it with intent to utter it as good, which is clearly a criminal *act* punishable as a misdemeanor. Thus upon an indictment for procuring counterfeit shillings with intent to utter them as good, the evidence was that two parcels were found upon the prisoner containing about twenty shillings each, wrapped up in soft paper to prevent their rubbing, and there was nothing to induce a suspicion that the prisoner had coined them; and the judges were of opinion unanimously, that procuring with intent to utter was an offence, and that the having in possession unaccounted for, and without any circumstances to induce a belief that the prisoner was the maker was evidence of procuring. (x) But the effect of such evidence would be removed by circumstances sufficient to induce a suspicion that the prisoner was the maker of the coin found in his possession; and, upon the argument in the last case, Thomson, C. B., mentioned a case where he had directed an acquittal, because from certain powder found upon the prisoner, there was a presumption that he was the maker of the coin. (y) Upon an indictment for procuring counterfeit money with intent to utter it, the uttering the money, knowing it to be counterfeit, is evidence that it was procured with that intent. (z)

With respect to persons having implements for house-breaking, &c., in their possession with a *felonious intent*, the Legislature has made some provisions. The 5 Geo. 4, c. 83, s. 4, made persons having in their possession implements of house-breaking or weapons with intent (a) to commit any felonious act, liable to be summarily convicted; and the 24 & 25 Vict. c. 96, s. 58, makes persons armed with offensive weapons, or in possession of implements of house-breaking, guilty of a misdemeanor. And in some instances an act, accompanied with a certain intent, has been made a felony by particular statutes; as by the 24 & 25 Vict. c. 96, s. 38, the severing with intent to steal the ore of any metal, or any coal, &c., from any mine, bed, or vein thereof, is made felony punishable by two years imprisonment. And by the 24 & 25 Vict. c. 97, s. 14, the damaging certain articles in a course of manufacture, with intent to destroy them, and the entering certain places with intent to commit such offence, is made felony punishable by penal servitude for life or imprisonment, &c.

Cases indictable under statutes.—Where an offence is not so at common law, but *made an offence* by Act of Parliament, an indictment will lie where there is a substantive prohibitory clause in such statute, though there be afterwards a particular provision and a particular remedy given. (b) Thus, an unqualified person may be indicted for acting as an attorney contrary to the 6 & 7 Vict. c. 73,

(x) *R. v. Fuller & Robinson*, East. T. 1816. MS. Bayley, J., R. & R. 308. See *R. v. Jarvis*, Dears. C. C. 552, *post*, Coin. In the marginal note to Parker's case, 1 Leach, 41, it is stated, that having the possession of counterfeit money with intention to pay it away as and for good money, is an indictable offence at common law. This may be criminal in some cases of such possession, as we have seen above: but, *quære*, if the point, as stated in the marginal note, was actually decided in Parker's case.

(y) *Fuller & Robinson's case*, *supra*.

(z) *Brown's case*, 1 Lew. 42, Holroyd, J. It is said the learned judge seemed to consider a procurement elsewhere, with intent to utter, a continuing procurement in the county where the uttering took place.

(a) See 32 & 33 Vict. c. 99, s. 9.

(b) *R. v. Wright*, 1 Burr. 543. *R. v. Gregory*, 5 B. & Ad. 555. 2 N. & M. 478. *R. v. Crossley*, 10 A. & E. 182. *R. v. Walker*, 44 L. J. M. C. 169.

s. 2, although sec. 35 and sec. 36 enact, that in case any person shall so act he shall be incapable of recovering his fees, and such offence shall be deemed a contempt of court and punishable accordingly. (c) And it is stated as an established principle that when a new offence is created by an Act of Parliament, and a penalty is annexed to it by a separate and substantive clause, it is not necessary for the prosecutor to sue for the penalty; but he may proceed on the prior clause, on the ground of its being a misdemeanor. (d) And wherever a statute *forbids* the doing of a thing, the doing it wilfully, although without any corrupt motive, is indictable. (e) Thus, under the 3 & 4 Vict. c. 95, s. 15, which made it a misdemeanor if any person 'shall wilfully do, or cause to be done, anything in such a manner as to obstruct any engine or carriage using any railway, Maule, J., held, that if a person designedly placed on a railway substances having a tendency to produce an obstruction, he was within the Act, and that it was not necessary that he should have placed them there expressly with the view to obstruct an engine. (f) If a statute *enjoin* an act to be done, without pointing out any mode of punishment, an indictment will lie for disobeying the injunction of the Legislature. (g) Thus, the father of a child is indictable if, being requested by the registrar within forty-two days of its birth so to do, he wilfully refuse to inform the registrar of the particulars required by the Act to be registered touching the birth, contrary to the 6 & 7 Will. 4, c. 86, s. 20. (h) And this mode of proceeding in such a case is not taken away by a subsequent statute pointing out a particular mode of punishment for such disobedience. (i) Where the same statute which enjoins an act to be done contains also an enactment providing for a particular mode of proceeding, as commitment, in case of neglect or refusal, it has been doubted whether an indictment will lie. (j) But where a statute

(c) *R. v. Buchanan*, 8 Q. B. 883.

(d) By Ashurst, J., in *R. v. Harris*, 4 T. R. 205. And this principle has been held to apply, where the clause annexing the penalty was in the same section of the statute. Thus the repealed clause, 5 Eliz. c. 4, s. 31, enacted, 'that *it shall not be lawful* to any person to set up, &c., any craft, mystery, &c., except he shall have been brought up therein seven years as an apprentice,' &c., upon pain that every person willingly offending or doing the contrary forfeit for every default forty shillings for every month; and the method of proceeding upon this statute was either by information *qui tam* in the court of oyer and terminer or sessions of the county, &c., where the offence was committed, to recover the penalty, or by *indictment* in those courts. See the cases collected in the note to *R. v. Kilderby*, 1 Saund. 312 a. But it should be observed that a subsequent section (39) gave authority to proceed by *indictment*, or by information, &c.

(e) *R. v. Sainsbury*, 4 T. R. 457, where

it was held to be a misdemeanor in magistrates to grant an ale license where they had no jurisdiction. See *R. v. Nott*, 4 Q. B. 768, *per* Lord Denman, C. J.

(f) *R. v. Holroyd*, 2 M. & Rob. 339; and see *Jones v. Taylor*, E. & E. 20, as to the meaning of the words '*wilfully* trespass upon any railway,' in the 3 & 4 Vict. c. 97, s. 16.

(g) *R. v. Davis*, Say. 125.¹

(h) *R. v. Price*, 11 A. & E. 727.

(i) *R. v. Boyal*, 2 Burr. 832. *R. v. Balme*, Cowp. 648, cited in the notes to 2 Hawk. P. C. c. 25, s. 4. And, generally speaking, the Court of King's Bench cannot be ousted of its jurisdiction but by express words, or by necessary implication. By Ashurst, J., in *Cates v. Knight*, 3 T. R. 445.

(j) *R. v. Cummings* and another, 5 Mod. 179. *R. v. King*, 2 Str. 1268; Cases of indictments against overseers for neglecting to account, and for not paying over the balance within the time limited by the statute. But see the authorities; and, in 2 Nol. P. L. 453, it is stated that an indictment

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¹ See also Bishop, i. ss. 237, 239.

only adds a further penalty to an offence prohibited by the common law, there is no doubt but that the offender may still be indicted, if the prosecutor think fit, at the common law; (*k*) and if it gives a new punishment or new mode of proceeding for what before was a misdemeanor, without altering the class or character of the offence, the new punishment or new mode of proceeding is cumulative only, and the offender may be proceeded against as before for the common-law misdemeanor. Therefore, notwithstanding the provisions of 9 & 10 Will. 3, c. 32, against blasphemy, it was held that a blasphemous libel might be prosecuted as a common-law offence. (*l*) Where a statute makes that felony which before was a misdemeanor only, the misdemeanor is merged, and there can be no prosecution afterwards for the misdemeanor. (*m*) It is an offence at common law to obstruct the execution of powers granted by statute. (*n*) But where a public Act regulates rights which are merely private, an indictment will not lie for the infringement of those rights: as, if a statute empowers the setting out of private roads and the directing their repairs, an indictment does not lie for not repairing them. (*o*)

Cases not indictable under statutes.¹—Where the statute making a new offence only inflicts a forfeiture and specifies the remedy, an indictment will not lie. (*p*) The true rule is stated to be this: Where the offence was punishable by a common-law proceeding, *before* the passing of a statute which prescribes a particular remedy by a summary proceeding, then either method may be pursued, as the particular remedy is *cumulative*, and does not exclude the common-law punishment; but where the statute creates a new offence by prohibiting and making unlawful anything which was lawful before, and appoints a particular remedy against such new offence by a particular sanction and particular method of proceeding, such method of proceeding must be pursued and no other. (*q*) The mention of other methods of proceeding impliedly excludes that of indictment; (*r*) unless such methods of proceeding are given by a separate and substantive clause. (*s*) Thus it has been held, (*t*) and seems now to be settled, (*u*) that where a stat-

will lie in these cases, though the statute provides another remedy by commitment. See cases there cited.

(*k*) 2 Hawk. P. C. c. 25, s. 4. R. v. Wigg, Lord Raym. 1163. 2 Salk. 480. And see the cases collected in R. v. Dickenson, 1 Saund. 135 a, note (4).

(*l*) R. v. Carlisle, 3 B. & A. 161, 164.¹

(*m*) But see now the 14 & 15 Vict. c. 100, s. 12. R. v. Cross, 1 Lord Raym. 711; and see R. v. Gregory, L. R. 1 C. C. R. 77.²

(*n*) R. v. Smith and others, Dougl. 441. And an indictment for such offence need not, and ought not, to conclude *contra formam statuti*. For an indictment for disobedience

to orders of the Epping Forest Commissioners, see R. v. Walker, 13 Cox, C. C. 94.

(*o*) R. v. Richards, 8 T. R. 637.

(*p*) R. v. Wright, 1 Burr. 543. R. v. Douse, 1 Lord Raym. 672.

(*q*) R. v. Robinson, 2 Burr. 805. R. v. Carlisle, 3 B. & A. 163. R. v. Boyal, 2 Burr. 832. See also Hartley v. Hooker, Cowp. 524. R. v. Wright, 1 Burr. 543. R. v. Balme, Cowp. 650. And see Faulkner's case, 1 Saund. 250, note (3).

(*r*) 2 Hawk. c. 25, s. 4.

(*s*) *Ante*, p. 199.

(*t*) Glass's case, 3 Salk. 350.

(*u*) 2 Hawk. c. 25, s. 4.

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¹ And this is so in America, see Bishop, ii. s. 74. Various statutes have been passed in many of the States declaratory of the law, s. 80, and profane swearing to such an extent as to become a public nuisance is also indictable in America. S. v. Jones, 9 Ired. N. C. 33.

² As to the doctrine of merger in America see Bishop, i. s. 787.

³ In Bishop, i. s. 238, it is said that a thing to be indictable must be of a sort which the common law makes so.

ute making a new offence, not prohibited by the common law, appoints in the same clause a particular manner of proceeding against the offender, as by commitment or action of debt or information, without mentioning an indictment, no indictment can be maintained. By 21 Hen. 8, c. 13, s. 1, no spiritual person shall take land to farm on pain to forfeit £10 per month; and it was decided on this statute, that as the clause prohibiting the act specified the punishment, the defendant was not liable to be indicted. (v) And it was held not to be an indictable offence to keep an ale-house without a licence, because a particular punishment, namely, that the party be committed by two justices, was provided by the statute. (w) And an indictment for assaulting and beating a custom-house officer in the execution of his office was quashed, because the 13 & 14 Car. 2, c. 11, s. 6, appointed a particular mode of punishment for that offence. (x) So an indictment will not lie against an overseer for wilful breaches of the duties imposed upon him by the Registration Act, 1843, in preparing and publishing voters' lists, inasmuch as the sections prescribing those duties contain no general prohibitory clause, and s. 51 gives the revising barrister power to fine overseers for wilful breaches of duty, and s. 97 gives the party aggrieved the right to bring a penal action against the overseer for every wilful misfeasance or wilful act of commission or omission contrary to the act. (y)

Cases not indictable at common law. — Amongst other decisions as to cases which cannot be made the subject of indictment, it appears to have been ruled that an indictment will not lie for acting, not being qualified, as a justice of peace; (z) nor for selling short measure; (a) nor for excluding commoners by enclosing; (b) nor for an attempt to defraud, if neither by false tokens or conspiracy; (c) nor

(v) *R. v. Wright*, 1 Burr. 543.

(w) *Anon.*, 3 Salk. 25. *S. P. Watson's case*, 1 Salk. 45, and *R. v. Edwards*, 3 Salk. 27. And see *Faulkner's case*, 1 Saund. 248, and *Mr. Serj. Williams's note* (3) at page 250 c.

(x) *Anon.*, 2 Lord Raym. 991. 3 Salk. 189. So an indictment for keeping an alehouse was quashed, because the 3 Car. 1, c. 3, had directed a particular remedy. *R. v. James*, cited in *R. v. Buck*, 1 Stra. 679. *R. v. Malland*, 2 Stra. 328.

(y) *R. v. Hale* (1891), 1 Q. B. 747. 17 Cox, C. C. 278, per Charles, J.

(z) *Castle's case*, Cro. Jac. 643.

(a) *R. v. Osborn*, 3 Burr. 1697; but selling by false measure is indictable. *Ibid.*

(b) *Willoughby's case*, Cro. Eliz. 90.

(c) *R. v. Channell*, 2 Stra. 793. Indictment against a miller for taking and detaining part of the corn sent to him; and *R. v. Bryan*, 2 Stra. 866. *Anon.*, 6 Mod. 105. *R. v. Wheatley*, 2 Burr. 1125. *R. v. Wilders*, cited, 2 Burr. 1128; and *R. v. Haynes*, 4 M. & S. 214. This last case was an indictment against a miller, for receiving good barley to grind at his mill, and delivering a mixture of oat and barley meal, different from the produce of the barley, and which was musty and unwholesome. On the part

of the prosecution, a note in 1 Hawk. P. C. c. 71, s. 1, referring to 1 Sess. Ca. 217, was cited, where it is laid down, 'that changing corn by a miller, and returning bad corn instead of it, is punishable by indictment; for, being in the way of trade, it is deemed an offence against the public:' but it was held that the indictment would not lie. Lord Ellenborough, in giving judgment, said, that if the allegation had been that the miller delivered the mixture as an article for the food of man, it might possibly have sustained the indictment, but that he could not say that its being musty and unwholesome necessarily and *ex vi termini* imported, that it was for the food of man; and it was not stated that it was to be used for the sustentation of man, but only that it was a mixture of oat and barley meal. His Lordship then proceeds: 'As to the other point, that this is not an indictable offence, because it respects a matter transacted in the course of trade, and where no tokens were exhibited by which the party acquired any greater degree of credit, if the case had been that this miller was owner of a soke-mill, to which the inhabitants of the vicinage were bound to resort, in order to get their corn ground, and that the miller, abusing the confidence of this his situation, had made it a colour for

for secreting another; (*d*) nor for bringing a bastard child into a parish; (*e*) nor for entertaining idle and vagrant persons in the defendant's house; (*f*) nor for keeping a house to receive women with child, and deliver them. (*g*)

Where an indictment alleged that the prisoner contriving to injure the inhabitants of the parish of Bathwicke, and unjustly to burthen them with the maintenance of her bastard child, being of very tender age and unable to move or walk, unlawfully did abandon the said child in the said parish without having provided any means for the support of the said child, the said child not being settled in the said parish; it was held that the indictment was bad, because the mere abandonment, the possible consequence of which might be to injure the parish, was not an indictable offence. (*h*)

Where an indictment stated that the prisoner intending to burthen the inhabitants of a parish with the maintenance of her bastard child abandoned the said child in the said parish, and it appeared that the prisoner left the child in a dry ditch in a field in the parish; there was a pathway in the field by the ditch, and a lane separated from the ditch by a hedge neither of which was much frequented; Parke, B., held that there was no ground for imputing any intention to burthen the parish, as it was not placed in a position where it was likely to come to the knowledge of the officers of the parish. (*i*)

It has been held that administering a poisonous ingredient with

practising a fraud, this might have presented a different aspect; but as it now is, it seems to be no more than the case of a common tradesman, who is guilty of a fraud in a matter of trade or dealing; such as is adverted to in *R. v. Wheatley*, and the other cases, as not being indictable. And see also *R. v. Bower*, Cowp. 323, as to the point that for an imposition, which a man's own prudence ought to guard him against, an indictment does not lie, but he is left to his civil remedy. But in *R. v. Dixon*, 3 M. & S. 11, it was held, that a baker who sells bread containing alum, in a shape which renders it noxious, is guilty of an indictable offence, if he ordered the alum to be introduced into the bread, although he gave directions for mixing it up in the manner which would have rendered it harmless. See *post*, Spreading Contagious Disorders.

(*d*) *R. v. Chaundler*, 2 Lord Raym. 1368; an indictment for secreting A., who was with child by the defendant, to hinder her evidence, and to elude the execution of the law for the crime aforesaid. But *quæ*.

(*e*) *R. v. Warne*, 1 Stra. 644, it appearing that the parish could not be burthened, the child being born out of it. But see a precedent of an indictment for a misdemeanor at

common law, in lodging an inmate, who was delivered of a bastard child, which became chargeable to the liberty. 2 Chit. Crim. Law, 700. And see also *id.* 699, and 4 Wentw. 353. Cro. Circ. Comp. (7th edit.) 648, precedents of indictments for misdemeanors at common law, in bringing such persons into parishes in which they had no settlements, and in which they shortly died, whereby the parishioners were put to expense. In one case it is stated to have been held, that no indictment will lie for procuring the marriage of a female pauper with a labouring man of another parish, who is not actually chargeable. *R. v. Tanner*, 1 Esp. 304. But if the facts of the case will warrant a charge of conspiracy, the offence would be substantiated, if under the circumstances the parish might possibly be put to expense. See 1 Nol. P. L. Settlement by Marriage, Sec. I. in the notes. *R. v. Seward*, 1 A. & E. 706. 3 N. & M. 557.

(*f*) *R. v. Langley*, 1 Lord Raym. 790.¹

(*g*) *R. v. Macdonald*, 2 Burr. 1646.

(*h*) *R. v. Hogan*, 2 Den. C. C. 277. The indictment was also held bad, because it did not allege that the child suffered any injury.

(*i*) *R. v. Renshaw*, 2 Cox, C. C. 285.

AMERICAN NOTE.

¹ Probably in America this would be an indictable offence if accompanied by great disorder, see Bishop, Vol. i. ss. 1113-1118.

intent to hurt and damage the body, and whereby sickness and disorder of the body is caused, is not indictable. (*j*)

Cases of *non-feasance* and *particular wrong* done to another are not in general the subject of indictment; and it has been doubted whether a clergyman is indictable for refusing to marry persons who were lawfully entitled to be married; (*k*) but circumstances may exist of mere *non-feasance* towards a child of tender years (such as the neglect or refusal of a master to provide sufficient food and sustenance for such a child, being his servant and under his dominion and control), which may amount to an indictable offence. (*l*)

It has been held, that where a mayor of a city, being a justice, made an order that a company in the city should admit one to be a freeman of that corporation, and the master of the company, being served with the order, refused to obey it, such refusal was not the subject of indictment. (*m*) And an indictment will not lie for not curing a person of a disease according to promise, for it is not a public offence, and no more in effect than a ground for an action. (*n*) To keep an open shop in a city, not being free of the city, contrary to the immemorial custom there, has been held not to be indictable. (*o*)

Trespasses. — With regard to *trespasses*, it has been held that a mere act of trespass (such as entering a yard and digging the ground, and erecting a shed or cutting a stable) committed by one person, unaccompanied by any circumstances constituting a breach of the peace, is not indictable; and the Court quashed such indictment on motion. (*p*) And an indictment against one person for pulling off the thatch of a man's house, who was in the peaceable possession of it, was also quashed on motion. (*q*) So an indictment for taking away chattels must import that such a degree of force was used as made the taking an offence against the public. An indictment averred that the defendant with force and arms unlawfully, forcibly, and injuriously seized, took, and carried away, of and from J. S., and against his will, a paper-writing purporting to be a warrant to apprehend the defendant for forgery; and, after a conviction, a motion was made in arrest of judgment on the ground that the charge did not amount to an indictable offence. Perryn, B., took time to consider until the subsequent assizes, and had the case argued before him;

(*j*) R. v. Hanson, 2 C. & K. 912, Williams and Cresswell, JJ.¹ This case would fall within the 24 & 25 Vict. c. 100, s. 24, *post*, Attempts to Murder. As to husband infecting wife with gonorrhoea, see R. v. Clarence, 22 Q. B. D. 23, *post*.

(*k*) R. v. James, 2 Den. C. C. 1. The point was not decided, as there had been no sufficient demand to marry.

(*l*) See *post*.

(*m*) R. v. Atkinson, 3 Salk. 188.

(*n*) R. v. Bradford, 1 Lord Raym. 366.

3 Salk. 189. In an Anon. case, 2 Salk. 522, it appears to have been held, that if a pawnbroker refuses, upon tender of the money, to deliver the goods pledged, he may be indicted. But see R. v. Jones, 1 Salk. 379, *contra*.

(*o*) R. v. George, 3 Salk. 188. Nor is it an indictable offence to exercise trade in a borough contrary to the bye-laws of that borough. R. v. Sharpless, 4 T. R. 777.

(*p*) R. v. Storr, 3 Burr. 1699.

(*q*) R. v. Atkins, 3 Burr. 1706.

AMERICAN NOTE.

¹ This case has been doubted in America, Bishop, i. s. 491, and in Massachusetts such an act has been held to be an assault and

battery, C. v. Stratton, 114 Mass. 303; 19 Am. R. 350.

and then held the objection valid, as the indictment charged nothing but a mere private trespass, and neither the King nor the public appeared to have any interest therein. (r)

But where the indictment stated the entering a dwelling-house, and *vi et armis and with strong hand* turning out the prosecutor, the Court refused to quash it. (s) And an indictment will lie for taking goods forcibly, if such taking be proved to be a breach of the peace: (t) and though such goods are the prosecutor's own property, yet, if he take them in that manner, he will be guilty. (u)

Effect of repeal of statutes creating offences. — As questions occasionally arise as to the effect of the repeal of statutes creating offences, it may be well to notice this subject. 'It has been long established that when an Act of Parliament is repealed, it must be considered (except as to transactions passed and closed) as if it had never existed.' (v) Where, therefore, a justice of the peace, under the 13 Geo. 3, c. 78, s. 24, presented the inhabitants of a parish for the non-repair of a highway, and the proceedings were removed into the Court of Queen's Bench, and the defendants pleaded, and issues of fact were joined, and a verdict found against the defendants, and the issues had been joined before, but tried after, the day on which the 5 & 6 Will. 4, c. 50, repealing the 13 Geo. 3, c. 78, came into operation, the judgment was arrested, on the ground that the power to give judgment upon a presentment made under the 13 Geo. 3, c. 78, was gone. (w) So where the liability to repair certain highways in a parish was taken away from the parish by a statute, and cast upon certain townships, and the statute gave a form of indictment against the townships for non-repair, and one of the townships was indicted under the Act, but before the trial the Act was repealed, and a verdict was found against the township, the judgment was arrested, on the ground that, although whatever had been done under the Act before it was repealed was valid, the statute when repealed was, with regard to any future operation, as if it had never existed, and the effect of the repeal is the same whether the alteration affect procedure only or matter which is more of substance. (x) So where a prisoner was indicted for privately stealing in a shop against the 10 & 11 Will. 3, c. 23, which was repealed after the offence was committed, but before the prisoner was tried, by the 1 Geo. 4, c. 117, s. 1, it was held that the prisoner could not be sentenced under the repealed Act. (y)

Repealing Acts, however, sometimes contain clauses for the pur-

(r) *R. v. Gardiner*, Salisbury, 1780, MS. Bayley, J.

(s) *R. v. Storr*, 3 Burr. 1699.¹

(t) *Anon.* 3 Salk. 187.

(u) *Ibid.* See *Blades v. Higgs*, 10 C. B. (N. S.) 713. 12 C. B. (N. S.) 501.

(v) Per Lord Tenterden, C. J., *Surtees v. Ellison*, 9 B. & C. 752.

(w) *R. v. Mawgan*, 8 A. & E. 496.

(x) *R. v. Denton*, 18 Q. B. 761.

(y) *R. v. M'Kenzie*, R. & R. 429.

AMERICAN NOTE.

¹ And see *S. v. Batchelder*, 5 N. H. 549; *S. v. Wilson*, 3 Miss. 125, and a case where a woman miscarried in consequence of the disturbance, *C. v. Taylor*, 5 Binn. 277. Mr. Bishop (see Vol. ii. s. 517 *et seq.*) devotes a small chapter to the offence of Forcible Tres-

pass, and cites a number of American cases. The principle in America, as here, seems to be that a trespass upon the personal property of another is only indictable where it tends to a breach of the peace. See also May's Criminal Law, s. 170.

pose of keeping alive the statutes they repealed so far as they relate to offences committed against them, and where a bankrupt had committed an offence against the 12 & 13 Vict. c. 106, s. 251, and an information had been laid before a magistrate for that offence, and a warrant issued for the prisoner's apprehension, before the 24 & 25 Vict. c. 134, came into operation, which by sec. 230 repeals the former Act, except as to 'any proceeding pending,' &c., 'or any penalty incurred,' &c., at the commencement of the Act, it was held that there was a proceeding pending within the meaning of this exception, and that the word 'penalty' in it extended to any penal consequences whatever, and was not restricted to a pecuniary penalty, and, consequently, that the bankrupt might be convicted and sentenced under the former Act. (z)

Many offences ordinarily punishable on summary conviction are under certain circumstances made indictable.

By the Summary Jurisdiction Act, 1879, 42 & 43 Vict. c. 49, s. 17, 'A person when charged before a court of summary jurisdiction with an offence in respect of the commission of which an offender is liable on summary conviction to be imprisoned for a term exceeding three months, (a) and which is not an assault, may, on appearing before the court and before the charge is gone into, but not afterwards, claim to be tried by a jury, and thereupon . . . the offence shall as respects the person so charged be deemed to be an indictable offence and if the person so charged is committed for trial or bailed to appear for trial, shall be prosecuted accordingly, and the expenses of the prosecution shall be payable as in cases of felony.'

By the Cruelty to Animals Act, 1876, 39 & 40 Vict. c. 77, s. 15, 'Where a person is accused before a court of summary jurisdiction of any offence against this Act in respect of which a penalty of more than five pounds can be imposed, the accused may, on appearing before the court of summary jurisdiction, declare that he objects to being tried for such offence by a court of summary jurisdiction, and thereupon the court of summary jurisdiction may deal with the case in all respects as if the accused were charged with an indictable offence, and not an offence punishable on summary conviction, and the offence may be prosecuted on indictment accordingly.'

(z) *R. v. Smith*, L. & C. 131.

not 43 & 44 Vic. c. 20, s. 20. See *Carle*

(a) *E. g.*, 43 & 44 Vic. c. 16, s. 5. But *Elkington*, 17 Cox, C. C. 557.

BOOK THE SECOND.

OF OFFENCES PRINCIPALLY AFFECTING THE GOVERNMENT, THE PUBLIC PEACE, OR THE PUBLIC RIGHTS.

CHAPTER THE FIRST.

OF COUNTERFEITING OR IMPAIRING COIN — OF IMPORTING INTO THE KINGDOM COUNTERFEIT OR LIGHT MONEY — AND OF EXPORTING COUNTERFEIT MONEY.

SEC. I.

*Of Counterfeiting Coin.*¹

THE Legislature has made provision against the counterfeiting of the following descriptions of coin, namely:— I. The King's current gold or silver coin. II. Foreign gold, silver, or copper coin. III. The copper money of this realm.

Counterfeiting the King's gold and silver coin. — I. The first of these, usually called the King's money, was protected by enactments, which placed the offence of counterfeiting it in the highest class of crimes, upon the ground that the royal majesty of the Crown was affected by such offence in a great prerogative of government; the coining and legitimation of money, and the giving it its current value, being the unquestionable prerogatives of the Crown. (a) But these enactments were repealed by the 2 Will. 4, c. 34, s. 1 (now repealed by the 24 & 25 Vict. c. 95).

What is the King's money. — It appears that the coin or money of this kingdom consists properly of gold or silver only, with a certain alloy, constituting what is called *sterling*, coined and issued by the King's authority: and therefore such money is supposed to be referred to by any statute naming 'money' generally. (b) The weight,

(a) 1 Hale, 188. 1 East, P. C. 148.

(b) 1 East, P. C. 147. And see 1 Hale, chaps. 17, 18, 19, 20.

AMERICAN NOTE.

¹ As to false money in Massachusetts see *C. v. Fuller*, 8 Met. 313. As to other States, *Harlan v. P.*, 1 Dougl. 207. As to foreign money, *Rouse v. S.*, 4 Geo. 136. With respect to offences relating to counterfeit coin in America the reader must be referred to the statutes of the United States and of the

several States of the Union. Where the statute does not seem to fit the facts of the case, it would seem that sometimes resort may be had to the common law with respect to cheating by false tokens or otherwise. As to which, see *Bishop*, Vol. ii. Ch. xiii. *Wilson v. S.*, 1 Wis. 184.

alloy, impression, and denomination, of money made in this kingdom are generally settled by indenture between the King and the master of the mint: but the Coinage Act, 1870, now regulates the standard of coins, and has consolidated and amended the law in this respect. (c) A proclamation has in some cases been made as a more solemn manner of giving the coin currency: but the proclamation in general cases is certainly not necessary, and in prosecutions for coining need not be proved. (d) And it is not necessary in such prosecutions to produce the indentures; though it may be of use in case of any new coin with a new impression, not yet familiar to the people, to produce either the indentures, or one of the officers of the mint cognizant of the fact, or the stamps used, or the like evidence. But in general, whether the coin, upon a question of counterfeiting or impairing it, be the King's money or not, is a mere question of fact which may be found upon evidence of common usage or notoriety. (e) It should be observed, that any coin, once legally made and issued by the King's authority, continues to be the current coin of the kingdom until recalled, notwithstanding any change in the authority by which it was constituted. (f) Her Majesty in council may direct the establishment of any branch of the mint in any British possession, and make the coins issued by it a legal tender, and also direct that foreign coins may be a legal tender. (g)

Interpretation of terms. — The 24 & 25 Vict. c. 99, which came into effect on the 1st of November, 1861, (h) and applies to England, Scotland, and Ireland, enacts by sec. 1, that, 'In the interpretation of and for the purposes of this Act, the expression, "the Queen's current gold or silver coin," shall include any gold or silver coin coined in any of Her Majesty's mints, or lawfully current, by virtue of any proclamation or otherwise, in any part of Her Majesty's dominions, whether within the United Kingdom or otherwise; and the expression, "the Queen's copper coin" shall include any copper coin and any coin of bronze or mixed metal coined in any of Her Majesty's mints, or lawfully current, by virtue of any proclamation or otherwise, in any part of Her Majesty's said dominions; and the expression, "false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin," shall include any of the current coin which shall have been gilt, silvered, washed, coloured, or cased over, or in any manner altered, so as to resemble or be apparently intended to resemble or pass for any of the Queen's current coin of a higher denomination; and the expression "the Queen's current coin" shall include any coin coined in any of Her Majesty's mints, or lawfully current, by virtue of any proclamation or otherwise, in any part of Her Majesty's said dominions, and whether made of gold, sil-

(c) 33 Vict. c. 10.

(d) 1 East, P. C. 142, where see some cases in which proclamation by the writ of proclamation under the great seal, or a remembrance thereof, is considered to be necessary to prove a coin current.

(e) 1 East, P. C. 149. But in the case of old coin which has gradually fallen into disuse, though still the legal coin of the

King, there can be no general notoriety of the fact.

(f) 1 East, P. C. 148, where it is said also, that this recall may be by proclamation; and long disuse may, it is conceived, be evidence of it. It has also been effected by Act of Parliament, as by 9 Will. 3, c. 2, and 6 Geo. 2, c. 26.

(g) See 33 Vict. c. 10, s. 11.

(h) Sec. 43.

ver, copper, bronze, or mixed metal; and where the having any matter in the custody or possession of any person is *mentioned* in this Act, it *shall include* not only the having of it by himself in his personal custody or possession, but also the *knowingly and wilfully having it in the actual custody or possession of any other person*, and also the knowingly and wilfully having it in any dwelling-house or other building, lodging, apartment, field, or other place, open or enclosed, whether belonging to or occupied by himself or not, and whether such matter shall be so had for his own use or benefit or for that of any other person.' (i)

The words of the 2 Will. 4, c. 34, s. 21, were 'coined in any of His Majesty's mints *and lawfully current*' in any part of His Majesty's dominions, whether within the United Kingdom or otherwise; and consequently did not include coin which was not coined in any such mint, but was current in any of the colonies by virtue of any proclamation or otherwise; this clause is so framed as to include all such coin, and by that means the provisions of this Act are extended to it.

The definition of the 'Queen's current coin' is new. A genuine sovereign was fraudulently filed at the edges, thereby reducing the weight by one twenty-fourth part. The old milling being destroyed, a new milling was made so as to make the coin appear like a current sovereign; it was held that the coin so altered was false and counterfeit, the words 'shall include' in section 1, not being words of limitation, but of extension. (j)

In *R. v. Rogers*, 2 M. C. C. R. 85; *R. v. Gerrish*, 2 M. & Rob. 219; and *R. v. Williams*, 1 C. & M. 259, questions had arisen whether a person could be said to be in possession of coin within the meaning of the 2 Will. 4, c. 34, s. 21, which was with his knowledge in the personal possession of another, even though he were in company and acting in concert with such other, and the words 'knowingly and wilfully having it in the actual custody or possession of any other person' were introduced to remove all doubt in such cases.

Counterfeiting the Queen's gold or silver coin. — Sec. 2. 'Whosoever shall falsely make or counterfeit any coin resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life or for any term not less than three years, — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.' (k)

Colouring counterfeit coin or any pieces of metal with intent to make them pass for gold or silver coin. — Sec. 3. 'Whosoever shall gild or silver, or shall, with any wash or materials capable of producing the colour or appearance of gold or of silver, or by any means whatsoever, wash, case over, or colour any coin whatsoever resembling or apparently intended to resemble or pass for any of the Queen's current gold

(i) This clause is framed on the 2 Will. 4, c. 34, s. 21, and 22 & 23 Vict. c. 80.

(j) *R. v. Hermann*, 4 Q. B. D. 284, per Coleridge, C. J., and Pollock & Huddleston BB., (Lush and Stephen JJ., diss.)

(k) This clause is taken from the 2 Will. 4, c. 34, s. 3. See the interpretation clause, *ante*, p. 208.

or silver coin; or shall gild or silver, or shall, with any wash or materials capable of producing the colour *or appearance* of gold or of silver, *or by any means whatsoever*, wash, case over, or colour any piece of silver or copper, or of coarse gold or coarse silver, or of any metal or mixture of metals respectively, being of a fit size and figure to be coined, and with intent that the same shall be coined into false and counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin; or shall gild, or shall, with any wash or materials capable of producing the colour *or appearance* of gold, *or by any means whatsoever*, wash, case over, or colour any of the Queen's current silver coin, or file or in any manner alter such coin, with intent to make the same resemble or pass for any of the Queen's current gold coin; or shall gild or silver, or shall, with any wash or materials capable of producing the colour *or appearance* of gold or silver, *or by any means whatsoever*, wash, case over, or colour any of the Queen's current copper coin, or file or in any manner alter such coin, with intent to make the same resemble or pass for any of the Queen's current gold or silver coin, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, to the same punishment as in sec. 2.

The words, 'by any means whatsoever,' were introduced in order to include every process by which false metal can be made to appear like gold or silver, whether such appearance be produced by galvanism or otherwise howsoever.

The order of the words in the former clause was 'wash, colour, or case over,' and it was advisedly altered.

Counterfeiting foreign gold and silver coin.—Sec. 18. 'Whosoever shall make or counterfeit any kind of coin not being the Queen's current gold or silver coin, but resembling or apparently intended to resemble or pass for any gold or silver coin of any foreign prince, state, or country, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement.' (*l*)

Counterfeiting foreign coin other than gold and silver coin.—Sec. 22. 'Whosoever shall falsely make or counterfeit any kind of coin not being the Queen's current coin, but resembling or apparently intended to resemble or pass for any copper coin, or any other coin made of any metal or mixed metals of less value than the silver coin of any foreign prince, state, or country, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, for the first offence to be imprisoned for any term not exceeding one year, and for the second offence, to the same punishment as in s. 18. (*m*)

(*l*) This clause is framed from the 37 Geo. 3, c. 126, s. 2. See the interpretation clause, *ante*, p. 208.

Geo. 3, c. 139, s. 3. See sec. 37 for the form of an indictment for a second offence, &c., *post*.

(*m*) This clause is framed from the 43

Sec. 23 provides for the summary conviction of persons in possession of such foreign coin as aforesaid without lawful excuse.

Counterfeiting copper coin. — Sec. 14. ‘Whosoever shall falsely make or counterfeit any coin resembling or apparently intended to resemble or pass for any of the Queen’s current copper coin, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable,’ as in s. 18. (*n*)

Selling medals resembling current coin. — By the Counterfeit Medal Act 1883 (46 & 47 Vict. c. 45) § 2, ‘If any person without due authority or excuse (the proof whereof shall lie on the person accused) makes or has in his possession for sale, or offers for sale, or sells any medal, cast coin, or other like thing, made wholly or partially of metal or any metallic combination, and resembling in size, figure, and colour any of the Queen’s current gold or silver coin, or having thereon a device resembling any device on any of the Queen’s current gold or silver coin, or being so formed that it can by gilding, silvering, colouring, washing, or other like process, be so dealt with as to resemble any of the Queen’s current gold or silver coin, he shall be guilty of a misdemeanor, and on being convicted shall be liable to be imprisoned for any term not exceeding one year with or without hard labour.’ Sec. 3. ‘“The Queen’s current gold or silver coin” includes any gold or silver coin coined in or for any of Her Majesty’s mints, or lawfully current by virtue of any proclamation or otherwise in any part of Her Majesty’s dominions, whether within the United Kingdom or otherwise.’

Counterfeiting coin by officers in the mint. — With respect to the offence of counterfeiting coin in general it may be observed, that not only all such as counterfeit the King’s coin without his authority, but even such as are employed by him in the mint, come within the statute, if for their own lucre they make the money of baser alloy, or lighter than by their indentures they are authorized and bound to do: for they can only justify their coining at all under such an authority; and if they have not pursued that authority, it is the same as if they had none. But it is not any mistake in weight or alloy that will make them guilty; the act must be wilful, corrupt, and fraudulent. (*nn*)

What is a sufficient counterfeiting. — The monies charged to be counterfeited must *resemble the true and lawful coin*: (*o*) but this resemblance is a matter of fact of which the jury are to judge upon the evidence before them; the rule being, that the resemblance need not be perfect, but such as may in circulation ordinarily impose upon the world. (*p*) Thus a counterfeiting with some small variation in the inscription, effigies, or arms, done probably with intent to evade the law, is yet within it; and so is the counterfeiting in a different metal, if in appearance it be made to resemble the true coin. (*q*)

Where, on an indictment for uttering a counterfeit half-sovereign,

(*n*) This clause is taken from part of sec. 12 of the 2 Will. 4, c. 34.

(*nn*) 1 East, P. C. c. 4, s. 15, p. 166.

1 Hale, 213. 1 Hawk. P. C. c. 17 s. 55. 3 Inst. 16, 17. 4 Blac. Com. 84.

(*o*) 1 Hawk. P. C. c. 17, s. 81.

(*p*) 1 Hale, 178, 184, 211, 215.

(*q*) 1 East, P. C. c. 4, s. 13, p. 164, citing 1 MS. Sum. 50, and Ridgeley’s case, Old Bailey, Dec. 1778.

the coin was, in reality, a Prince of Wales's medal; and though on one side it bore some resemblance to a good half-sovereign, having Her Majesty's head and the usual inscription, on the other side was the plume of the Prince of Wales, with the words 'Prince of Wales's model half-sovereign,' and it was held that it was a question for the jury whether this coin was intended by the maker to pass as a counterfeit coin, or was merely designed for a plaything, a card-marker, &c. (r).

It is quite clear that there will be a sufficient counterfeiting where the counterfeit money is made to resemble coin, the impression on which has been *worn away by time*. In one case the shillings produced in evidence were quite smooth, without the smallest vestige of either head or tail, and without any resemblance of the shillings in circulation, except their colour, size, and shape; and the Master of the Mint proved that they were bad, but that they were very like those shillings the impression on which had been worn away by time, and might very probably be taken by persons having less skill than himself for good shillings; and the Court were of opinion that a *blank* that is smoothed and made like a piece of legal coin, the impression of which is worn out, and yet suffered to remain in circulation, is sufficiently counterfeited to the similitude of the current coin of this realm to bring the counterfeiters and coiners of such blanks within the statute; these blanks having some reasonable likeness to that coin which has been defaced by time, and yet passed in circulation. (s) In a subsequent case the counsel for the prisoners having objected, upon the fact of no impression of any sort or kind being discernible upon the shillings produced in evidence, that they were not counterfeited to the *likeness and similitude of the good and legal coin of the realm*, the judges were of opinion, that it was a question of fact whether the counterfeit monies were of the likeness and similitude of the lawful current silver coin called a shilling. And the jury having so found it, the want of an impression was immaterial; because, from the impression being generally worn out or defaced, it was notorious that the currency of the genuine coin of that denomination was not thereby affected; the counterfeit therefore was perfect for circulation, and possibly might deceive the more readily from having no appearance of an impression: and in the deception the offence consists. (t) Before the 2 Will. 4, c. 34, where the imitation of the real coin had not proceeded so far as to fabricate a false coin sufficiently perfect to be circulated, the offence of counterfeiting was not complete. Thus, where the prisoner had forged the impression of a half-guinea on a piece of gold, which was previously hammered, but was not round, nor would pass in the condition it then was, upon reference to the judges, it was held that the crime of counterfeiting was incomplete. (u) And where the prisoners were convicted under the 25 Edw. 3, c. 2, and it appeared that no one piece of the base metal found upon them was in such a state as to make it passable, the conviction was held to be wrong. (v) But by the 24 & 25 Vict.

(r) R. v. Byrne, 6 Cox, C. C. 475.
Crampton, J.

(s) Wilson's case, Old Bailey, 1788; 1 Leach, 285.

(t) R. v. Welsh, 1 Leach, 364. 1 East, P. C. c. 4, s. 13, p. 164.

(u) Varley's case, 1 Leach, 76. 1 East, P. C. c. 4, s. 13, p. 164. 2 Blac. Rep. 682.

(v) R. v. Harris, 1 Leach, 185.

c. 99, s. 30, the offence of counterfeiting shall be deemed to be complete, although the coin be not in a state fit to be uttered, or the counterfeiting not finished or perfected. (w) The prisoner was indicted under 24 & 25 Vict. c. 95, s. 13, for uttering a medal resembling in size, figure, and colour, one of the Queen's current gold coins called a half-sovereign. The medal was stated by a witness to be 'made of metal the same diameter as a half-sovereign, — somewhat similar in colour. On the obverse there is the head of the Queen, similar to that on a half-sovereign. The legend is entirely different from that on a half sovereign, being "Victoria, Queen of Great Britain," instead of "Victoria Dei Gratia." The medal is querled, but the querling is round and not square.' At this point of his evidence the witness accidentally dropped the medal, and it was lost. No evidence was given of what was on the other side of the medal nor was the medal shown to the jury. The court were all of opinion that there was evidence that the medal resembled a half-sovereign in size, colour, and figure. (x)

Colouring. — Upon an indictment on the 8 & 9 Will. 3, c. 26, s. 4 (now repealed), it appeared that the colour of silver was produced by melting a small portion of good silver with a large portion of base metal, and throwing it, after it had been cut up into round blanks, into *aqua fortis*, which has the effect of drawing to the surface whatever silver there may be in the composition, and giving the metal the colour and appearance of real silver. A doubt therefore arose, whether this process of extracting the latent silver by the power of the wash from the body to the surface of the blank was colouring with 'a wash and materials' within the meaning of the statute; or whether the Legislature did not intend such a colouring only as is produced by some external application on the surface of the blank. But the judges thought that this process of extracting the latent silver from the body to the surface of the base metal by the power of *aqua fortis* was a colouring within the words of the statute; (y) and they also thought that it might be charged as a colouring with silver; for the effect of the *aqua fortis* is to corrode the base metal, and leave the silver only on the superficies; and so the copper is coloured or cased with silver. (z)

So though it was necessary that the blanks should be *rubbed* after they were taken out of the wash, in order to give them the appearance of silver, the preparing and steeping them in the wash was held to be a colouring within the 8 & 9 Will. 3, c. 26, s. 4. The prisoner was apprehended in the very act of steeping round blanks composed of brass and silver in *aqua fortis*: none of them were in a finished state; but many were taken out of the liquor, and others were found dry. These blanks exhibited the appearance of lead, and some of them had the impression of a shilling, and by *rubbing* them they might be made perfectly to resemble silver coin; but in their then state the jury found that none of them would pass current. The question was, whether the offence was completed, inasmuch as the colour of silver had not been produced on any of the blanks. There

(w) *Post*, p. 217.

(x) *R. v. Robinson*, L. & C. 604; 34 L. J. M. C. 176.

(y) *R. v. Lavey*, 1 Leach, 153.

(z) *S. C.*, 1 East, P. C. c. 4, s. 14.

was some difference of opinion amongst the judges upon a case reserved. One judge said, he understood the words 'colour, &c.,' to mean producing on the piece of metal the colour of silver, which was not done here; for without rubbing, the money coined would not pass: and another observed, that the word in the statute was '*producing*' in the present tense, and not materials *which would produce*. But the other judges thought the conviction right. They considered that the offence was complete when the piece was coloured; for it was then coloured with materials which produce the colour of silver; and that it was not necessary that the piece so coloured should be current, for the colouring of blanks was an offence within the clause. And it was observed, that a contrary construction would prevent any conviction until a wash was discovered, which would in the first instance produce a perfect bright shilling or sixpence. (a)

Upon an indictment on the 2 Will. 4, c. 34, s. 4, which alleged that the prisoner three sixpences 'feloniously did gild with materials capable of producing the colour of gold,' it was proved that the prisoner was apprehended in the act of gilding sixpences with gold, three of which so gilt were found in the room where he was taken: it was objected that the indictment was not proved, as the prisoner had used gold and not materials capable of producing the colour of gold. It was answered, that the latter words might be rejected; to which it was replied, that they could not, as they qualified the word gold, and showed it was not used in the strict sense of the word. A verdict having been directed for the Crown, the counsel for the prisoner moved, in arrest of judgment, in case the objection should arise on the record. Upon a case reserved, the judges present were unanimous that the indictment was proved, and all, except two, (b) considered the indictment good. (c)

Counterfeiting complete without uttering. — If there be a counterfeiting in fraud of the King, the offence is complete before any uttering, or attempt to utter. (d)

Procuring dies with intent to counterfeit foreign coin. — One count charged the prisoner with unlawfully causing to be made two dies, one of the obverse side, the other of the reverse side of a silver half-dollar of Peru, with intent feloniously to make counterfeit Peruvian half-dollars; another count charged him with attempting feloniously to coin by making the dies, with intent to use them in coining such counterfeit coins. The prisoner, without any authority or license so to do, caused to be made by one Jackson, a die sinker (who, though he executed the order, gave notice to the police, and committed no offence against the law), the necessary dies for making a counterfeit dollar of the Republic of Peru. The dies, though suitable and necessary for making such counterfeit coin could not alone produce it; a press, copper blanks, galvanic battery, and a

(a) *R. v. Case*, 1 East, P. C. c. 4, s. 14. 1 Leach, 154, note (a). This case probably caused the use of the terms, 'materials capable of producing the colour of gold or silver,' in the 2 Will. 4, c. 34, s. 4, instead of the terms, 'materials producing the colour

of gold or silver,' in the 8 & 9 Will. 3, c. 26, s. 4. C. S. G.

(b) *Littledale, J., and Parke, B.*

(c) *R. v. Turner*, 2 M. C. C. R. 42.

(d) 3 Inst. 61. 1 Hale, 215, 223. 1 Hawk. c. 17, s. 55. 1 East, P. C. c. 4, s. 13, p. 165.

preparation of silver being also necessary for that purpose. The prisoner had procured galvanic batteries, and had been in negotiation for the purchase of a press and copper blanks for the aforesaid purpose; but he had not actually procured either press, blanks, or preparation of silver. There was no doubt that the prisoner intended to use the whole apparatus when procured in making counterfeit Peruvian dollars, and the only doubt was whether he intended to coin in Peru only, or in this country also; and it was contended that, if he only intended to make the coin in Peru, no offence had been committed; and even if he did intend to coin in this country, that intention, though coupled with the act of causing the dies to be made in pursuance of such intention, fell short of an attempt to commit a felony. The jury found that the intention of the prisoner was to cause to be made and procure the dies and other apparatus in order therewith to coin counterfeit Peruvian half-dollars, and to make a few only of the counterfeit coin in England by way of trying whether the apparatus would answer before sending it out to Peru, to be there used in making the counterfeit coin, and convicted the prisoner; and upon a case reserved, it was held that the conviction was right. This was not an indictment for an attempt to commit a statutable offence; but the indictment was founded on a criminal intent coupled with an act immediately connected with the offence. Nobody could doubt that the prisoner was in possession of machinery necessarily connected with the offence, for the express purpose of committing it, and which was obtained, and could be obtained, for no other purpose. No doubt the act was done with intent to commit a felony, and was sufficient to support such an indictment as the present. It was an act immediately connected with the offence, and the prisoner could have no other object than to commit the offence. (e)

Punishment of principals in the second degree and accessories. — By the 24 & 25 Vict. c. 99, s. 35, 'In the case of every felony punishable under the Act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act shall be liable to be imprisoned for any term not exceeding two years with or without hard labour.' (f)

Accomplices or receivers, in those offences concerning the coin which amount to felony, follow the general rule applicable to felony. Two agree to counterfeit, and one does it in consequence of that agreement; they are both guilty. One counterfeits, and another by agreement beforehand afterwards puts it off; the latter is a principal: so if he put it off afterwards, knowing that the other coined it; for that makes him an aider: so if he furnished the coiner with tools, or materials for coining. (g)

Proof that a man occasionally visited coiners; that the rattling of

(e) *R. v. Roberts*, Dears. C. C. 539. The Court seem to have been clear that making a few specimens to ascertain whether they would answer the purpose would have been a felony within the statute; and that even making a few specimens to put in a cabinet

would be so also. And see *R. v. Harvey*, L. R. 1 C. C. R. 284.

(f) This clause is taken from the 2 Will. 4, c. 34, s. 18.

(g) 1 East, P. C. c. 4, s. 31, p. 186.

money was occasionally heard with them; that he was seen counting something as if it was money when he left them; that, on coming to the lodgings just after their apprehension, he endeavoured to escape, and was found to have bad money about him; is not sufficient evidence to implicate him, as counselling, procuring, aiding, and abetting the coining. Two women were indicted for colouring a shilling and sixpence, and a man as counselling them, &c. The evidence against him was, that he visited them once or twice a week; that the rattling of copper money was heard whilst he was with them; that once he was counting something just after he came out; that on going to the room just after their apprehension he resisted being stopped, and jumped over a wall to escape; and that there were then found upon him a bad three-shilling piece, five bad shillings, and five bad sixpences; but upon a case reserved the judges thought the evidence too slight to convict him. (*h*)

Venue. — Sec. 28. 'Where any person shall tender, utter, or put off any false or counterfeit coin in one county or jurisdiction, and shall also tender, utter, or put off any other false or counterfeit coin in any other county or jurisdiction, either on the day of such first mentioned tendering, uttering, or putting off, or within the space of ten days next ensuing, (*i*) or where two or more persons, acting in concert in different counties or jurisdictions, shall commit any offence against this Act, every such offender may be dealt with, indicted, tried, and punished, and the offence laid and charged to have been committed, in any one of the said counties or jurisdictions, in the same manner in all respects as if the offence had been actually and wholly committed within such one county or jurisdiction.' (*j*)

The first part is introduced to remove a doubt which had risen whether a person tendering, &c., coin in one jurisdiction, and afterwards tendering, &c., coin in another jurisdiction, within sec. 10, could be tried in either. As the offence created by that section is only a misdemeanor, probably there was no substantial ground for that doubt, but it was thought better to set the matter at rest.

Sec. 36. 'All indictable offences mentioned in this Act which shall be committed within the jurisdiction of the Admiralty of England or Ireland shall be deemed to be offences of the same nature and liable to the same punishments as if they had been committed upon the land in England or Ireland, and may be dealt with, inquired of, tried, and determined in any county or place in England or Ireland in which the offender shall be apprehended or be in custody, in the same manner in all respects as if the same had been actually committed in that county or place, and in any indictment for any such offence, or for being accessory to any such offence, the venue in the margin shall be the same as if such offence had been committed in such county or place, and the offence itself shall be averred to have been committed "on the high seas;" provided that nothing herein contained shall alter or affect any of the laws relating to the government of Her Majesty's land or naval forces.'

(*h*) *R. v. Isaacs*, Hil. T. 1813. MS. Bayley, J.

(*i*) The preceding part of this section is new.

(*j*) This clause is taken from the 2 Will. 4, c. 34, s. 15.

What is sufficient proof of coin being counterfeit. — Sec. 29. 'Where, upon the trial of any person charged with any offence against this Act, it shall be necessary to prove that any coin produced in evidence against such person is false or counterfeit, it shall not be necessary to prove the same to be false and counterfeit by the evidence of any moneyer, or other officer of Her Majesty's Mint, but it shall be sufficient to prove the same to be false or counterfeit by the evidence of any other credible witness.' (*k*)

Where the offence is complete — Sec. 30. 'Every offence of falsely making or counterfeiting any coin, *or of buying, selling, receiving, paying, tendering, uttering, or putting off, or of offering to buy, sell, receive, pay, utter, or put off, any false or counterfeit coin,* against the provisions of this Act, shall be deemed to be complete, although the coin so made or counterfeited, *or bought, sold, received, paid, tendered, uttered, or put off, or offered to be bought, sold, received, paid, uttered, or put off,* shall not be in a fit state to be uttered, or the counterfeiting thereof shall not be finished or perfected.'

This clause is taken from the 2 Will. 4, c. 34, s. 3, which was limited in terms to making or counterfeiting gold or silver coin, and consequently it was held that it did not apply to a case of selling counterfeit coin. The words in *italics* have, therefore, been added in order to include all cases of 'buying, selling,' &c. (*l*)

Power to apprehend persons found committing offences. — Sec. 31. 'It shall be lawful for any person whatsoever to apprehend any person who shall be found committing any indictable offence, or any high crime and offence, or crime and offence, against this Act, and to convey or deliver him to some peace officer, constable, or officer of police, in order to his being conveyed as soon as reasonably may be before a justice of the peace or some other proper officer, to be dealt with according to law.' (*m*)

This clause is new, and clearly unnecessary, as far as it relates to any felony or indictable misdemeanor, for there is no doubt whatever that any person in the act of committing any such offence is liable by the common law to be apprehended by any person; but it was introduced at the instigation of the Solicitors of the Treasury, as it had been found that there was great unwillingness to apprehend in such cases, in consequence of doubts that prevailed among the public as to the right to do so.

The words, 'or officer of police,' were introduced in the House of Commons quite unnecessarily, as without doubt every officer of police is a peace officer; and they render this clause inconsistent with other clauses in some of the other Acts.

Fine and sureties for keeping the peace. — Sec. 38. 'Whenever any person shall be convicted of any indictable misdemeanor punishable under this Act the Court may, if it shall think fit, in addition to or in lieu of any of the punishments by this Act authorised, fine the offender, and require him to enter into his own recognizances, and to find sureties, both or either, for keeping the peace and being of good be-

(*k*) This clause is taken from the 2 Will. 4, c. 34, s. 17.

(*l*) *R. v. Bradford*, 2 C. & D. 41.

(*m*) Sec. 33 provides for a notice of action, tender of amends, &c. Sec. 32 takes away the *certiorari*, &c. Sec. 41 provides for summary proceedings.

haviour; and in case of any felony punishable under this Act, the Court may, if it shall think fit, require the offender to enter into his own recognizances and to find sureties, both or either, for keeping the peace, in addition to any punishment by this Act authorised; provided that no person shall be imprisoned under this clause, for not finding sureties, for any period exceeding one year.' (n)

Hard labour. — Sec. 39. 'Whenever imprisonment, with or without hard labour, may be awarded for any indictable offence under this Act, the court may sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction.'

Solitary confinement. — Sec. 40. 'Whenever solitary confinement may be awarded for any offence under this Act, the Court may direct the offender to be kept in solitary confinement for any portion or portions of his imprisonment, or of his imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year.'

Costs. — Sec. 42. 'In all prosecutions for any offence against this Act in England, which shall be conducted under the direction of the Solicitors of Her Majesty's Treasury, the Court before which such offence shall be prosecuted or tried shall allow the expenses of the prosecution in all respects as in cases of felony; and in all prosecutions for any such offence in England which shall not be so conducted it shall be lawful for such Court, in case a conviction shall take place, but not otherwise, to allow the expenses of the prosecution in like manner; and every order for the payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid, upon the same terms and in the same manner in all respects as in cases of felony. (o)

Before the passing of this Act the costs of mint prosecutions were paid by the Treasury wherever they were conducted by the Solicitors of the Treasury; but in no other case. As the Solicitors of the Treasury were accustomed to employ attorneys in the country to conduct these prosecutions, and they did not always like to pay the witnesses before they had received the costs of the prosecution from the Treasury, it sometimes happened that the witnesses did not get their expenses till a considerable time after the trial, and the earlier part of this clause was introduced in order that the attorneys might at once obtain the costs of the prosecutions, and pay the witnesses their expenses; and, as in all mint prosecutions so conducted the expenses were invariably paid, the first part of the clause is imperative, and the Court must allow the expenses.

It sometimes also happened that private individuals conducted mint prosecutions, after the officers of the mint had declined to prosecute, and, considering the importance of bringing offenders in such cases to justice, it was thought expedient to give the costs in some of these cases; the second part of the clause therefore gives the Court a *discretion* to grant the costs in such cases, provided a conviction takes place, but not otherwise. This provision will on the one hand encourage prosecutions where there are substantial grounds for them,

(n) This clause is new.

(o) This clause is new.

and on the other hand it will prevent speculative prosecutions where the evidence is unsatisfactory.

Producing tools and base money in evidence.—In many instances of offences relating to the counterfeiting coin, the Legislature have made special provisions for securing the base coin, and also the tools of the offenders; in order that they may be produced in evidence, and afterwards be disposed of in a proper manner. (*p*)

By the 24 & 25 Vict. c. 99, s. 27, 'If any person shall find or discover in any place whatever, or in the custody or possession of any person having the same without lawful *authority or excuse*, any false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the Queen's current gold, silver, or copper coin, or any coin of any foreign prince, state, or country, or any instrument, tool, or engine whatsoever, adapted and intended for the counterfeiting of any such coin, *or any filings or clippings, or any gold or silver bullion, or any gold or silver in dust, solution, or otherwise, which shall have been produced or obtained by diminishing or lightening any of the Queen's current gold or silver coin*, it shall be lawful for the person so finding or discovering and he is hereby required to seize the same, and to carry the same forthwith before some justice of the peace; and where it shall be proved, on the oath of a credible witness before any justice of the peace, that there is reasonable cause to suspect that any person has been concerned in counterfeiting the Queen's current gold, silver, or copper coin, or any such foreign or other coin as in this Act before mentioned, or has in his custody or possession any such false or counterfeit coin, or any instrument, tool, or engine whatsoever adapted and intended for the making or counterfeiting of any such coin, *or any other machine used or intended to be used for making or counterfeiting any such coin, or any such filings, clippings, or bullion or any such gold or silver in dust, solution, or otherwise* as aforesaid, it shall be lawful for any justice of the peace, by warrant under his hand, to cause any place whatsoever belonging to or in the occupation or under the control of such suspected person to be searched, either in the day or in the night, and if any such false or counterfeit coin, or any such instrument, tool, or engine, *or any such machine, or any such filings, clippings, or bullion or any such gold or silver*

(*p*) The Legislature has made other provisions for the suppression of base coin, or coin inferior in value, where there is no criminal charge imputed to the person who may happen to tender it. And by sec. 26 of the 24 & 25 Vict. c. 99, 'Where any coin shall be tendered *as the Queen's current gold or silver coin* to any person who shall suspect the same to be diminished otherwise than by reasonable wearing or to be counterfeit, it shall be lawful for such person to cut, break, *bend*, or deface such coin, and if any coin so cut, broken, *bent*, or defaced shall appear to be diminished otherwise than by reasonable wearing, or to be counterfeit, the person tendering the same shall bear the loss thereof; but if the same shall be of due weight, and shall appear to be lawful coin, the person cutting, breaking, *bending*, or defacing the same is hereby required to re-

ceive the same at the rate it was coined for; and if any dispute shall arise whether the coin so cut, broken, *bent*, or defaced be diminished in manner aforesaid, or counterfeit, it shall be heard and finally determined in a summary manner by any justice of the peace, who is hereby empowered to examine upon oath as well the parties as any other person, in order to the decision of such dispute; and the tellers at the receipt of Her Majesty's Exchequer, and their deputies and clerks, and the receivers general of every branch of Her Majesty's revenue, are hereby required to cut, break, or deface, or cause to be cut, broken, or defaced, every piece of counterfeit or unlawfully diminished gold or silver coin which shall be tendered to them in payment of any part of Her Majesty's revenue.' And see 33 Vict. c. 10, s. 7.

dust, solution, or otherwise as aforesaid, shall be found in any place so searched, to cause the same to be seized and carried forthwith before some justice of the peace; and whensoever any such false or counterfeit coin, or any such instrument, tool, or engine, *or any such machine, or any such filings, clippings, or bullion, or any such gold or silver in dust, solution or otherwise* as aforesaid shall in any case whatsoever be seized and carried before a justice of the peace, he shall *if necessary*, cause the same to be secured, for the purpose of being produced in evidence against any person who may be prosecuted for any offence against this Act; and all such false and counterfeit coin, and all instruments, tools, and engines adapted and intended for the making or counterfeiting of coin, *and all such machines, and all such filings, clippings, and bullion, and all such gold and silver in dust, solution, or otherwise* as aforesaid, after they shall have been produced in evidence, or when they have been seized, and shall not be required to be produced in evidence, shall forthwith be delivered up to the officers of Her Majesty's Mint, or to the *solicitors of Her Majesty's Treasury*, or any person authorized by them to receive the same.' (q)

The parts in *italics* are introduced in order to provide for the seizure of filings of coin, gold or silver dust, and machines mentioned in the preceding clauses of the Act.

The solicitors of the Treasury now superintend all mint prosecutions. (r)

By the 33 Vict. c. 10, s. 5, no piece of gold, silver, copper, or bronze, or of any metal or mixed metal of any value whatever, shall be made or issued except by the mint as a coin or a token for money, or as purporting that the holder thereof is entitled to demand any value denoted thereon. Every person who acts in contravention of this section shall be liable on summary conviction to a penalty not exceeding twenty pounds.

SEC. II.

Impairing and Defacing Coin.

Impairing gold or silver coin, with intent. — The 24 & 25 Vict. c. 99, s. 4, enacts that, 'Whosoever shall impair, diminish, or lighten any of the Queen's current gold or silver coin, with intent *that* the coin so impaired, diminished, or lightened *may* pass for the Queen's current gold or silver coin, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years, — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.' (t)

(q) This clause is framed on 2 Will. 4, c. 34, s. 14; 37 Geo. 3, c. 126, s. 7; and 43 Geo. 3, c. 139, s. 7; as to the words 'without lawful authority or excuse,' see *R. v. Harvey*, L. R. 1 C. C. R. 284.

(r) See the interpretation clause, *ante*, p. 208.

(t) See sec. 40, *ante*, p. 218.

This clause is taken from the 2 Will. 4, c. 34, s. 5, the words of which were 'with intent to *make* the coin pass,' &c., which intent never existed; for the coin was not impaired in order to *make* it pass, but in order to obtain some metal from the coin, and that it *might* nevertheless pass in circulation. The words in *italics* have therefore been substituted for those of the former enactment.

Unlawful possession of filings or clippings of gold or silver coin. — Sec. 5. 'Whoever shall unlawfully have in his custody or possession any filings or clippings, or any gold or silver bullion, or any gold or silver in dust, solution, or otherwise, which shall have been produced or obtained by impairing, diminishing, or lightening any of the Queen's current gold or silver coin, knowing the same to have been so produced or obtained, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years and not less than three years, — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement. (u)

Defacing coin by stamping words thereon. — Sec. 16. 'Whosoever shall deface any of the Queen's current gold, silver, or copper coin, by stamping thereon any names or words, whether such coin shall or shall not be thereby diminished or lightened, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding one year, with or without hard labour.'

This clause is taken from the 16 & 17 Vict. c. 102, s. 1, which contained the words 'or shall use any machine or instrument for the purpose of bending the same,' but it was considered that this provision was much too comprehensive, and therefore it was omitted.

Tender of coin so defaced not legal. — Sec. 17. 'No tender of payment in money made in any gold, silver, or copper coin so defaced by stamping as in the last preceding section mentioned shall be allowed to be a legal tender; and whosoever shall tender, utter, or put off any coin so defaced shall, on conviction thereof before two justices, be liable to forfeit and pay any sum not exceeding forty shillings: Provided that it shall not be lawful for any person to proceed for any such last-mentioned penalty without the consent, in England or Ireland, of Her Majesty's Attorney-General for England or Ireland respectively, or in Scotland of the Lord Advocate.' (v)

Searching for clippings of coin, &c., — With a view to more effectually prevent the clipping, diminishing, or impairing the current coin of the kingdom, the 6 & 7 Will. 3, c. 17, s. 8, made provision for breaking open houses and searching for bullion; and for the punishment of the person in whose possession bullion was found, not proving it to be lawful silver, and that the same was not before the melting thereof coin nor clippings. (w) Provision concerning *melting*

(u) This clause is new.

(w) These provisions seem to be repealed

(v) This clause is taken from the 16 & 17 Vict. c. 102, s. 2. See the interpretation clause, *ante*, p. 208.

down coin were made by the 17 Edw. 4, c. 1, and 13 & 14 Car. 2, c. 31. (x) And if money, false or clipped, be found in the hands of any that is suspicious, he may be imprisoned till he hath found his warrant *per statutum de moneta*. (y)

SEC. III.

Of Importing into the Kingdom Counterfeit or Light Money.

Importing counterfeit coin from beyond seas. — By the 24 & 25 Vict. c. 99, s. 7, 'Whosoever, *without lawful authority or excuse (the proof whereof shall lie on the party accused)*, shall import or receive into the United Kingdom from beyond the seas any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life or for any term not less than three years, — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.' (z)

The first words in *italics* were introduced for the reason mentioned in the note to sec. 6. (a)

The words 'or receive' were added to include cases where the offender received coin which had come from abroad, but there was no evidence to bring his offence within the term 'import.'

Under the 1 & 2 Ph. & M. c. 11 (now repealed), it was held that the words 'false or counterfeit coin or money being current within this realm,' referred to gold and silver coin of foreign realms, current here by the sufferance and consent of the Crown, which must be by proclamation, or by writ under the great seal. And the money, the bringing in of which was prohibited by the 25 Edw. 3, st. 5, c. 2, and 1 & 2 Ph. & M. c. 11 (both now repealed) must be brought from some foreign place out of the King's dominions into some place within the same, (b) and not from Ireland or some other place subject to the Crown of England, for though to some purposes they are distinct from England, yet as the counterfeiting is punishable there as much as in England, the bringing money from such places is not within those Acts. (c) It may be observed also that these Acts were confined to the *importer*, and did not extend to a *receiver* at second hand; and such importer must also have been averred and proved to have known that the money was counterfeit. (d)

It seems to have been the better opinion, that it was not necessary that such false money should be actually paid away or merchandized

(x) This Act and every Act in force before its passing, whereby the melting, &c., of coin was prohibited, are repealed by the 59 Geo. 3, c. 49, s. 11.

(y) 3 Inst. 18.

(z) This clause is taken from the 2 Will. 4, c. 34, s. 6.

(a) *Post*.

(b) 1 East, P. C. c. 4, ss. 1, 4, 5, 6, 21, 22.

(c) 1 Hawk. c. 17, s. 87.

(d) 1 Hale, 227, 228, 317. 1 Hawk. c. 17, ss. 86, 88. 1 East, P. C. c. 4, s. 22, p. 175. The words of the 25 Ed. 3, were, 'if any man *bring*;' of the 1 & 2 Ph. & M. 'if any person shall *bring*.'

with, for the words of the 25 Edw. 3 are, to 'merchandize or making payment,' &c., which only import an *intention* to do so, and are fully satisfied whether the act intended be performed or not; (e) and it is clear that bringing over money counterfeited according to the similitude of foreign coin was treason within the 1 & 2 Ph. & M. c. 11. (f)

Importing foreign counterfeit coin. — By the 24 & 25 Vict. c. 99, s. 19, 'Whosoever, *without lawful authority or excuse (the proof whereof shall lie on the party accused)*, shall bring or receive into the United Kingdom (g) any such false or counterfeit coin resembling or apparently intended to resemble or pass for any gold or silver coin of any foreign prince, state, or country, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years and not less than three years, — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.' (h)

From the words of the statute, an importation of counterfeit foreign coin, with a knowledge that it is counterfeit, is clearly sufficient, without any actual uttering. The present clause omits the words 'to the intent to utter the same,' which were in the former Act.

It seems that this statute does not provide for the case of a person collecting the base money therein mentioned from the vendors of it in this country, with intent to utter it within the realm, or the dominions of the realm. (i)

SEC. IV.

Of Exporting Counterfeit Money.

By the 24 & 25 Vict. c. 99, s. 8, 'Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall export, or put on board any ship, vessel, or boat for the purpose of being exported from the United Kingdom, any false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the Queen's current coin, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted

(e) 1 Hawk. c. 17, s. 89. But Lord Coke and Lord Hale seem to have thought differently. 3 Inst. 18. 1 Hale, 229. But see 1 East, P. C. c. 4, s. 22, pp. 175, 176, where it is said that though the best trial and proof of an intent may be by the act done, yet it may also be evinced by a variety of circumstances, of which the jury are to judge.

(f) 1 Hawk. c. 17, s. 89. It is to be observed, that the new statute has neither the words 'to merchandize or make payment,'

which were in the 25 E. 3, nor the words 'to the intent to utter or make payment with the same,' which were in the 1 & 25 Ph. & M. The crime, therefore, seems now to consist in importing counterfeit coin knowing it to be counterfeit. C. S. G.

(g) See the note to sec. 6, *post*.

(h) This clause is framed from the 37 Geo. 3, c. 126, s. 8.

(i) 1 East, P. C. c. 4, s. 23, p. 177.

thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.' (*k*)

This clause will include all cases of exporting counterfeit colonial coin.

(*k*) This clause is new. As to hard labor, &c., see *ante*, p. 218. See the interpretation clause, *ante*, p. 208.

CHAPTER THE SECOND.

OF FRAUDS RELATING TO BULLION, AND OF COUNTERFEITING BULLION.

SEC. I.

Of Frauds relating to Bullion.

BULLION signifies properly either gold or silver in the mass ; but is sometimes used to denote those metals in any state other than that of authenticated coin ; comprising in this latter sense gold and silver wares and manufactures. Many statutes have been passed for the prevention of frauds with respect to such bullion, by creating offences in making, working, putting to sale, exchanging, selling, or exporting any gold or silver manufactures of less fineness than the standards respectively fixed at the time by the several Acts. But it is not intended to make any particular mention of those statutes ; (a) the punishments inflicted by them being in general certain penalties and forfeitures, or, in default of payment, commitment to the house of correction. The knowingly exposing for sale and selling wrought gold under the sterling alloy as gold of the true standard, though indictable in *goldsmiths*, is a private imposition only in a *common person*, and the party injured is left to his civil remedy. (b)

It is conceived also that offenders fraudulently affixing public and authentic marks on goods of a value inferior to such tokens are liable to suffer at common law upon an indictment for a cheat. J. Fabian, a working goldsmith, was indicted for falsifying plate, by putting in too much alloy, and then corrupting one of the assay master's servants to help him to the proper marks, with which he stamped his plate, and sold it to the goldsmiths ; and being convicted, he was fined £100 and adjudged to stand three times in the pillory ; and was also fore-judged of his trade that he should not use that trade again as a master workman. This judgment must have been at common law. (c)

The offences of counterfeiting the assay marks on bullion or plate, or transposing such marks from one piece of manufacture to another, will be mentioned in a subsequent part of the work.

Provisions were made by several statutes to prevent the fraudulent exportation of bullion, but these statutes are either repealed, or their provisions do not fall within the scope of this work.

(a) See them collected in 1 East, P. C. c. 4, s. 32, pp. 188 to 194. The 28 Ed. 1, st. 3, c. 20, was repealed by the 19 & 20 Vict. c. 64.

(b) R. v. Bower, Cowp. 323.

(c) Fabian's case, Old Bailey, Dec. Sess. 1664. 1 East, P. C. c. 4, s. 34, p. 194. Kel. 39.

CHAPTER THE THIRD.

OF THE MAKING, MENDING, OR HAVING IN POSSESSION ANY INSTRUMENTS FOR COINING.

By the 24 & 25 Vict. c. 99, s. 24, 'Whosoever, without lawful authority *or excuse* (the proof whereof shall lie on the party accused), shall knowingly make or mend, or begin or proceed to make or mend, or buy or sell, or have in his custody or possession, any puncheon, counter-puncheon, matrix, stamp, die, pattern, or mould, in or upon which there shall be made or impressed, or which will make or impress, or which shall be *adapted and* intended to make or impress, the figure, stamp, or apparent resemblance of both or either of the sides of any of the Queen's current gold or silver coin, *or of any coin of any foreign prince, state, or country*, or any part or parts of both or either of such sides; or shall make or mend, or begin or proceed to make or mend, or shall buy or sell, or have in his custody or possession, any edger, edging *or other* tool, collar, instrument, or engine adapted and intended for the marking of coin round the edges with letters, grainings, or other marks or figures apparently resembling those on the edges of any such coin as in this section aforesaid, knowing the same to be so adapted and intended as aforesaid; or shall make or mend, or begin or proceed to make or mend, or shall buy or sell, or have in his custody or possession, any press for coinage, or any cutting engine for cutting, by force of a screw or of any other contrivance, round blanks out of gold, silver, or other metal *or mixture of metals, or any other machine*, knowing such press to be a press for coinage, or knowing such engine *or machine* to have been used, or to be intended to be used, for or in order to the *false making or* counterfeiting of any such coin as in this section aforesaid, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life, or for any term not less than three years, — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.' (a)

Lawful authority or excuse. — It has been decided upon this section that the word 'excuse' includes authority, and that it is unnecessary to allege or prove any intent. The felony is knowingly to have possession of a die, and the guilty knowledge required is that of being in possession of the die, contrary to the provisions of the Act of

(a) This clause is framed from the 2 Will. 4, c. 34, s. 10, and is extended to tools for making foreign coin, and to other tools

and machines than those mentioned in the former enactment, and to tools for cutting blanks out of mixed metals.

Parliament, that is, without lawful authority or excuse. A guilty intention to use the dies is not necessary. (b)

Where two galvanic batteries were found in the prisoner's house, with white metal and other things plainly indicating that they had been used for coining, and it was proved that counterfeit coin is electro-plated before it is put in circulation, and that that is generally done by the aid of galvanic batteries, it was held that the batteries were machines within the meaning of this section. (c)

Conveying tools or monies out of the mint without authority. — Sec. 25. 'Whosoever, without lawful authority *or excuse* (the proof whereof shall lie on the party accused), shall knowingly convey out of any of Her Majesty's mints any puncheon, counter-puncheon, matrix, stamp, die, pattern, mould, edger, edging *or other* tool, collar, instrument, press, or engine used or employed in or about the coining of coin, or any useful part of any of the several matters aforesaid, or any coin, bullion, metal, or mixture of metals, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable' (d) to the same punishment, as in s. 24.

Making or having tools for coining copper. — Sec. 14. 'Whosoever, without lawful authority *or excuse* (the proof whereof shall lie on the party accused), shall knowingly make or mend, or begin or proceed to make or mend, or buy or sell, or have in his custody or possession, any instrument, tool, or engine adapted and intended for the counterfeiting any of the Queen's current copper coin, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement. (e)

Decisions on repealed statutes. — Several points arose as to the tools or instruments which were within the words of the 8 & 9 Will. 3. Where the prisoner was indicted for *having in his custody a press for coinage* without any lawful authority, a question was raised whether a press for coinage was one of the tools or instruments within that clause of the Act on which the indictment was founded; and a majority of the judges held that it was. (f) In another case, the prisoner was convicted of *having in his custody*, without lawful excuse, one *mould made of lead*, on which was impressed the resemblance of one of the sides of a shilling, viz., the head side of a shilling; and it was submitted to the judges whether the mould found in the prisoner's custody was comprised under the general words '*other tool or instrument before mentioned*,' so as to make the unlawful custody of it high treason; and also whether, if it were so comprised, it should not have been laid in the indictment to be *a tool or instrument* in the words of the Act. And the judges were unanimously of opinion that this

(b) *R. v. Harvey*, L. R. 1 C. C. R. 284.
40 L. J. M. C. 63.

(c) *R. v. Gover*, 9 Cox, C. C. 282. The Common Serjeant, after consulting Keating, J.

(d) This clause is taken from the 2 Will. 4, c. 34, s. 11.

(e) This clause is taken from part of sec. 12 of the 2 Will. 4, c. 34.

(f) *Bell's case*, Fort. 480.

mould was a tool or instrument mentioned in the former part of the statute, and therefore comprised under the general words; and that as a mould is expressly mentioned by name in the first clause of the Act which respects the making or mending, it need not be averred to be a tool or instrument so mentioned. (g)

The prisoner was indicted for having in his custody a puncheon made of iron and steel, upon which was impressed the resemblance of the head side of a shilling, without lawful authority, &c. Several puncheons were found in the prisoner's lodgings, together with a quantity of counterfeit money, and he had them knowingly for the purposes of coining. These puncheons were ready for use; but it was impossible to say that the shillings which were found were actually made with these puncheons, the impressions being too faint to be exactly compared; but they had the appearance of having been made with them. The manner of making these puncheons was as follows: a true shilling was cut away to the outline of the head; that outline was fixed on a piece of steel, which was filed or cut close to the outline, and this made the puncheon; the puncheon made the die, which is the counter-puncheon; a puncheon is complete without letters, but it may be made with letters upon it; though from the difficulty and inconvenience it is never so made at the mint; but after the die is struck the letters are engraved on it; a puncheon alone without the counter-puncheon, will not make the figure; but to make an old shilling or a base shilling current, nothing more is necessary than the instrument produced. They may be used for other purposes, such as making seals, buttons, medals, or other things, where such impressions are wanted. Eleven of the judges (*absente*, De Grey, C. J.) were unanimously of opinion that this was a *puncheon* within the meaning of the Act; for the word 'puncheon' is expressly mentioned in the statutes, and will, by the means of the counter-puncheon or matrix, 'make or impress the *figure, stamp, resemblance, or similitude of the current coin*;' and these words do not mean an exact figure, but if the instrument impress a resemblance in fact, such as will impose on the world, it is sufficient, whether the letters are apparent on the puncheon or not; otherwise the Act would be quite evaded, for the letters would be omitted on purpose. The puncheon in question was one to impress the head of King William; and the shillings of his reign, though the letters were worn out, were

(g) Lennard's case, 1 Leach, 90. 1 East, P. C. c. 4, s. 17, p. 170. Another point was afterwards raised in this case upon the form of the indictment. The doubt was, whether the mould which was found in the prisoner's custody, it having only the resemblance of a shilling *inverted*, viz. the convex parts of the shilling being concave in the mould, and *vice versa*, the head or profile being turned the contrary way of the coin, and all the letters of the inscription reversed, was not properly an instrument which *would make and impress* the resemblance, stamp, &c., rather than an instrument on which the same *were made and impressed*, as laid in this indictment, the statute seeming to distinguish between such

as *will make and impress* the similitude, &c. as the matrix, die, and mould; and such on which the same is *made and impressed*, as a puncheon, or counter-puncheon, or pattern. But a great majority of the judges were of opinion that this evidence sufficiently maintained the indictment; because the *stamp* of the current coin was certainly impressed on the mould in order to form the cavities thereof. They agreed, however, that the indictment would have been more accurate had it charged that 'he had in his custody a mould that *would make and impress* the similitude,' &c., and in this opinion some, who otherwise doubted, acquiesced.

current coin of the kingdom. The puncheon made an impression like them, and the coin stamped with it would resemble them on the head side, though there were no letters. This was compared to the case mentioned by Sir Matthew Hale, (*h*) that the omission or addition of words in the inscription of the true seals, for the purpose of evading the law, would not alter the case. (*i*)

The part of the 8 & 9 Will. 3, c. 26, which related to instruments to mark the edges of coins, was not confined to such instruments as were in use when the Act passed; but extended to newly-invented instruments, which would produce the same effect; and it was not confined to such instruments, as, used by the hand unconnected with any other power, would produce the effect. A collar therefore, marking the edge of coin, by having the coin forced through it by machinery, is an instrument within the 8 & 9 Will. 3, c. 26, though this mode of marking the edges is of modern invention, and though the collar cannot be used by itself, but must be used in conjunction with other machinery. (*j*)

It was decided, that having a tool or instrument (of such sort as is included in the 8 & 9 Will. 3, c. 26) in possession *for the purpose of coining foreign gold coin not current here*, was not within that statute; (*k*) but it is expressly included in the present clause.

Where a die calculated to make shillings is made by an innocent agent, the party procuring him to make such die is the principal. The prisoner was indicted for feloniously making a die which would impress the resemblance of the obverse side of a shilling. The prisoner applied to a die-sinker to sink dies for counters for two whist clubs, stating that it was their practice to play with counters with one side resembling coins, and that they wished to have counters stamped by dies made under the following directions:—‘Four dies for whist counters, obverse head of Queen Victoria, as in the shilling coin. Reverse. “Blandford Whist Club, established 1800.” Obverse the shilling, as in coin, with wreath, &c. Reverse, “Exeter Whist club, established 1800.”’ The die-sinker, entertaining suspicions, applied to the agent of the Mint, and communicated the order to him. The agent sent to the officers of the Mint in London, and the die-sinker was by them directed to execute the prisoner’s order. The prisoner afterwards desired to have the obverse of one of the pieces, and the obverse of the other finished first, and they were so. When they were finished, they formed a die for the coining of a shilling. For the prisoner, it was objected that he could not be convicted, as he had not himself done anything in the making of the die, and that he was not answerable in this form of charge for the act of the die-sinker; that the die-sinker having acted under the instructions of the Mint, no felony whatever had been committed, and that the prisoner should have been indicted for a misdemeanor in inciting the die-sinker to commit a felony. But, upon a case reserved, the judges thought the die-sinker an innocent agent, and held the conviction good. (*l*)

(*h*) 1 Hale, 184. 2 Hale, 212, 215. Robinson’s case, 2 Roll. Rep. 50. 1 East, P. C. c. 2, s. 25, p. 88.

(*i*) Ridgelay’s case, 1 Leach, 189. 1 East, P. C. c. 4, s. 18, p. 171.

(*j*) R. v. Moore, R. & M. 122; S. C., 2 C. & P. 205.

(*k*) Bell’s case, 1 East, P. C. c. 4, s. 17, p. 169; Foster, 430.

(*l*) R. v. Baunen, 2 M. C. C. R. 309. 1 C. & K. 295.

Evidence. — On an indictment for having in possession a die made of iron and steel, proof of a die made of either material will be sufficient; and it seems that if the indictment state that the die was made of iron, steel, and other materials, proof that it was made of any material would be sufficient; and that it would not be necessary even to prove the exact material. The indictment was for having in possession a die made of iron and steel, a witness who saw the die said it was made of iron; another witness, who had not seen it, said that dies were usually made of steel, and that iron dies would not stand; and the judges held that this evidence would support the indictment, for it was immaterial to the offence of what the die was made, and proof of a die either of iron or steel, or both, would satisfy this charge. (*m*)

In proceeding upon the 8 & 9 Will. 3, c. 26, it was not necessary to prove that money was actually made with the instrument in question. (*n*)

The having tools for coining in possession, with intent to use them, is a misdemeanor at *common law*. (*o*)

It seems that the degree of similitude to the real coin which the tools or instrument must be capable of impressing in order to bring the case within the statute, must be governed by considerations similar to those which have been stated with respect to the counterfeit coin itself. (*p*) Whether the instrument in question be calculated to impress the figure, stamp, resemblance, or similitude of the coin current is a question for the jury; and it is clear, that the offence is not confined to an *exact imitation* of the original and proper effigies of the coin. (*q*)

Upon an indictment which alleges that a prisoner feloniously had in his possession a mould having the resemblance of the obverse side of a shilling impressed upon it, it must be proved that the entire impression was upon the mould. The prisoner was charged in one count with having in his possession a mould, 'upon which was impressed the figure and apparent resemblance of one of the sides (that is to say) the obverse side of the King's current coin called a shilling,' and in another count the word 'reverse' was substituted for 'obverse;' the moulds when produced appeared not to have a complete impression of the obverse and reverse sides of a shilling, but only the outside rim, and a slight portion of the other parts of the impression: the entire impressions, however, appeared to have been upon them at one time, but part had been obliterated. It was held, that if the jury believed that no more than part of the impression was impressed upon the moulds while the prisoner was in possession of them, he ought to be acquitted. (*r*) But where an indictment charges that the prisoner made a mould, which was intended to impress the resemblance of the obverse side of a shilling, it is sufficient to prove that the prisoner made a mould, which would

(*m*) *R. v. Oxford*, East. T. 1819. MS.
Bayley, J., and R. & R. 382. S. P. R. v.
Phillips, R. & R. 369.

(*n*) *Ridgelay's case*, 1 East, P. C. c. 4,
s. 18, p. 172.

(*o*) *R. v. Sutton*, Rep. temp. Hardw. 370. J.

But see the remarks on this case, *ante*,
p. 198.

(*p*) *Ante*, p. 211.

(*q*) 1 East, P. C. c. 4, s. 18, p. 171.

(*r*) *R. v. Foster*, 7 C. & P. 494, Patteson,

make a part of the impression. One count charged the prisoner with making a mould, 'which said mould was intended to make and impress the figure and apparent resemblance' of the obverse side, and another the reverse side, of a shilling; the evidence being the same as in the former case; it was held, that the term 'intended' did not mean in a state to make an entire impression, and therefore if the prisoner had only begun to make, the intention to make the whole might be inferred, though only part was actually made, and consequently that the evidence was sufficient. (*s*)

But where upon an indictment for having in possession a mould, upon which was made the figure of one of the sides of a shilling, it appeared that the mould had a perfect impression on one side of it; but that there was no channel, through which the metal runs, and the previous case was cited; Maule, J., held that a mould must be a thing by means of which a person may be able to make a coin; and that a thing by means of which coin cannot be made cannot be a mould; for it requires something to be done to make it a mould. The proof, therefore, was insufficient. As to the words 'any part or parts' contained in the clause, they did not refer to any part of the mould, but to any part of the impression. (*t*)

Where a mould was made to resemble the whole of one side of a coin, which had been worn partly away by use, an indictment under the 2 Will 4, c. 34, s. 10, might charge the possession of a mould on which was impressed the figure of one of the sides of such coin, as the words 'part or parts' of the sides in that section applied to cases where several moulds were used to make one side of a coin. (*u*)

An indictment charging that the prisoner had in his possession a mould 'upon which was made and impressed the figure' of one of the sides of a coin, is bad for not showing that the figure was on the mould at the time when the prisoner had it in his possession. The words 'then and there' should be introduced before the word 'made.' (*u*)

Weeks and two other men and two women were indicted for having in their possession a mould impressed with one side of a half-crown. Weeks had occupied a house for a month, and the police one night went to the house and found the other prisoners there. The men attacked the police, whilst the women snatched up something which they threw into the fire. The police preserved part of this, which proved to be fragments of a plaster of Paris mould of a half-crown, *parts of which were still wet*. Weeks shortly afterwards came to the house. The women called out to him that the police were there. He nevertheless came in. The house had two rooms on each floor, and a quantity of plaster of Paris was found in a cupboard up stairs, with several bottles of liquid. In a cupboard down stairs an iron ladle, such as might have been used for melting metal, was found; on the hearth in one of the rooms up stairs was found a small portion of white metal and some fragments of plaster of Paris moulds. Thirteen days before Weeks had passed a bad half-crown; but there was no evidence to show that it was made in the mould

(*s*) R. v. Foster, 7 C. & P. 495, Patteson, J.

(*t*) R. v. Macmillan, 1 Cox, C. C. 41.

(*u*) R. v. Richmond, 1 C. & K. 240, Rolfe, B. See R. v. Silcot, 3 Mod. 280.

found in the house. The jury found that Weeks knew that the mould was in the house. It was held that Weeks was rightly convicted, as the mould was found in the house of which he was the master, and that the evidence of the uttering of the half-crown by him was rightly admitted to establish the scienter. (v)

On an indictment against husband, wife, and boy aged ten years, for having in possession a mould on which was impressed the obverse side of a shilling, it appeared that the boy was apprehended whilst passing a counterfeit half-crown, and on the officer going to the house where he said he resided the husband was found in an upper room. In the lower room the mould and various coining implements were found, and whilst the officer was searching the wife came in, and soon afterwards broke up a mould used in casting counterfeit shillings; on her counterfeit money was found, but none on her husband. Talfourd, J., held that as the husband occupied the room in which the mould was found, *prima facie* he must be presumed to be in possession of what the room contained; but that presumption might be rebutted, and the jury must consider all the circumstances, and see whether they satisfied them that the trade was carried on there with his sanction. If they were satisfied that the husband was in possession of the mould, they ought to acquit the wife, as she could not in law be said to have any possession separate from her husband; but if they thought that the criminality was on her part alone, and that he was entirely guiltless of any participation in her conduct, she might be convicted. If they thought she broke the mould to screen him from detection, that would not affect the case. Either husband or wife might be convicted on this evidence, but not both. As to the boy, it would be going too far to say that he was a joint possessor with either of his parents. (w)

(v) *R. v. Weeks*, L. & C. 18.

(w) *R. v. Boober*, 4 Cox, C. C. 272.

CHAPTER THE FOURTH.

OF UTTERING, TENDERING, ETC., COUNTERFEIT COIN.¹

IN some cases formerly the putting off counterfeit money might amount to *treason*: as if A. counterfeited the gold or silver coin current, and by agreement before that counterfeiting B. was to take off and vent the counterfeit money, B. was an aider and abettor to such counterfeiting, and consequently a principal traitor within the law. (a) And in the case of the copper coin, B. acting a similar part was an accessory before the fact to the felony, within the statute 11 Geo. 3, c. 40 (now repealed). (b) And if B., knowing that A. had counterfeited money, put off this false money for him after the fact, without any such agreement precedent to the counterfeiting, he seems to be as a receiver of A. because he maintains him. (c)

If A. counterfeited money, and B. knowing the money to be counterfeited uttered the same for his own benefit, B. was neither guilty of treason, nor misprision of treason. But he might be proceeded against under the 15 Geo. 2, c. 28 (now repealed), before which statute he was only liable to be punished as for a cheat and misdemeanor. (d) Where the defendant was indicted for 'unlawfully uttering and tendering in payment to T. H. ten counterfeit halfpence, knowing them to be counterfeit,' and convicted on a count laying this generally, upon reference to all the judges they held it was not an indictable offence. (e) And upon the principles which have been mentioned in a former part of this work, (f) the unlawful procuring of counterfeit coin with *intent to circulate* it, though no act of uttering be proved, is a misdemeanor. and the possession of counterfeit coin

(a) 1 Hale, 214.

(b) 1 East, P. C. c. 4, s. 26, p. 178.

(c) 1 Hale, 214.

(d) 1 East, P. C. c. 4, s. 26, p. 179. 1 Hale, 214. See precedents of indictments for a misdemeanor at common law in uttering a counterfeit half-guinea: Cro. Cir. Comp. 315 (7th edit.). Starkie, 466, 2 Chit. Crim. Law, 116. See also a precedent of an indictment for a misdemeanor at common law, against a man for uttering a counterfeit sixpence, and having another found in his custody, Cro. Cir. Comp. 315, (7th edit.), 2 Chit. Crim. Law, 117. The uttering of false money, knowing it to be

false, is mentioned as a misdemeanor in the recital to the 15 Geo. 2, c. 28, s. 2. There is also a precedent for a misdemeanor at common law, in uttering, and causing to be uttered, guineas filed and diminished as good guineas: Cro. Cir. Comp. 317 (7th edit.), and 2 Chit. Crim. Law, 116; and also a precedent for a misdemeanor at common law in selling counterfeit Dutch guilders: Cro. Cir. Comp. 313 (7th edit.), 2 Chit. Crim. Law, 119, 120.

(e) Cirwan's case, Oxford Sum. Ass. 1794, MS. Jud. 1 East, P. C. c. 4, s. 28 p. 182; 2 Leach, 834, note (a).

(f) *Ante*, p. 198.

AMERICAN NOTE.

¹ See *Harper v. S.*, 8 Humph. 93. *Brown v. P.*, 4 Gilm. 489. *Fox v. S.*, 5 How. (U. S.) 410. *U. S. v. Marigold*, 9 How. (U. S.) 560.

unaccounted for was held to be evidence of an unlawful procurement with intent to circulate. (g)

But the uttering, or tendering in payment of counterfeit money is now provided for.

SEC. I.

Of uttering &c., Counterfeit Coin of the Realm.

Uttering counterfeit gold or silver coin. — By the 24 & 25 Vict. c. 99, s. 9, 'Whosoever shall tender, utter, or put off any false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding one year, with or without hard labour, and with or without solitary confinement.' (h)

Uttering, accompanied by possession of other counterfeit coin, or followed by a second uttering. — Sec. 10. 'Whosoever shall tender, utter, or put off any false or counterfeit coin resembling, or apparently intended to resemble or pass for any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit, and shall, at the time of such tendering, uttering, or putting off, have in his *custody* or possession, besides the false or counterfeit coin so tendered, uttered, or put off, *any other* piece of false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin, or shall, either on the day of such tendering, uttering, or putting off, or within the space of ten days then next ensuing, tender, utter, or put off any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.' (i)

Having three or more pieces of counterfeit gold or silver coin in possession, &c., with intent, &c. — Sec. 11. 'Whosoever shall have in his custody or possession three or more pieces of false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same *or any of them*, shall, in England and Ireland, be guilty of a misdemeanor, and

(g) *R. v. Fuller & Robinson*, *ante*, p. 199. The possession in this case was under particularly suspicious circumstances; the coin being wrapped up in parcels with soft paper to prevent it from rubbing.

(h) This clause is taken from the 2 Will. 4, c. 34, s. 7. As to hard labour, &c., see

ante, p. 218. See the interpretation clause, *ante*, p. 208.

(i) This clause is taken from the 2 Will. 4, c. 34, s. 7. The words 'any other piece' are substituted for 'one or more piece or pieces,' and the words 'any false or counterfeit coin' for 'any more or other false or counterfeit coin.'

in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.' (j)

Uttering after a previous conviction. — Sec. 12. 'Whosoever having been convicted, (k) *either before or after the passing of this Act*, of any such misdemeanor or crime and offence as in any of the last three preceding sections mentioned, *or of any felony or high crime and offence against this or any former Act relating to the coin*, shall afterwards commit any of the misdemeanors or crimes and offences in any of the said sections mentioned, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life or for any term not less than three years, — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.'

This clause is taken from the 2 Will. 4, c. 34, ss. 7, 8, but those sections only applied to offences committed after a conviction for a misdemeanor: but it was expedient to extend the clause to convictions after a previous conviction for felony; for such previous conviction rendered the offender deserving of at least as high a punishment as if he had been previously convicted of any misdemeanor mentioned in any of the three preceding sections, and it sometimes happened that it was easier to prove a previous conviction for felony than for such a misdemeanor; as the former might have taken place in the same county where the subsequent offence was committed, but not the latter.

Evidence of previous conviction. — Sec. 37. 'Where any person shall have been convicted of any offence against this Act, or any former Act relating to the coin, and shall afterwards be indicted for any offence against this Act committed subsequent to such conviction, it shall be sufficient in any such indictment, after charging such subsequent offence, to state the substance and effect only (omitting the formal part) of the indictment and conviction for the previous offence; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous offence, purporting to be signed by the clerk of the court or other officer having or purporting to have the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer, shall, upon proof of the identity of the person of the offender, be sufficient evidence of the previous conviction, without proof of the signature or official character or authority of the person appearing to have signed the same, or of his custody or right to the custody of the records of the court, and for every such certificate a fee of six shillings and eightpence, and no more, shall be demanded or taken; and the

(j) This clause is taken from the 2 Will. 4, c. 34, s. 8, with the addition of the words in *italics*.

(k) The expression "convicted" is satisfied by a plea or finding of "guilty," and does not mean "sentenced." So where a

prisoner had been found guilty, and released on recognizance to come up for judgment when called upon, it was held that this was a conviction within the meaning of the section. *R. v. Blaby* (1894), 1 Q. B. 170.

proceedings upon any indictment for committing any offence after a previous conviction or convictions shall be as follows; (that is to say), the offender shall, in the first instance, be arraigned upon so much only of the indictment as charges the subsequent offence, and if he plead not guilty, or if the Court order a plea of not guilty to be entered on his behalf, the jury shall be charged, in the first instance, to inquire concerning such subsequent offence only; and if they find him guilty, or if on arraignment he plead guilty, he shall then, and not before, be asked whether he had been previously convicted as alleged in the indictment, and if he answer that he had been so previously convicted, the Court may proceed to sentence him accordingly, but if he deny that he had been so previously convicted, or stand mute of malice, or will not answer directly to such question, the jury shall then be charged to inquire concerning such previous conviction or convictions, and in such case it shall not be necessary to swear the jury again, but the oath already taken by them shall for all purposes be deemed to extend to such last-mentioned inquiry; Provided that if upon the trial of any person for any such subsequent offence such person shall give evidence of his good character, it shall be lawful for the prosecutor, in answer thereto, to give evidence of the conviction of such person for the previous offence or offences, before such verdict of guilty shall be returned, and the jury shall inquire concerning such previous conviction or convictions at the same time that they inquire concerning such subsequent offence.'

This clause is principally new. Under the 2 Will. 4, c. 34, it was necessary in an indictment for a subsequent offence, to set out at length the previous indictment, &c., and to give in evidence a copy of that indictment, &c.; this was very objectionable, and therefore this clause has provided for a short statement in the indictment, and for a certificate containing the substance and effect of the former indictment, &c.; it has also provided for the proceedings on the arraignment, and in the same manner as on an indictment for larceny after a previous conviction for felony.

The words 'after charging the subsequent offence' were inserted in order to render it absolutely necessary always to charge the subsequent offence or offences first in the indictment, and after so doing to allege the previous conviction or convictions. This was the invariable practice on the Oxford Circuit, and the Select Committee of the Commons were clear that it ought to be universally followed, so that the previous conviction should not be mentioned, even by accident, before a verdict of guilty of the subsequent offence had been delivered.

Mode of proceeding.—The proceedings on the arraignment and trial are now to be as follows:—

The defendant is first to be arraigned on that part only of the indictment which charges the subsequent offence; that is to say, he is to be asked whether he be guilty or not guilty of that offence. If he plead not guilty, or if the Court order a plea of not guilty to be entered for him under the 7 & 8 Geo. 4, c. 28, s. 2, or 9 Geo. 4, c. 54, s. 8, (I), where he stands mute or will not answer directly to the charge, then the jury are to be charged in the first instance to try the subsequent offence only. If they acquit of that offence, the case

is at an end; but if they find him guilty of the subsequent offence, or if he plead guilty to it on arraignment, then the defendant is to be asked whether he has been previously convicted as alleged, and if he admit that he has, he may be sentenced accordingly; but if he deny it, or stand mute of malice, or will not answer directly to such question, then the jury are to be charged to try whether he has been so previously convicted, and this may be done without swearing them again, and then the previous conviction is to be proved in the same manner as before this Act passed. (*l*)

Where the indictment charged a felonious uttering after a previous conviction, the jury found the prisoner guilty of the uttering but not guilty of the previous conviction, it was held that this was a verdict of not guilty of the felony charged, and that the prisoner could not be convicted of the misdemeanor of uttering upon that indictment. (*m*)

A doubt has been raised as to the mode of proceeding where a prisoner is indicted after this Act came into operation for an offence against the former Act. Where the prisoner was indicted for feloniously uttering counterfeit coin on the 19th of October, 1861, after a previous conviction, and tried in the November following, the Recorder and Common Serjeant held that the proceedings at the trial must be as before the new Act passed. (*n*) But where the same question arose in an ordinary case of felony, Byles, J., was of opinion that, as far as the offence was concerned, the offence was governed by the former statute; but as to the procedure at the trial, that was to be regulated by the Act which was in force at the time of the trial. (*o*) But Martin, B., is said to have subsequently held that the former view was correct. (*p*)

It is clear from the terms of the clause that the certificate is admissible, if it be apparently regularly framed, without any additional evidence.

Two cases are reported, in which it is said that Cresswell, J., held that, where a certificate was produced purporting to be signed by a clerk of the peace, there must be some evidence in addition that the certificate is genuine and comes from the proper custody, as by proof of the handwriting, or that the document came from the office of the clerk of the peace. (*q*)

(*l*) See also the note, Greaves' Cr. Acts, 199 (2nd edit.) And this has now been decided to be the correct mode of proceeding, although the general practice appeared to be to prove the previous conviction in the first instance, in order to prove the offence to be a felony. *R. v. Martin*, L. R. 1 C. C. R. 214; 39 L. J. M. C. 31. *R. v. Goodwin*, 10 Cox, C. C. 534.

(*m*) *R. v. Thomas*, 44 L. J. M. C. 42. L. R. 2 C. C. R. 141. 13 Cox, C. C. 52. The prisoner was in fact charged with and tried for a felony, and the jury found him guilty of a misdemeanor only.

(*n*) *R. v. Montrion*, 9 Cox, C. C. 27.

(*o*) Anonymous, 9 Cox, C. C. 28.

(*p*) Anonymous, *ibid.* It seems quite clear that Byles, J., fell into a misapprehension. The old Acts are all kept alive by

sec. 3 of 24 and 25 Vict. c. 95, as to all offences committed before the 1st of Nov. 1861, and that section, in addition, expressly provides that every such offence 'shall be dealt with, *tried*, &c., in the same manner as if the repealing Act had not passed; and sec. 37 of the Coin Act and sec. 116 of the Larceny Act provide in the commencement for the indictment for offences against those Acts, and the subsequent parts of those sections ought to be held to apply to those cases only. See the note, Greaves' Cr. Acts, 199, (2nd ed.). C. S. G.

(*q*) *R. v. Whale*, 1 Cox, C. C. 69. *R. v. Stone*, *ibid.* 70. These cases are very probably misreported, as it is quite clear that no such evidence is required, and the universal practice has been to the contrary. See vol. iii. Evidence.

The proviso as to giving evidence of the previous conviction, if the prisoner give evidence of his good character, remains unaltered.

If the prisoner, whether by himself or his counsel, attempts to prove a good character for honesty, either directly, by calling witnesses, or indirectly, by cross-examining the witnesses for the Crown, the prosecution may give the previous conviction in evidence against the prisoner. (r) If, however, a witness for the prosecution were asked by the prisoner's counsel some question, which has no reference to character, and he happened to say something favourable to the prisoner's character, the prisoner would not be said to give evidence as to his character, and the previous conviction ought not to be admitted. (s)

Uttering base copper coin.—Sec. 15. 'Whosoever shall tender, utter, or put off any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current copper coin, knowing the same to be false or counterfeit, or shall have in his custody or possession three or more pieces of false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current copper coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same or any of them, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding one year, with or without hard labour, and with or without solitary confinement.' (t)

Decisions on repealed statutes.—The prisoner was indicted for uttering a counterfeit coin intended to resemble a piece of the current coin called a groat. All the witnesses called the coin a fourpenny-piece, except the Inspector for the Mint, who called it a groat, and said it had had that name, he believed, from the earliest period. It had the word 'fourpence' upon it, but the original name was groat in the time of Edward III. They were not then the same size and weight as this. He had heard them called groats; they were called groats as well as fourpenny pieces in the proclamation. It was contended for the prisoner that the coin was not proved by legal evidence to be a groat, the proclamation not having been produced. Maule, J., (Erskine, J., being present,) in summing up, said: 'A groat is a common word belonging to our own mother tongue, such as "uttering," "public-house," "half-pint," and many other expressions; and you are here as Englishmen to use your own knowledge of your own language; and if, understanding the matter without any evidence, you are satisfied that a fourpenny-piece and a groat are the same thing, then the prisoner is rightly indicted. It is very true that a groat in Edward the Third's time weighed a great deal more than a fourpenny-piece does now; and so it is with respect to other coins. Things have kept their names, though they have changed their value.' (u)

(r) *R. v. Shrimpton*, 2 Den. C. C. 319. *R. v. Gadbury*, 8 C. & P. 676.

(s) Per Lord Campbell, *R. v. Shrimpton*, *supra*. So if a witness were to volunteer any evidence of the prisoner's good charac-

ter, it clearly would not render the conviction admissible. See *ante*, p. 72.

(t) This clause is taken from the 2 Will. 4, c. 34, s. 12.

(u) *R. v. Connell*, 1 C. & K. 190. See *ante*, p. 25.

Under the 8 & 9 Will. 3, c. 26, s. 6, which had only the words 'take, receive, pay, or put off,' there must have been an *actual passing* or getting rid of the money, and not merely an attempt to do so. The prisoner had carried a large quantity of counterfeit shillings to the house of a Mrs. Levey, which she agreed to receive from him, and which he agreed to put off to her at the rate of twenty-nine shillings for every guinea. In pursuance of this bargain, the prisoner laid a heap of counterfeit shillings on a table, and Mrs. Levey proceeded to count them out at the rate before-mentioned; and had counted out three parcels, containing eighty-seven counterfeit shillings, for which she was to pay the prisoner three guineas; but before she had paid him, and while the counterfeit money lay upon the table, the officers entered the room and apprehended them. Mrs. Levey swore that she had bought the three parcels of shillings, and was going to pay the prisoner three guineas for them at the moment they were detected. This was ruled not to be a completion of the offence charged, and the prisoner was acquitted. (v) But this case would clearly be within the new Act, which has the word 'tender' in it.

Upon an indictment under the 2 Will. 4, c. 34, s. 7, for 'uttering and putting off' a counterfeit shilling, it appeared that the prisoner went into a shop and asked to purchase some coffee and sugar, and in payment of the same he put on the counter the coin in question, when the shopkeeper took up the coin and told the prisoner it was a bad one. The prisoner then left the shop, leaving the shilling behind him, but without the coffee and sugar, and it was held that the charge of uttering and putting off was proved by the evidence. (w)

If the names of the persons to whom the money was put off can be ascertained, they ought to be mentioned, and laid severally in the indictment: but if they cannot be ascertained, the same rule will apply which prevails in the case of stealing the property of persons unknown. (x)

The words of the 15 Geo. 2, c. 28, s. 2, 'utter or tender in payment' being in the disjunctive, were held to apply to an uttering of counterfeit money, though not tendered in payment, but passed by the common trick called *ringing the changes*. The prosecutor having bargained with the prisoner, who was selling fruit about the streets, to have five apricots for sixpence, gave him a good shilling to change. The prisoner put the shilling into his mouth, as if to bite it in order to try its goodness; and returning a shilling to the prosecutor, told him it was a bad one. The prosecutor gave him another good shilling, which he also affected to bite, and then returned another shilling, saying it was not a good one. The prosecutor gave him another good shilling, with which he practised this trick a third time; the shillings returned by him being in every instance bad. The Court held that the words of

(v) Wooldridge's case, 1 Leach, 807. 1 East, P. C. c. 4, s. 27, p. 179. I have left this case, as it might be useful if an indictment omitted the word 'tender.' C. S. G.

(w) R. v. Welch, 2 D. C. C. R. 78. See R. v. Ion, 2 Den. C. C. 475.

(x) 1 East, P. C. c. 4, s. 27, p. 180, citing a case from MS. Tracy, of a woman who was indicted at the Old Bailey, 1702, for

putting off ten pieces of counterfeit gilt money like guineas, to divers persons unknown; Holt, C. J., said, that the names of the persons ought to be mentioned and laid severally; yet he tried the prisoner, and she was convicted. Probably the names of the persons to whom the money was put off could not be ascertained.

the statute were sufficient to include this case; and that *uttering* and *tendering in payment* were two distinct and independent acts. (y)

It was once held that the uttering must either be with intent to defraud the party receiving the money, or with intent that that party should pass it as the agent of the utterer. Upon an indictment on 2 Will. 4, c. 34, s. 7, against husband and wife for uttering a counterfeit half-crown, it appeared that a woman asked the female prisoner to give her something, as her children were without food, and the male prisoner gave her twopence, and told her that his wife would give her something more, on which she gave the woman the bad half-crown in question, telling her to get what she could for her children; it was held that, although in the statute there are no words with respect to defrauding, yet in the proof it is necessary to go beyond the mere words of the statute, and to show an intention to defraud some person. There might be cases of a party giving a person a piece of counterfeit money, and at the same time telling the person that it was bad, and yet he would still be liable to be convicted on an indictment like the present, if a case falling within the mere words of the statute were sufficient. (z)¹

But where on an indictment for uttering counterfeit coin, it appeared that the prisoner had given the coin to a girl with whom he had had connection, Lord Denman, C. J., and Coltman, J., held that if the prisoner gave the coin to the girl under the circumstances proved, knowing it to be counterfeit, he was guilty of the offence charged; that the preceding decision was not in point, as that was a case of charity; but that there were great doubts as to the correctness of that ruling. (a) And *R. v. Page* (b) is said to have been overruled, and that 'the intent is inferred by law,' in like manner as 'if a forged instrument is put away in order to get money or credit, that amounts to an uttering.' (c)

An indictment on the 15 Geo. 2, c. 28, charged the prisoner in the first count with having, on the 15th December, uttered to one G. S. a counterfeit half-crown, knowing it to be so; and in the *second count* with having, on the said 15th December, uttered another counterfeit half-crown to the same person; and the prisoner was convicted on both counts. The question was whether the uttering the counterfeit money twice on the same day *being stated in the two counts*, the Court could pronounce the greater punishment inflicted by the third section of the statute, or must give only the smaller punishment inflicted by the second section; and the judges held that this indictment was not sufficient to subject the prisoner to the larger penalty, as for uttering

(y) Frank's case, 2 Leach, 64.

(z) *R. v. Page*, 8 C. & P. 122, Lord Abinger, C. B. As every person is taken to intend the probable consequence of his act, and as the probable consequence of giving a piece of bad money to a beggar is that that beggar will pass it to some one else, and thereby defraud that person; *quære*, whether this case rests upon satisfactory grounds?

In any case a party *may* not be defrauded by taking base coin, as he *may* pass it again, but still the probability is that he will be defrauded, and that is sufficient. C. S. G.

(a) Anonymous, 1 Cox, C. C. 250.

(b) *Supra*.

(c) Per Alderson, B., in *R. v. Ion*, 2 Den. C. C. 484.

AMERICAN NOTE.

¹ In America, losing money at play has been held to be a 'passing' of the money. *Smith v. Beeler*, 1 Brevard, 482.

two pieces of counterfeit coin on the same day, there being no distinct averment of that fact. (*d*) But where two utterings are charged in one count of the indictment, on a certain day therein named, the day will be held to be material, and the fact of an uttering twice on the same day to be sufficiently averred. The indictment charged that the prisoner on the 14th of February, uttered base coin to W. C.; and that on the said 14th February he uttered to J. L. other base coin, and it was held sufficient to warrant the higher punishment; the utterings, on the face of the indictment, appearing to be on the same day. And the judges held, that though when the day is not material, the fact may be proved on a day different from the day laid, yet where the day is not indifferent, the precise time laid must be proved: and that in this case it must be taken that it was proved that the defendant uttered counterfeit coin at two different times of the same day. (*e*)

On a conviction of two separate utterings, in two counts, one judgment of two years' imprisonment under sec. 7 of the 2 Will. 4, c. 34, is bad. The first count charged the prisoner with uttering on the 2nd of December a counterfeit shilling; the second count charged him with uttering another counterfeit shilling on the same day and at the same place, and he was convicted of both utterings, and sentenced to two years' imprisonment, and, upon a case reserved, the judges were of opinion that the sentence was incorrect, and that there should have been consecutive judgments of one year's imprisonment each. (*f*)

For the purpose of proving the act charged in the indictment to have been done *knowingly*, it is the practice to receive proof of more than one uttering committed by the party about the same time, though only one uttering be charged in the indictment. This is in conformity with the practice upon indictments for disposing of and putting away forged bank notes, knowing them to be forged; (*g*) upon one of which the counsel for the prisoners, objecting to such evidence, contended that it would not be allowed upon an indictment for uttering bad money; and stated that the proof in such case was always exclusively confined to the particular uttering charged in the indictment. But Thomson, B., said, that he by no means agreed in the conclusion of the prisoners' counsel, that the prosecutor could not give evidence of another uttering on the same day to prove the *guilty knowledge*. 'Such other uttering,' he observed, 'cannot be punished until it has become the subject of a distinct and separate charge; but it affords strong evidence of the knowledge of the prisoner that the money he uttered was bad. If a man utter a bad shilling, and fifty other bad shillings are found upon him, this would bring him within the description of a common

(*d*) Tandy's case, 2 Leach, 833. 1 East, P. C. c. 4, s. 29, pp. 182, 184. Eyre, C. J., Buller, J., and Heath, J., were absent when this opinion was given, viz., Hil. T. 1799. The judges also thought it advisable to give judgment of imprisonment for six months singly, and not on each of the counts. And see Smith's case, 2 Leach, 856.

(*e*) Martin's case. Derby Lent Ass. 1801, *coram* Graham, B., decided by the judges in June, in the same year. 2 Leach, 223. 1 East, P. C. *Addend.* xviii. MS. Bayley, J.

(*f*) R. v. Robinson, R. & M. C. C. R. 413. In R. v. Roberts, Carthew, 226, Holt, C. J., said, 'Each offence requires a separate and distinct punishment according to the quality of the offence.' See this case, *post*, Extortion. See *ante*, p. 85.

(*g*) R. v. Whiley, 2 Leach, 983. 1 New R. 92. Tattershall's case, cited in R. v. Whiley. And see Ball's case, 1 Campb. 325, and other cases, vol. iii. Evidence.

utterer: (*h*) but if the indictment do not contain that charge, yet these circumstances may be given in evidence on any other charge of uttering, to show that he uttered the money with a knowledge of its being bad.' (*i*) So, upon an indictment for uttering a counterfeit shilling, the fact of five other counterfeit shillings having been found in the prisoner's possession five days afterwards, has been held admissible in order to show guilty knowledge. (*j*)

In order to prove guilty knowledge, both previous and subsequent utterings of the same and of different kinds of coin are admissible. On an indictment for uttering a counterfeit half-crown on the 12th of December, that uttering was proved, and the uttering of another counterfeit half-crown on the 11th of December, and evidence was admitted of an uttering of a counterfeit shilling on the 4th of January, although it was objected that a subsequent uttering of a different species of counterfeit coin was not admissible to show guilty knowledge at a prior time; and it was held that this evidence was properly received. In order to show guilty knowledge, it would not be sufficient merely to prove some other dishonest act; but here the uttering of the bad silver was so connected with the offence charged, as to make the evidence of it admissible, although the coin was of a different denomination; and the difference of the denomination goes to the weight of the evidence, but does not affect its admissibility. (*k*)

On an indictment on the 2 Will. 4, c. 34, s. 8 (now repealed), for having in possession counterfeit crowns and half-crowns with intent to utter the same, it appeared that there were found in different pockets of the prisoner's dress four counterfeit crowns, all electro-plated, of the same date and same mould, each wrapped in a separate piece of paper: thirteen counterfeit half-crowns, all electro-plated, of the same date and the same mould, each wrapped in a separate piece of paper; and fourteen counterfeit shillings, all electro-plated, of the same date and the same mould. The prisoner said that they had been given him while gambling, and that he did not know that they were counterfeit: and it was held that there was sufficient evidence to go to the jury that he knew that the coin was counterfeit, and intended to utter it. (*l*)

Accessories. — It was formerly held that an associate of an utterer of counterfeit coin could not be convicted unless he were either present at the uttering or so near as to be able to give assistance, (*m*) but this view of the law has been held to be erroneous.

The first count charged the prisoners with uttering a counterfeit sixpence to A., and on the same day uttering another to B.; the second count with uttering to C.; and a third count with uttering to D. The prisoners were in a town together all the day in question, and in the evening quitted a public-house together, having first changed their clothes for the purpose of disguise. Each of them uttered three bad sixpences, made in the same mould, and of the same metal, to

(*h*) That is, within the repealed Act, 15 Geo. 2, c. 28.

(*i*) *R. v. Whiley*, 2 Leach, 983.

(*j*) *Harrison's case*, 2 Lewin, 118, Tann-
ton, J., and Alderson, B.

(*k*) *R. v. Foster*, Dears. C. C. R. 456;
24 L. J. M. C. 134. See vol. iii. Evidence.

(*l*) *R. v. Jarvis*, Dears. C. C. 552.

(*m*) *R. v. Elae*, Rus. & Ry. 42; *R. v.*
Page, 2 Moo. C. C. 290; *R. v. Skeritt*, 2
C. & P. 427.

shopkeepers living within a short space of each other, and the prisoners were found together immediately afterwards with counterfeit money on their persons, but there was no proof that they were together at either of the utterings. There were other facts to show a community of purpose. On these facts, Erskine, J., at first called on the counsel for the prosecution to elect as to which of the prisoners he intended to proceed; but it was contended that if the prisoners jointly provided themselves with the coin for uttering, and shared the proceeds afterwards, they were jointly guilty of each act of uttering; that in misdemeanor there being no accessories, the acts which would make them accessories before the fact in felony made them principals on this charge, and that at all events one of them could be convicted of the two utterings on the same day, and the other of the single uttering, of which he was guilty, on one of the other counts. Erskine, J., then directed the trial to proceed, and in summing up told the jury, that if two persons, having jointly prepared counterfeit coin, planned the uttering, and went on a joint expedition, and uttered, in concert and by previous arrangement, the different pieces of coin, then the act of one would be the act of both, though they might not be proved to be actually together at each uttering. It might be different if, having possession of the counterfeit coin, they shared it between them, and each went his own way, and acted independently of the other. If they thought they were acting in concert in the utterings charged, they should convict on the whole indictment. If they thought they were uttering independently of each other, they might convict one of the two utterings on the first count, and the other on the other counts. (n)

So, where, on an indictment against Greenwood and Johnson for a misdemeanor in uttering counterfeit coin, it appeared that the uttering was by Johnson in the absence of Greenwood; but that both were together before the uttering, each offering counterfeit shillings of the same description with that uttered by Johnson; that they both brought food purchased with the proceeds of such utterings to a common lodging; and that Greenwood was taken on the same evening with a counterfeit shilling of the same mould in his possession, and with eight good sixpences and five fourpenny pieces, which left no doubt of their joint engagement in a common purpose of uttering base shillings and sharing in the proceeds; Talfourd, J., directed the jury that if they thought Greenwood was engaged on the evening in question with Johnson in the common purpose of uttering counterfeit shillings, having one stock of such coin, for their mutual benefit; and if, in pursuance of such purpose, Johnson uttered the shilling, they ought to find Greenwood guilty, subject to the question of law whether the actual presence of Greenwood, or so near the neighbourhood as to amount to association in the very act, was necessary to support the charge. The jury found both guilty; but, in deference to the authority of *R. v. Else* (o) and *R. v. Page*, (p) the question whether Greenwood was properly convicted was reserved for the opinion of the judges; and they were unanimously of opinion that he

(n) *R. v. Hulse*, 2 M. & Rob. 360.(o) *Supra*.(p) *Supra*.

was rightly convicted. At common law, persons who in felony would have been accessories before the fact, in misdemeanor were principals, and therefore the cases of *R. v. Else* and *R. v. Page* were wrongly decided. (q)

Where one of two persons utters base coin, and other base coin is found on the other, they are jointly guilty of the aggravated offence under sec. 10 of the 24 & 25 Vict. c. 99, if they are acting in concert, and the one knows of the possession of the base coin by the other; for by the interpretation clause the having any coin in possession includes 'the knowing and wilfully having it in the actual custody or possession of any other person;' and as it is clear that under that clause a man may have possession of coin in a house or other place, though he is far away, so the possession of coin by one man may be the possession of another within that clause, though they are at a great distance from each other. (r)

Form of indictment. — The word 'knowing' in indictments for uttering coin sufficiently applies to the time and place of uttering, and no addition of time or place is necessary. The word 'knowing' refers to the prisoner, and not to the person to whom the coin was uttered, although that person's name immediately precedes the word 'knowing.' It is sufficient, in an indictment for a felony for uttering base coin after a previous conviction, to state that the prisoner was in due form of law tried and convicted by a jury.

It is no objection that an indictment for felony, for uttering base coin after a previous conviction, states that the prisoner, together with another person, was tried and convicted; and the record of the former trial shows the conviction of the prisoner and the acquittal of the other person.

Where a prisoner was indicted under the 3 Will. 4, c. 34, s. 7, for uttering counterfeit money after a previous conviction, and the indictment alleged that the prisoner, 'together with one T. P., was in due form of law tried and convicted' by a jury upon an indictment against them, for that they did unlawfully utter a shilling 'to A. W., knowing the same to be false,' and thereupon it was considered that the prisoner should be imprisoned for two years; and that the prisoner afterwards feloniously did utter a half-crown 'to T. H., knowing the same to be false.' The copy of the record of the former trial stated the conviction of the prisoner and the acquittal of T. P.: it was objected, 1st. That the indictment was bad for want of an addition of time and place to the allegation of knowledge, which was to be found neither in the recital of the former indictment, nor in the substantive charge on the face of the present indictment; but the learned judge thought that the former indictment was good, being in the words of the statute and after verdict; and that 'knowing' in the present indictment, being a participle in the present tense, must import knowledge at the time of the uttering. 2ndly. That the word 'knowing' did not refer to the prisoner, but to A. W. and T. H.; but the learned judge thought that 'knowing' did

(q) *R. v. Greenwood*, 2 Den. C. C. 453; 362; S. C., 2 Cox, C. C. 68, and *R. v. overruling also R. v. Hayes*, 1 Cox, C. C. West, 2 Cox, C. C. 237.

(r) See *ante*, p. 234.

refer to the prisoner, as all that was alleged to be done was alleged to be done by him. 3rdly. That the indictment did not state any former conviction, because neither the plea nor the verdict of the jury was recited; but the learned judge thought the allegation that he had been in due course of law tried and convicted, together with a statement of the judgment, was sufficient. 4thly. That the recital of the former record showed a conviction of the prisoner and T. P., whereas the record produced showed that the prisoner alone had been convicted and T. P. acquitted, and therefore there was a variance; the learned judge overruled this objection also, but entertaining some doubt upon the point, he reserved the case for the opinion of the judges, who held the conviction right. (s)

SEC. II

Of Uttering, Tendering, &c., Foreign Counterfeit Coin, &c.

By the 24 & 25 Vict. c. 99, s. 20, 'Whosoever shall tender, utter, or put off any such false or counterfeit coin resembling or apparently intended to resemble or pass for any gold or silver coin of any foreign prince, state, or country, (t) knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding six months, with or without hard labour.' (u)

Sec. 21. 'Whosoever, having been so convicted as in the last preceding section mentioned, shall afterwards commit the like offence of tendering, uttering, or putting off any such false or counterfeit coin as aforesaid, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and whosoever, having been so convicted of a second offence, shall afterwards commit the like offence of tendering, uttering, or putting off any such false or counterfeit coin as aforesaid, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life or for any term not less than three years, — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.' (v)

(s) *R. v. Page*, Hereford Spr. Ass. 1841, Coleridge, J., MSS. C. S. G., and 2 M. C. C. R. 219. The learned judge only reserved the last point, but he stated the others to the judges, that the prisoner might have the benefit of them, if he had been wrong in overruling them.

(t) See sec. 18, *ante*, p. 210.

(u) This clause is framed from the 37 Geo. 3, c. 126, s. 4, with such alterations in its terms as to make it correspond with the

rest of this Act. It is new in Ireland. As to hard labour, &c., see *ante*, p. 218.

(v) This clause is framed from the 37 Geo. 3, c. 126, s. 4. As to the indictment and proceedings, see sec. 37, *ante*, p. 235. Having in custody a greater number than five pieces of counterfeit foreign coin, whether current here or not, makes the party liable to punishment by proceedings before a justice of the peace, under sec. 23 of the statute.

Sec. 13. 'Whosoever shall, with intent to defraud, tender, utter, or put off as or for any of the Queen's current gold or silver coin, any coin not being such current gold or silver coin, or any medal or piece of metal or mixed metals, resembling in size, figure, and colour the current coin as or for which the same shall be so tendered, uttered, or put off, such coin, medal, or piece of metal or mixed metals so tendered, uttered, or put off being of less value than the current coin as or for which the same shall be so tendered, uttered, or put off, shall, in England and Ireland be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof, shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding one year, with or without hard labour, and with or without solitary confinement.'

This clause is new. It is intended to meet the cases of uttering foreign coin or medals as and for the current coin of the realm. In order to bring a case within this clause, the coin or medal uttered must be of less *value* than the coin for which it was uttered, and must have been uttered with intent to defraud. (*w*)

The prisoner was indicted on the 24 & 25 Vict. c. 99, s. 13, for uttering a medal resembling in size, figure, and colour, a half sovereign. The medal was described as being made of metal, and of the same diameter as a half sovereign, and somewhat similar in colour. On the obverse there was the head of the Queen, similar to that on a half sovereign; but the legend was entirely different from that on the half sovereign, being 'Victoria, Queen of Great Britain,' instead of 'Victoria Dei Gratiâ.' The medal was querled, but the querling was round and not square. The medal was of less value than a half sovereign. The coin was lost before a full description of it was given, and it was never shown to the jury. It was objected that 'figure' in the indictment meant the impression on the medal, and that such impression must be similar to the impression on the genuine coin for which it was uttered, and that there was no evidence that the medal resembled the half sovereign in size, figure, and colour. It was answered that 'figure' meant the general shape and outline of the medal, and that there was evidence for the jury; and the jury having convicted, it was held, on a case reserved, that there was some evidence that the medal, in size, figure, and colour resembled a half sovereign. (*x*)

(*w*) See the interpretation clause, *ante*, p. 208.

(*x*) *R. v. Robinson*, R. & M. C. C. R. 418.

CHAPTER THE FIFTH.

OF BUYING, SELLING, RECEIVING, OR PAYING FOR COUNTERFEIT COIN AT A LOWER RATE THAN ITS DENOMINATION IMPORTS.

By the 24 & 25 Vict. c. 99, s. 6, 'Whosoever *without lawful authority or excuse (the proof whereof shall lie on the party accused)*, shall buy, sell, receive, pay, or put off, or offer to buy, sell, receive, pay, or put off, any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin at or for a lower rate or value than the same imports or *was apparently intended to import*, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and in any indictment for any such offence as in this section aforesaid it shall be sufficient to allege that the party accused did buy, sell, receive, pay, or put off, or did offer to buy, sell, receive, pay, or put off the false or counterfeit coin at or for a lower rate or value than the same imports or was apparently intended to import, without alleging at or for what rate, price, or value the same was bought, sold, received, paid, or put off, or offered to be bought, sold, received, paid, or put off.' (a)

The words 'without lawful authority,' &c., were introduced in order to protect officers and others who are authorised to buy or procure false coin in order to detect coiners; under the former enactment every one who bought, &c., false coin was within its words.

The words of the former enactment were 'the same by its denomination imports, or was coined, or counterfeited for.' The words in *italics* have been substituted for them as more appropriately applying to counterfeit coin.

Under the former enactment it was necessary to allege in the indictment, and prove by evidence, the sum for which the coin was bought, &c.; (b) the last part of this clause renders it unnecessary to allege the sum for which the coin was bought, &c., and consequently whatever the evidence on that point may be, there can be no variance between it and the allegation in the indictment, and all that need be proved is that the coin was bought, &c., at some lower rate or value than it imports.

(a) This clause is taken from the 2 Will. 4, c. 34, s. 6.

(b) *R. v. Joyce*, Carr. Supp. 184; *R. v. Hedges*, 3 C. & P. 410.

By the 24 & 25 Vict. c. 99, s. 14, 'Whosoever shall buy, sell, receive, pay, or put off, or offer to buy, sell, receive, pay, or put off any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current copper coin, at or for a lower rate or value than the same imports *or was apparently intended to import*, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years, — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.' (c)

The mere vending of the money was not considered to come within the 8 & 9 Will. 3, c. 26, s. 6, unless it were done at a lower value than the coin imported; and it should be so stated in the indictment. (d)

If the names of the persons to whom the money was put off can be ascertained, they ought to be laid in the indictment; but if they cannot be ascertained the same rule applies as in stealing the property of persons unknown. (e)

(c) This clause is taken from part of sec. 12 of the 2 Will. 4, c. 34. As to the words in *italics*, see remarks on sec. 6, *ante*, p. 247.

(d) 1 East, P. C. c. 4, s. 27, p. 180.

(e) *Ibid.*

CHAPTER THE SIXTH.

OF SERVING OR PROCURING OTHERS TO SERVE FOREIGN STATES.

ENTERING into the service of any foreign state without the consent of the King, or contracting with it any other engagement which subjects the party to an influence or control inconsistent with the allegiance due to our own sovereign, is, at common law, a high misdemeanor, and punishable accordingly. (a) Indeed it is considered as so high an offence to prefer the interest of a foreign state to that of our own, that any act is criminal which may but incline a man to do so; as to receive a pension from a foreign prince without the leave of the King. (b)

Where the defendants were indicted under the 59 Geo. 3, c. 69, now repealed by the 33 & 34 Vict. c. 90, s. 31, *infra*, for engaging and procuring at Liverpool men to enlist as sailors in the Confederate service; and it appeared that the men had been induced by the defendants to sign articles at Liverpool to serve in the 'Japan' on a voyage to China, and they embarked on board her, and she sailed to the British Channel, and anchored off Brest, and the next day a captain of the Confederate navy enlisted the men in that service; Cockburn, C. J., held that the question was, whether the defendants procured the sailors to embark at Liverpool for the purpose of their being employed in the service of the Confederate States. If they procured the sailors to embark on board the 'Japan' and sail to a foreign country, to be there enlisted in the Confederate service, they were guilty, and it was sufficient if that was the intention of the defendants, although the men themselves did not go with that intention. (c)

An indictment on the 59 Geo. 3, c. 69, now repealed, contained counts for causing, &c., men to enlist in the Confederate service as sailors, &c., and for counselling men here to enlist in that service abroad, and for assisting the equipment of a vessel for that service. An old iron steam gunboat dismantled of all her guns and warlike equipments, and stripped of her armour-plates, masts, spars, and sails, and with only her engines and boilers in her, was sold by the Government to a firm, who bought her with a view to her being engaged in the Confederate service. Leave was obtained from the Admiralty to have the vessel docked and repaired at Sheerness, and the defendant, who was one of the dockyard officials, had rendered every assistance.

(a) 1 East, P. C. c. 2, s. 23, p. 81. 4 Blac. Com. 122.

(b) 1 Hawk. P. C. c. 22, s. 3. 4 Blac. Com. 121. 3 Inst. 144.

(c) R. v. Jones, 4 F. & F. 25. But see now 33 & 34 Vict. c. 90, s. 6, *post*, p. 252.

There were no warlike equipments done, but mere repairs or fittings as a mercantile vessel. The defendant had held himself out as engaging men on board the vessel for a trial trip previously to her going on a voyage to China, and had engaged men, or sent them on board to be engaged, as stokers, firemen, or engineers; but none of the men had any other idea than that the vessel was destined for China. The vessel went to Calais, and there the Confederate flag was hoisted, and officers came on board and took the command of her as a Confederate vessel, and the men were invited to enlist in the Confederate service, but most of them declined. The defendant was on board whilst the Confederate flag was flying, in company with the officers, and when he came back to Sheerness he continued to interest himself in sending men over for the service of the vessel, though only in connection with the locomotive power. The jury were directed — 1. That the main question was, whether the defendant was a party to the engagement of the men with a view to enlistment in the Confederate service. 2. That the acts of the defendant after he must have been aware of the destination of the vessel, though not the subject-matter of the indictment, might be taken into consideration as throwing light upon the intention with which he did the acts in the earlier part of the transaction, which were the subject-matter of the indictment. 3. That the trifling repairs done to the engines, &c., did not amount to an equipment. 4. That if the defendant procured the men to enter into engagements nominally for a trial trip, but with the ulterior purpose on his part of getting them into a position in which they might be induced to enlist in the Confederate service, the defendant was guilty, but if his object in engaging the men was simply that the vessel should go out on a trial trip and come back, he was not guilty. 5. That the term 'sailors' in the statute included persons engaged as stokers, firemen, and engineers, for the purpose of navigating the vessel. 6. That there must be a hiring or enlistment in the United Kingdom to bring the case within the statute. 7. That such an offence must have been committed in England, or the offence of counselling its commission was not proved. (*d*)

The building in pursuance of a contract, with intention to sell and deliver to a belligerent power the hull of a vessel suitable for war, but unarmed and not equipped, or fitted out with anything which enables her to cruise or commit hostilities, or do any warlike act whatever, is not a violation of the 59 Geo. 3, c. 69, now repealed. The equipment forbidden by that Act is an equipment of such warlike character as enables a ship on leaving a port of this kingdom to cruise or commit hostilities. (Per Pollock, C. B., and Bramwell, B.) If the character of equipment is doubtful, it may be explained by evidence of the intent of the parties. The Act includes a case where the equipment is such that, although the ship when it leaves a port in this kingdom is not in a condition at once to commit hostilities, it is yet capable of being used for war, and the intent is clear that it is to be used for war. (Per Channell, B.) Any act of equipping, furnishing, or fitting out done to the hull or vessel, of whatever nature or character that act may be, if done with the prohibited intent, is within

(*d*) *R. v. Rumble*, 4 F. & F. 175. See *R. v. Corbett*, 4 F. & F. 555.

the statute. (Per Pigott, B.) On the trial of an information respecting the seizure of a vessel in a port at Liverpool for an alleged violation of the Act for equipping her for the service of a belligerent state, Bramwell, B., was of opinion, that a right direction would be, that if the jury were satisfied that the parties concerned were equipping, or arming, or attempting to equip or arm, the ship claimed, with intent that it should be employed in the service of a foreign power to cruise or commit hostilities against others as alleged, they should find for the Crown; but such equipment or attempted equipment must be of a warlike character, so that by means of it the ship was in a condition more or less effective to cruise or commit hostilities; otherwise they must find for the claimants. Channell, B., was of opinion that the questions left to the jury should have been — 1. Was there an intent, on the part of any one having a controlling power over the vessel, that she should be employed in the service of the Confederate States, to cruise or commit hostilities against the United States? 2. If so, was she equipped, fitted out, or furnished in a British port in order to be employed to cruise, &c.? 3. If not equipped, was there any attempt to equip her in a British port in order that she should be so employed? 4. Or did any one knowingly assist, &c., in such equipment in a British port? Pigott, B., said that the jury should have been directed to see — 1, whether the equippers or the purchasers had the prohibited intent; and, 2, whether with such intent they had done any act towards equipping, furnishing, or fitting out the ship, beyond the mere work of building the hull of the vessel, or had attempted to do so. (e)

With respect to serving, or procuring others to serve, foreign states, provisions have been made by several statutes. The 3 Jac. 1, c. 4, s. 18, which contained provisions against soldiers and other persons going out of the realm to serve foreign states, was repealed by the 9 & 10 Vict. c. 59. Under that Act it was considered, that if a party went out of the realm with intent to serve a foreign state, although there was no service in fact; or if a party did actually so serve, though he did not go over for that purpose, but upon some other occasion. it was within the statute. (f)

Now by the Foreign Enlistment Act 1870 (33 & 34 Vict. c. 90), s. 4, 'if any person, without the licence of Her Majesty, being a British subject, within or without Her Majesty's dominions, accepts or agrees to accept any commission or engagement in the military or naval service of any foreign state at war with any foreign state at peace with Her Majesty, and in this Act referred to as a friendly state, or whether a British subject or not within Her Majesty's dominions, induces any other person to accept or agree to accept any commission or engagement in the military or naval service of any such foreign state as aforesaid, —

'He shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted;

(e) *Attorney-Gen. v. Sillem*, 2 H. & C. 431. But see now 33 & 34 Vict. c. 90, s. 8, p. 32.
9, *post*, p. 258.

(f) 3 Inst. 80. 1 East, P. C. c. 2, s. 23,

and imprisonment, if awarded, may be either with or without hard labour.'

Sec. 5. 'If any person, without the licence of Her Majesty, being a British subject, quits or goes on board any ship with a view of quitting Her Majesty's dominions, with intent to accept any commission or engagement in the military or naval service of any foreign state at war with a friendly state, or, whether a British subject or not, within Her Majesty's dominions, induces any other person to quit or to go on board any ship with a view of quitting Her Majesty's dominions with the like intent,' he shall be punishable as under sec. 4.

Sec. 6. 'If any person induces any other person to quit Her Majesty's dominions or to embark on any ship within Her Majesty's dominions under a misrepresentation or false representation of the service in which such person is to be engaged, with the intent, or in order that such person may accept or agree to accept any commission or engagement in the military or naval service of any foreign state at war with a friendly state,' he shall be punishable as under sec. 4.

Sec. 7. 'If the master or owner of any ship, without the licence of Her Majesty, knowingly either takes on board, or engages to take on board or has on board such ship within Her Majesty's dominions any of the following persons, in this Act referred to as illegally enlisted persons; that is to say,

(1.) 'Any person who, being a British subject within or without the dominions of Her Majesty, has, without the licence of Her Majesty, accepted or agreed to accept any commission or engagement in the military or naval service of any foreign state at war with any friendly state :

(2.) 'Any person, being a British subject, who, without the licence of Her Majesty, is about to quit Her Majesty's dominions with intent to accept any commission or engagement in the military or naval service of any foreign state at war with a friendly state :

(3.) 'Any person who has been induced to embark under a misrepresentation or false representation of the service in which such person is to be engaged, with the intent or in order that such person may accept or agree to accept any commission or engagement in the military or naval service of any foreign state at war with a friendly state, —

'Such master or owner shall be guilty of an offence against this Act, and the following consequences shall ensue; that is to say,'

(1.) He shall be punishable as under sec. 4.

(2.) 'Such ship shall be detained until the trial and conviction or acquittal of the master or owner, and until all penalties inflicted on the master or owner have been paid, or the master or owner has given security for the payment of such penalties to the satisfaction of two justices of the peace, or other magistrate or magistrates having the authority of two justices of the peace:' and

(3.) 'All illegally enlisted persons shall immediately on the discovery of the offence be taken on shore, and shall not be allowed to return to the ship.'

Sec. 8. 'If any person within Her Majesty's dominions, without

the licence of Her Majesty, does any of the following acts; that is to say, —

(1.) 'Builds or agrees to build, or causes to be built any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state: or

(2.) 'Issues or delivers any commission for any ship with intent or knowledge, or having reasonable cause to believe that the same power shall or will be employed in the military or naval service of any foreign state at war with any friendly state: or

(3.) 'Equips any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state: or

(4.) 'Dispatches, or causes or allows to be dispatched, any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state, —

'Such person shall be deemed to have committed an offence against this Act, and the following consequences shall ensue:'

(1.) He shall be punishable as under sec. 4.

(2.) 'The ship in respect of which any such offence is committed, and her equipment shall be forfeited to Her Majesty:'

'Provided that a person building, causing to be built, or equipping a ship in any of the cases aforesaid, in pursuance of a contract made before the commencement of such war as aforesaid, shall not be liable to any of the penalties imposed by this section in respect of such building or equipping if he satisfies the conditions following (that is to say),

(1.) If forthwith upon a proclamation of neutrality being issued by Her Majesty he gives notice to the Secretary of State, that he is so building, causing to be built, or equipping such ship, and furnishes such particulars of the contract and of any matters relating to, or done, or to be done under the contract as may be required by the Secretary of State:

(2.) If he gives such security, and takes and permits to be taken such other measures, if any, as the Secretary of State may prescribe for ensuring that such ship shall not be dispatched, delivered, or removed without the licence of Her Majesty until the termination of such war as aforesaid.'

Sec. 9. 'Where any ship is built by order of or on behalf of any foreign state when at war with a friendly state, or is delivered to or to the order of such foreign state, or any person who to the knowledge of the person building is an agent of such foreign state, or is paid for by such foreign state or such agent, and is employed in the military or naval service of such foreign state, such ship shall, until the contrary is proved, be deemed to have been built with a view to being so employed, and the burden shall lie on the builder of such ship of proving that he did not know that the ship was intended to be so employed in the military or naval service of such foreign state.'

Sec. 10. 'If any person within the dominions of Her Majesty, and without the licence of Her Majesty, —

By adding to the number of the guns, or by changing those on board for other guns, or by the addition of any equipment for war increases or augments, or procures to be increased or augmented, or is knowingly concerned in increasing or augmenting the warlike force of any ship which at the time of her being within the dominions of Her Majesty was a ship in the military or naval service of any foreign state at war with any friendly state,' he shall be punishable as under sec. 4.

Sec. 11. 'If any person within the limits of Her Majesty's dominions, and without the licence of Her Majesty, —

Prepares or fits out any naval or military expedition to proceed against the dominions of any friendly state, the following consequences shall ensue :

(1.) Every person engaged in such preparation or fitting out, or assisting therein, or employed in any capacity in such expedition, shall be guilty of an offence against this Act, and shall be punishable' as under sec. 4.

(2.) 'All ships, and their equipments, and all arms and munitions of war, used in or forming part of such expedition, shall be forfeited to Her Majesty.' (g)

Sec. 12. 'Any person who aids, abets, counsels, or procures the commission of any offence against this Act shall be liable to be tried and punished as a principal offender.'

Sec. 13. 'The term of imprisonment to be awarded in respect of any offence against this Act shall not exceed two years.'

Sec. 14 provides for the restoration of certain illegal prizes brought into British ports.

Sec. 15. 'For the purposes of this Act, a licence by Her Majesty shall be under the sign manual of Her Majesty, or be signified by Order in Council or by proclamation of Her Majesty.'

Sec. 16. 'Any offence against this Act shall, for all purposes of and incidental to the trial and punishment of any person guilty of any such offence, be deemed to have been committed either in the place in which the offence was wholly or partly committed, or in any place within Her Majesty's dominions in which the person who committed such offence may be.'

Sec. 17. 'Any offence against this Act may be described in any indictment or other document relating to such offence, in cases where the mode of trial requires such a description, as having been committed at the place where it was wholly or partly committed, or it may be averred generally to have been committed within Her Majesty's dominions, and the venue or local description in the margin may be that of the county, city, or place in which the trial is held.'

Sec. 18. 'The following authorities, that is to say: in the United

(g) The offence of fitting out and preparing an expedition within the Queen's dominions against a friendly State under this section is constituted by the purchase of guns and ammunition in this country and their shipment for a foreign port for the purpose of there being put on board a ship, with the knowledge of the purchaser and shipper

that they are to be used in a hostile demonstration against such state, though the shipper takes no part in any overt act of war, and the ship is not fully equipped for the expedition within any port belonging to the Queen's dominions. *R. v. Sandoval*, 16 Cox, C. O. 206.

Kingdom, any judge of a superior court, in any other place within the jurisdiction of any British court of justice, such court, or, if there are more courts than one, the court having the highest criminal jurisdiction in that place, may, by warrant or instrument in the nature of a warrant in this section included in the term "warrant," direct that any offender charged with an offence against this Act shall be removed to some other place in Her Majesty's dominions for trial, in cases where it appears to the authority granting the warrant that the removal of such offender would be conducive to the interests of justice, and any prisoner so removed shall be triable at the place to which he is removed, in the same manner as if his offence had been committed at such place.

Any warrant for the purposes of this section may be addressed to the master of any ship or to any other person or persons, and the person or persons to whom such warrant is addressed shall have power to convey the prisoner therein named to any place or places named in such warrant, and to deliver him, when arrived at such place or places, into the custody of any authority designated by such warrant.

Every prisoner shall, during the time of his removal under any such warrant as aforesaid, be deemed to be in the legal custody of the person or persons empowered to remove him.'

Sec. 19 directs how proceedings for the condemnation and forfeiture of a ship, &c., are to be taken.

Sec. 20. 'Where any offence against this Act has been committed by any person by reason whereof a ship, or ship and equipment, or arms and munitions of war, has or have become liable to forfeiture, proceedings may be instituted contemporaneously or not, as may be thought fit, against the offender in any court having jurisdiction of the offence, and against the ship, or ship and equipment, or arms and munitions of war, for the forfeiture in the Court of Admiralty; but it shall not be necessary to take proceedings against the offender because proceedings are instituted for the forfeiture, or to take proceedings for the forfeiture because proceedings are taken against the offender.'

Sec. 21, and the following sections, enact that the Secretary of State and certain other persons may seize or detain any ship liable to be seized or detained in pursuance of this Act, and give them certain powers for such purpose.

Sec. 29. 'The Secretary of State shall not, nor shall the chief (gg) executive authority, be responsible, in any action or other legal proceedings whatsoever for any warrant issued by him in pursuance of this Act, or be examinable as a witness, except at his own request, in any court of justice in respect of the circumstances which led to the issue of the warrant.'

Sec. 30. 'In this Act, if not inconsistent with the context, the following terms have the meanings hereinafter respectively assigned to them; that is to say, —

"Foreign state" includes any foreign prince, colony, province, or part of any province or people, or any person or persons exercising or assuming to exercise the powers of government in or over any foreign country, colony, province, or part of any province or people: "Military

service" shall include military telegraphy and any other employment whatever, in or in connexion with any military operation: "Naval service" shall, as respects a person, include service as a marine, employment as a pilot in piloting or directing the course of a ship of war or other ship when such ship of war or other ship is being used in any military or naval operation, and any employment whatever on board a ship of war, transport, store ship, privateer, or ship under letters of marque; and as respects a ship, include any user of a ship as a transport, store ship, privateer, or ship under letters of marque: "United Kingdom" includes the Isle of Man, the Channel Islands, and other adjacent islands: "British possession" means any territory, colony, or place being part of Her Majesty's dominions, and not part of the United Kingdom, as defined by this Act: "The Secretary of State" shall mean any one of Her Majesty's Principal Secretaries of State: "The Governor" shall as respects India mean the Governor General or the Governor of any presidency, and where a British possession consists of several constituent colonies, mean the Governor General of the whole possession or the Governor of any of the constituent colonies, and as respects any other British possession it shall mean the officer for the time being administering the government of such possession; also any person acting for or in the capacity of a governor shall be included under the term "Governor": "Court of Admiralty" shall mean the High Court of Admiralty of England or Ireland, the Court of Session of Scotland, or any Vice-Admiralty Court within Her Majesty's dominions: "Ship" shall include any description of boat, vessel, floating battery, or floating craft; also any description of boat, vessel, or other craft or battery, made to move either on the surface of or under water, or sometimes on the surface of and sometimes under water: "Building" in relation to a ship shall include the doing any act towards or incidental to the construction of a ship, and all words having relation to building shall be construed accordingly: "Equipping" in relation to a ship shall include the furnishing a ship with any tackle, apparel, furniture, provisions, arms, munitions, or stores, or any other thing which is used in or about a ship for the purpose of fitting or adapting her for the sea or for naval service, and all words relating to equipping shall be construed accordingly: "Ship and equipment" shall include a ship and everything in or belonging to a ship: "Master" shall include any person having the charge or command of a ship.'

Sec. 32. 'Nothing in this Act contained shall subject to forfeiture any commissioned ship of any foreign state, or give to any British court over or in respect of any ship entitled to recognition as a commissioned ship of any foreign state any jurisdiction which it would not have had if this Act had not passed.'

Sec. 33. 'Nothing in this Act contained shall extend or be construed to extend to subject to any penalty any person who enters into the military service of any prince, state, or potentate in Asia, with such leave or licence as is for the time being required by law in the case of subjects of Her Majesty entering into the military service of princes, states, or potentates in Asia.'

It was held that the former Act (59 Geo. 3, c. 69) created an offence against the state, and the Court of Queen's Bench would not grant

a criminal information for such offence on the application of a private prosecutor, but leave the case to be dealt with like other public offences. (h)

It may be observed, though not strictly applicable to the subject of this chapter, that disobedience to the King's letter to a subject commanding him to return from beyond the seas, or to the King's writ of *ne exeat regno*, commanding a subject to stay at home, is a high imprisonment and contempt. (i) And it is also a high offence to refuse to assist the King for the good of the public, either in councils, by advice, if called upon, or in his wars by personal service for the defence of the realm against a rebellion or invasion; (j) under which class may be ranked the neglecting to join the *posse comitatus*, or power of the county, being thereunto required by the sheriff or justices, according to the statute 2 Hen. 5, c. 8, which is a duty incumbent upon all that are fifteen years of age, under the degree of nobility, and able to travel. (k)

(h) *Ex parte Crawahay*, 8 Cox, C. C. 356. As to summary conviction for persuading soldiers to desert, see *post*, p. 259.

(i) 4 Blac. Com. 122. And if the subject neglects to return from beyond the seas,

when commanded, his land shall be seized till he does return, 1 Hawk. P. C. c. 22, s. 4.

(j) 1 Hawk. P. C. c. 22, s. 2.

(k) 4 Blac. Com. 122. Lamb. Eir. 315.

CHAPTER THE SEVENTH.

OF SEDUCING SOLDIERS AND SAILORS TO DESERT OR MUTINY.

IN consequence of the attempts of evil-disposed persons, by the publication of written or printed papers, and by malicious and advised speaking, to seduce soldiers and sailors from their duty and allegiance to his Majesty, the 37 Geo. 3, c. 70, was passed, enacting 'that any person who shall maliciously and advisedly endeavour to seduce any person or persons serving in his Majesty's forces by sea or land, from his or their duty and allegiance to his Majesty, or to incite or stir up any such person or persons to commit any act of mutiny, or to make, or endeavour to make, any mutinous assembly, or to commit any traitorous or mutinous practice whatsoever, shall, on being legally convicted of such offence, be adjudged guilty of felony.' By sec. 3, any person tried, acquitted, or convicted, of any offence against this Act, shall not be liable to be prosecuted again for the same offence or fact, as high treason, or misprision of high treason; and nothing in the Act contained shall prevent the trial of any person who has not been tried for an offence against this Act from being tried for the same as high treason, or misprision of high treason. And by sec. 2, any offence against this Act, whether committed on the high seas or in England, may be prosecuted and tried before any court of oyer and terminer, or gaol delivery, for any county in England, as if the said offence had been therein committed.

The 9 Will. 4, & 1 Vict. c. 91, s. 1, after reciting this Act, provides, 'that if any person shall,' after the 1st of October, 1837, 'be convicted of any of the offences hereinbefore mentioned, such person shall not suffer death, or have sentence of death awarded against him or her for the same, but shall be liable, at the discretion of the Court to be transported (a) beyond the seas for the term of the natural life of such person, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years.'

Sec. 2. 'In awarding the punishment of imprisonment for any offence punishable under this Act, it shall be lawful for the Court to direct such imprisonment to be with or without hard labour in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the Court in its discretion shall seem meet.'

(a) Penal servitude by the 20 & 21 Vict. c. 3, s. 2, for not less than three years. See 54 & 55 Vict. c. 69, *ante*, p. 79.

A sailor in a sick hospital, where he had been for thirty days, and who therefore was not entitled to pay, nor liable for what he then did to answer before a court-martial, is nevertheless a person serving in his Majesty's forces by sea within this statute, so as to make the seducing him an offence within its provisions. (*b*)

An indictment upon this statute need not set out *the means* used for seducing the soldier from his duty and allegiance; and it need not aver that the prisoner *knew* the person endeavoured to be seduced *to be a soldier*. It seems also that a double act, namely, that the prisoner endeavoured to incite a soldier to commit mutiny, and also to commit traitorous and mutinous practices, may be charged in one count of the indictment.' (*cd*)

By sec. 153 of the Army Act, 1881, (*e*) which is continued by the Annual Mutiny Act, persons inducing soldiers to desert may be summarily convicted. (*f*)

(*b*) R. v. Tierney, Mich. T. 1804. R. & R. 74.

(*cd*) Fuller's case, 2 Leach, 790. 1 East, P. C. c. 2, s. 33, p. 92. 1 Bos. and Pul. 180.

(*e*) 44 & 45 Vict. c. 58.

(*f*) As to militia, see 45 & 46 Vict. c. 49, s. 25. As to reserved forces, 45 & 46 Vict. c. 48, s. 17. As to navy, see 29 30 Vict. c. 109, ss. 19-24.

CHAPTER THE EIGHTH.

OF PIRACY.¹

SEC. I.

Of Piracy at Common Law,² and by Statute.

THE offence of piracy at common law consists in committing those acts of robbery and depredation upon the high seas which, if committed upon land, would have amounted to felony there. (a) It is not a felony which was triable by jury at common law, but it was only punishable by the civil law before the 28 Hen. 8, c. 15; and this statute, though it makes the offence capital, and provides for the trial of it according to the course of the common law, by the King's special commission, does not make it a felony; therefore, a pardon of all felonies generally does not extend to it. (b)

The offence of piracy is also provided against by several statutes. The 11 & 12 Will. 3, c. 7, s. 8, enacts, 'that if any of his Majesty's natural-born subjects, or denizens of this kingdom, shall commit any piracy or robbery, or any act of hostility against others his Majesty's subjects, upon the sea, under colour of any commission from any foreign prince or state, or pretence of authority from any person whatso-

(a) 1 Hawk. P. C. c. 37, s. 4. 4 Blac. Com. 72. 2 East, P. C. c. 17, s. 3. p. 796.

(b) 1 Hawk. P. C. c. 37, s. 13. 3 Inst. 112. Co. Lit. 391. Moor, 746. 2 East, P. C. c. 17, s. 3, p. 796, where it is said that the offence does not extend to corruption of blood, at least where the conviction is before the Admiralty jurisdiction; though the contrary is holden by great authority upon attainder before commissioners, under the statute of Hen. 3. A fallacy seems to run through some of our books in saying that piracy was not felony

at common law; this arose from such expressions as that it was a crime of which the common law did not take notice or cognizance, — i. e., which was not triable by jury, the common law mode of trial. See 2 Hale, 18, 370. 1 Hale, 355. Lord Coke says it was felony, Co. Lit. 391 a. 3 Inst. 112. 13 Rep. 61. In 40 Ass. Pl. 25, p. 245, a case of piracy is mentioned where a Norman captain was attainted of felony and hanged. See this case stated, 3 Inst. 21, and 1 Hale, 100.

AMERICAN NOTES.

¹ In America the law relating to Piracy is contained in Acts of Congress. See Act of April 30, 1790. Act of March 3, 1819. Robbery on the high seas is piracy both by the law of nations and by the Acts of Congress. U. S. v. Furlong, 5 Wheat. 164. As to mutiny on board ship, see U. S. v. Sharp, 1 Peters, C. C. 122; U. S. v. Bladen, ib. 213; U. S. v. Gardiner, 5 Mason, 402; U. S. v. Kelly, 4 Wash. C. C. 528. As to running away with a ship, see U. S. v. Haskell, 4 Wash. C. C. 402.

² Piracy at common law is robbery on the high seas directed against all mankind; but under the statutes relating to this offence, persons (Southern States rebels) were guilty of piracy who planned and carried out attacks on American vessels only. See the case of the Savannah Pirates, cited in note to Bishop, vol. ii. s. 1058. And see Statute of 1890, c. 9, s. 8, and U. S. v. Palmer, 3 Wheat. 610; Klintock's case, 5 Wheat. 144, 184; The Malek Adhel, 2 How. U. S. 219.

ever, such offender and offenders shall be deemed, adjudged, and taken to be pirates, felons, and robbers; and being duly convicted thereof, according to that Act, or the 28 Hen. 8, c. 15, shall suffer such pains of death, (c) and loss of lands, goods, and chattels, as pirates, &c., upon the seas ought to suffer. And the 18 Geo. 2, c. 30, enacts, 'that all persons, being natural-born subjects or denizens of his Majesty, who during any war shall commit any hostilities upon the sea, or in any haven, river, creek, or place, where the admiral or admirals have power, authority, or jurisdiction, against his Majesty's subjects, by virtue or under colour of any commission from any of his Majesty's enemies, or shall be any other ways adherent, or giving aid or comfort to his Majesty's enemies upon the sea, or in any haven, river, creek, or place, where the admiral or admirals have power, authority, or jurisdiction, may be tried as pirates, felons, and robbers in the said Court of Admiralty, on ship-board, or upon the land, in the same manner as persons guilty of piracy, felony, and robbery, are by the said Act (d) directed to be tried; and such persons being upon such trial convicted thereof, shall suffer such pains of death, (e) loss of lands, &c., (ee) as any other pirates, felons, and robbers ought, by virtue of the 11 & 12 Will. 3, c. 7, or any other Act, to suffer.' (f)

Sec. 9 enacts, 'that if any commander or master of any ship, or any seaman or mariner, shall, in any place where the admiral hath jurisdiction, betray his trust, and turn pirate, enemy, or rebel, and piratically and feloniously run away with his or their ship or ships, or any barge, boat, ordnance, ammunition, goods, or merchandize; or yield them up voluntarily to any pirate; or shall bring any seducing message from any pirate, enemy, or rebel; or consult, combine, or confederate with, or attempt or endeavour to corrupt any commander, master, officer, or mariner, to yield up or run away with any ship, goods, or merchandizes, or turn pirates, or go over to pirates; or if any person shall lay violent hands on his commander, whereby to hinder him from fighting in defence of his ship, and goods committed to his trust, (g) or shall confine his master, or make or endeavour to make a revolt in the ship, he shall be adjudged, deemed, and taken to be a pirate, felon, and robber, and being convicted thereof according to the direction of this Act, shall suffer death (e) and loss of lands, goods, and chattels, (ee) as pirates, felons, and robbers upon the seas ought to suffer.'

In an indictment for confining a captain of a ship, 'constructive' confinement will satisfy the requirements of the statute, and this will be supported by evidence that, although no force was used, the cap-

(c) Repealed by 1 Vict. c. 88, s. 1. See sec. 2, &c., *post*, p. 262.

(d) 11 & 12 Will. 3, c. 7.

(e) Repealed by 1 Vict. c. 88, s. 1.

(ee) As to the present law in lieu of forfeiture for felony, see *ante*, p. 108.

(f) Sec. 2 contains a proviso that any person tried and acquitted, or convicted according to the Act, shall not be liable to be indicted, &c., again in Great Britain or elsewhere, for the same crime or fact as high treason. But by sec. 3 the Act is not to prevent any offender, who shall not be tried

according thereto, from being tried for high treason with this realm, according to the stat. 28 Hen. 8, c. 15.

(g) This last provision is similar to one in the 22 & 23 Car. 2, c. 11, s. 9, which is repealed by 9 Geo. 4, c. 31, s. 1, so far as relates to any mariner laying violent hands on his commander. This statute of Car. 2 contains also some provisions as to yielding without fighting, and as to mariners declining or refusing to fight and defend the ship when commanded by the master.

tain was restrained by the presence and gestures of the prisoners, and deprived of his lawful command, and compelled to remain in certain parts of the vessel. (*h*)

By the 8 Geo. 1, c. 24, s. 1, 'in case any person or persons belonging to any ship or vessel whatsoever, upon meeting any merchant ship or vessel on the high seas, or in any port, haven, or creek whatsoever, shall forcibly board or enter into such ship or vessel, and though they do not seize or carry off such ship or vessel, shall throw overboard or destroy any part of the goods or merchandizes belonging to such ship or vessel; the person or persons guilty thereof, shall in all respects be deemed and punished as pirates aforesaid.'

Sec. 1 further enacts 'that if any commander or master of any ship or vessel, or any other person or persons, shall anywise trade with any pirate by truck, barter, exchange, or in any other manner, or shall furnish any pirate, felon, or robber upon the seas, with any ammunition, provision, or stores of any kind; or shall fit out any ship or vessel knowingly, and with a design to trade with, or supply, or correspond with any pirate, felon, or robber upon the seas; or if any person or persons shall any ways consult, combine, confederate, or correspond with any pirate, felon, or robber, on the seas, knowing him to be guilty of any such piracy, felony, or robbery, every such offender and offenders shall be deemed and adjudged guilty of piracy, felony, and robbery.' The Act further provides that every offender convicted of any piracy, felony, or robbery, by virtue of the Act, shall not be admitted to have the benefit of clergy. (*i*)

The 1 Vict. c. 88 (which came into operation on the 1st October, 1837) (*j*) s. 1, repeals so much of the 28 Hen. 8, c. 15; 11 & 12 Will. 3, c. 7; 4 Geo. 1, c. 11, s. 7; 8 Geo. 1, c. 24, and 18 Geo. 2, c. 30, 'as relates to the punishment of the crime of piracy, or of any offence by any of the said Acts declared to be piracy, or of accessories thereto respectively.' (*k*)

Sec. 2 enacts, 'That from and after the commencement of this Act whosoever, with intent to commit or at the time of or immediately before or immediately after committing the crime of piracy in respect of any ship or vessel, shall assault, with intent to murder, any person being on board of or belonging to such ship or vessel, or shall stab, cut, or wound any such person, or unlawfully do any act by which the life of such person may be endangered, shall be guilty of felony, and being convicted thereof shall suffer death as a felon.' (*l*)

(*h*) *R. v. Jones*, 11 Cox, C. C. 393.

(*i*) Sec. 4 (but see now 1 Vict. c. 88, *infra*, as to the punishment), and by sec. 2 every vessel fitted out to trade, &c., with pirates, and also the goods shall be forfeited, half to the Crown and half to the informer. Offenders against this Act are to be tried according to the 28 Hen. 8, c. 15, and 11 & 12 Will. 3, c. 7. In the second edition, the 32 Geo. 3, c. 25, s. 12, was here inserted, but as that Act was only to continue in force during the then war with France, it seems to have expired. See 2 East, P. C. c. 17, s. 7, p. 801 n. (*a*), and Crabb's Index to the Statutes, C. S. G. The 22 Geo. 3, c. 25, prohibits ransoming any ship belonging to

any subject of his Majesty, or goods on board the same, which shall be captured by the subjects of any state at war with his Majesty, or by any persons committing hostilities against his Majesty's subjects.

(*j*) By sec. 7.

(*k*) The 37 & 38 Vict. c. 35, repeals this enactment, but the Acts repealed by it are not thereby revived; see 13 & 14 Vict. c. 21, s. 5.

(*l*) This sentence may be recorded by the 4 Geo. 4, c. 48, s. 1, and where the indictment charges a stabbing, cutting, or wounding, the jury may acquit of the felony, and convict of the stabbing, cutting, or wounding, by the 14 & 15 Vict. c. 19, s. 5.

Sec. 3. 'From and after the commencement of this Act whosoever shall be convicted of any offence which by any of the Acts hereinbefore referred to amounts to the crime of piracy, and is thereby made punishable by death, shall be liable, at the discretion of the Court, to be transported (*m*) beyond the seas for the term of the natural life of such offender, or for any term not less than fifteen years (*n*), or be imprisoned for any term not exceeding three years.'¹

Sec. 4. 'In the case of every felony punishable under this Act every principal in the second degree and every accessory before the fact shall be punishable with death or otherwise in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act shall, on conviction, be liable to be imprisoned for any term not exceeding two years.'

Sec. 5. (*nn*) 'Where any person shall be convicted of any offence punishable under this Act for which imprisonment may be awarded, it shall be lawful for the Court to sentence the offender to be imprisoned, or imprisoned and kept to hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the Court in its discretion shall seem meet.' (*o*)

(*m*) Penal servitude, by the 20 & 21 Vict. c. 3, s. 2.

(*n*) Not less than three years, see 54 and 55 Vict. c. 69.¹

(*nn*) It seems that the 37 & 38 Vict. c. 35, repeals this section.

(*o*) This statute having repealed the punishment of piracy at common law, which was before punishable by the 28 Hen. 8, c. 15, s. 3, with death without benefit of clergy, a difficulty arises as to what is now the punishment for that offence. The 39 Geo. 3, c. 37, s. 1, provides, 'That all and every offence and offences, which, after the passing of this Act, shall be committed upon the high seas out of the body of any county of this realm shall be, and they are hereby declared to be offences of the same nature respectively, and to be liable to the same punishments respectively, as if they had been committed upon the shore, and shall be inquired of, heard, tried, and determined, and adjudged in the same manner as treasons, murders, and conspiracies are directed to be by the same Act' (28 Hen. 8, c. 15). It should seem, therefore, that this Act, by making all offences committed on sea of the same nature as if they were committed on shore, has made piracy at common law a felony, which it was not at common law, or by the 28 Hen. 8, c. 15. By the 1 Geo. 4, c. 90, any person found

guilty of any capital crime or offence committed upon the sea, which, if committed upon the land would be clergyable, is entitled to the benefit of clergy in like manner as if he had committed such offence upon land. By the 7 & 8 Geo. 4, c. 28, s. 6, clergy was abolished; and by sec. 7 no person convicted of *felony* was to suffer death unless for some felony excluded from clergy, on or before the first day of that session of Parliament; and by sec. 12, 'all offences prosecuted in the High Court of Admiralty shall, upon every first and subsequent conviction, be subject to the same punishments, whether of death or otherwise, as if such offences had been committed upon land.' See also the Criminal Law Consolidation Acts of 1861. By the 4 & 5 Will. 4, c. 36 piracy may now be tried at the Central Criminal Court. By some writers piracy at common law is defined to be the committing those acts of robbery and depredation on sea which, if committed on land, would have amounted to *felony*. 1 Hawk. c. 37, s. 4. 4 Bla. Com. 72. 2 East, P. C. c. 17, s. 3, p. 796. Mason's case, *post*, note (*r*). By others it seems to be considered the same offence as *robbery* on land. Archb. Vict. Acts, 72. 2 Hale, 369. 1 Hale, 354. 3 Inst. 113, where Lord Coke calls a pirate 'a robber upon the sea.' On the whole it seems that each act of piracy at

AMERICAN NOTE.

¹ By the Revised Statutes of the United States the crime of piracy against the law of nations is punishable by death.

Prior to the statutes (except the statute of Hen. 8), several mariners on board a ship lying near the Groyne seized the captain, he not agreeing with them; and having put him on shore, carried away the ship, and afterwards committed several piracies. This force upon the captain, and the carrying away the ship, which was explained by the use of it afterwards, was adjudged piracy. (*p*) But where the master of a vessel loaded goods on board at Rotterdam consigned to Malaga, which he caused to be insured, and after he had run the goods on shore in England the ship was burned, when he protested both the ship and cargo as burned, with intent to defraud the owner and insurers; the judges of the common law, who assisted the judges of the Admiralty, directed an acquittal upon an indictment for piracy and stealing the goods; because being only a breach of trust and no felony, it could not be piracy to convert the goods in a fraudulent manner until the special trust was determined. (*q*).

Making or endeavouring to make a revolt, with a view to procure a redress of what the prisoners thought grievances, and without any intent to run away with the ship, or to commit any act of piracy, was held to be an offence within the 11 & 12 Will. 3, c. 7, s. 9. (*r*)

Where one count charged the prisoners with making, and another with endeavouring to make a revolt in a ship, it appeared that great complaints had been made by the sailors in the course of the voyage about the provisions and the great heat of the cabin where the men had to sleep, which on account of the fire for cooking, &c., being close to it, was unsupportable in the warm latitudes. On the 30th of September the prisoner M. refused to go on duty, and remained off duty till the following day, when he was again desired to work, and again refused, using at different times violent and threatening language. The captain in consequence ordered the crew to put M. in irons, but instead of obeying him they walked away forward. The prisoner S. had the same morning refused to go to his duty, and he and one G. went towards the captain, who was endeavouring, with the assistance of his officers, to put M. in irons. Violent language was used by both, and threats uttered against the captain, to induce him to alter his determination, and G. rushed to a boat where spears used in the whale-fishery were kept, with the evident intention of seizing one of them, and releasing M. by force. The captain shot G. in the act of laying hold of a spear. Lord Abinger, C. B.: 'By revolt I understand something like rebellion or resistance to lawful authority, and if the crew of a ship combine together to resist the captain, especially if the object be to deprive him of his authority altogether, it will in my opinion amount to making a revolt. I think upon the construction of this Act of Parliament that the resistance of one person to the authority of the captain would not be a revolt. Revolt means something more than the dis-

common law is now a felony of the same kind, and liable to the same punishment, as if the same act had been done upon land, and the offender is triable either under a commission founded on the 28 Hen. 8, c. 15, or at the Central Criminal Court, or at the assizes. C. S. G.

(*p*) R. v. May, Bishop, and others, Nov.

1696, MS. Tracy, 77. 2 East, P. C. c. 17, s. 3, p. 796.

(*q*) Mason's case, Old Bailey, 9 Geo. 1, on a special commission, 8 Mod. 74. 2 East, P. C. c. 17, s. 3, p. 796, S. C.

(*r*) R. v. Hastings and Meharg, East. T. 1825. Ry. & Mood. 82.

obedience of one man. I think it would be straining the evidence rather too far to say that the conduct of these men amounted to a revolt; and the charge of making a revolt, if my construction of the Act be correct, will fall to the ground. The question of whether the ship was properly fitted up and found is not material; for it has been decided that, although there be real grievances to redress, yet it is not an answer to a charge of attempting to make a revolt. If G. and the prisoners were united in some common design to prevent the captain from putting M. in irons, which on the evidence he had a sufficient justification in doing, and calling upon others of the crew to assist them in resisting the captain's authority, then I think that it was an attempt to excite a revolt.' (s)

On an indictment upon the 11 & 12 Will. 3, c. 7, s. 9, it appeared that the prisoners were two of the mates and the others mariners of a merchant ship, and the captain seeing something in the manner of a sailor which displeased him spoke sharply to him and ordered him to leave the helm, and called to some one else to take his place, and he ordered the sailor to go and grease the masts, which the captain thought necessary to be done. The sailor peremptorily refused, and the captain on that ordered all hands up: he desired the mates to have the masts greased, which the men refused to do, and said that it was the duty of the boys, and that whilst there were boys on board they would not. The captain positively insisted, and the men as positively refused. He then said, 'If that's the case, I'll put you on short commons; that beef which is lying there you sha'n't have,' and ordered it to be taken below, on which there was a peremptory refusal to let him have it. The captain, who saw that this did not meet with the slightest opposition from the mates, perceived the disposition to mutiny, and that he must act at once or there would be no authority, went down and armed himself with a cutlass, came again on deck, and said, 'Give me that beef!' and speaking to the steward said, 'Take it below, and the first man who interferes, I will exercise my authority, and cut him down with the instrument with which I am armed.' The steward, seeing the captain was not to be trifled with, obeyed; the beef was taken down and the captain put away his cutlass, and, after staying on deck some time, went down, and had his dinner, and then believing he had done sufficient to assert his authority, he sent the beef back, and allowed the crew to have their dinners. After the beef was taken away, the men all refused to do anything, and went below: however, the captain thought that all this had passed away. After this the steward requested the captain to come on deck, as the men wanted to speak to him. He went on deck, was made prisoner, and confined in his cabin, the vessel put about, and brought to Plymouth by the mate and crew, and there the crew made a complaint against the captain. Williams, J., told the jury that in considering the meaning of the terms used in the statute he must tell them that confederating together and making a revolt constituted the offence charged, unless they were satisfied that there was some justifiable cause. The great question for their consideration was, whether

or not there was any justification for this unquestionable confinement of the captain. Did, therefore, his conduct afford any justification for that step? He was bound to tell them that, according to the authorities, a seaman was not justified in making a revolt in a ship, or in imprisoning his captain, by reason of that captain having been unjust or unreasonable; it was not to be allowed that seamen should take the law into their own hands, because the captain had issued an unjust order, or had conducted himself in a harassing or embarrassing manner. If the rule of law was that whenever the seamen considered the captain's conduct unreasonable and rash, they could take charge of the ship, there would be an end to all maritime discipline. It was necessary, for the due maintenance of discipline, that mutiny and revolt, if not justifiable, should be punished as a crime in the merchant service as well as in the royal navy. In his opinion, in point of law, it was justifiable in one view only, namely, if the conduct of the captain had been such as to afford reasonable ground for concluding that, unless the men had imprisoned him, the crew, or some one or more of them, would have been in danger of their lives, or of suffering some grievous bodily harm from his conduct. If they thought that was made out, and that the conduct of the captain was such that the lives of the crew were in danger unless he were imprisoned, then there was a justification. But if they should not come to the conclusion that there was reasonable ground for this belief, then, in point of law, they ought to find the prisoners guilty. (*t*)

On an indictment under the same section, for making a revolt in a merchant ship, it appeared that the prisoners formed part of the crew of a steamer trading between London and Holland; their register tickets were deposited with the captain, but no agreement in writing had been entered into with them previously to their sailing on the voyage during which the revolt was made, and the Recorder held that the prisoners were not mariners, or seamen; the 7 & 8 Vict. c. 112, s. 2, (*u*) made any contract other than the agreement thereby required illegal, and therefore the relation of commander and mariner did not exist. (*v*)

Upon an indictment on the 18 Geo. 2, c. 30, a question was made whether *adhering to the King's enemies* in hostilely cruising in their ships could be tried *as piracy* under the usual commission granted by virtue of the 28 Hen. 8, c. 15. The 18 Geo. 2, recites that doubts had arisen whether subjects entering into the service of the King's enemies on board privateers and other ships, having commissions from France and Spain, and having by such adherence been guilty of high treason, could be deemed guilty of felony within the intent of the 11 & 12 Will. 3, c. 7, and be triable by the Court of Admiralty appointed by virtue of the said Act; and then enacts that persons who shall commit hostilities upon the sea, &c., against his Majesty's subjects by virtue or under colour of any commission from any of his Majesty's enemies, or shall be *any otherwise adherent* to

(*t*) *R. v. Rose*, 2 Cox, C. C. 329. As reported, this direction is open to the objection that it did not inform the jury that the captain might lawfully use any force that was reasonably necessary to retain the command of the vessel and stop the revolt, and that

the crew would not be justified in imprisoning him for using such force for that purpose; but, no doubt, the learned judge did so direct the jury.

(*u*) Repealed by the 17 & 18 Vict. c. 120.

(*v*) *R. v. Smith*, 3 Cox, C. C. 443.

his Majesty's enemies upon the sea, &c., may be tried *as pirates*, felons, or robbers, in the said Court of Admiralty in the same manner as persons guilty of piracy, felony, and robbery, are by the said Act directed to be tried; but it does not say that they shall be deemed *pirates, &c.*, as in the 11 & 12 Will. 3, c. 7. The prisoner having been convicted, the question was reserved for consideration of the judges; and it was agreed by eight who were present, (*w*) that the prisoner had been well tried under the commission. For that taking the 11 & 12 Will. 3, and 18 Geo. 2 together, and the doubt raised in the latter, and also its enactment that in the instances therein mentioned, and also in case of any other adhering to the King's enemies, the parties might be tried as pirates by the Court of Admiralty according to that statute, it was substantially declaring that they should be *deemed pirates*; and that it was a just construction in their favour to allow them to be tried *as such* by a jury. (*x*)

Accessories to piracy were triable only by the civil law if their offence was committed on the sea, and were not triable at all if their offence was committed on land, until the 11 & 12 Will. 3, c. 7, s. 10, which enacts, 'that every person and persons whatsoever, who shall either on the land or upon the seas, knowingly or wittingly set forth any pirate; or aid and assist, or maintain, procure, command, counsel, or advise, any person or persons whatsoever, to do or commit any piracies or robberies upon the seas; and such person or persons shall thereupon do or commit any such piracy or robbery, then all and every such person or persons whatsoever, so as aforesaid setting forth any pirate, or aiding, assisting, maintaining, procuring, commanding, counselling, or advising, the same either on the land or upon the sea, shall be and are hereby declared, and shall be deemed and adjudged to be accessory to such piracy and robbery, done and committed; and further, that after any piracy or robbery is or shall be committed by any pirate or robber whatsoever, every person and persons, who, knowing that such pirate or robber has done or committed such piracy and robbery, shall, on the land or upon the sea, receive, entertain, or conceal any such pirate or robber, or receive or take into his custody any ship, vessel, goods, or chattels, which have been by any such pirate or robber piratically and feloniously taken; shall be, and are hereby likewise declared, deemed, and adjudged to be accessory to such piracy and robbery.' And then the statute directs, 'that all such accessories to such piracies and robberies shall be inquired of, tried, heard, determined, and adjudged, after the common course of the laws of this land, according to the 28 Hen. 8, as the principals of such piracies and robberies may and ought to be, and no otherwise: and being thereupon attainted, shall suffer such pains of death, (*y*) losses of lands, goods, and chattels, (*yy*) and in like manner, as such principals ought to suffer, according to the 28 Hen. 8, which is thereby declared to continue in full force.'

(*w*) Lord Loughborough, Lord C. B. Skynner, Gould, J., Willes, J., Ashurst, J., Eyre, B., Perryn, B., and Heath, J., who met Nov. 11, 1782.

(*x*) Evans's case, MS. Gould, J., 1 East, P. C. c. 17, s. 5, pp. 798, 799. The 18 Geo. 2, c. 30, s. 3, provides that the Act shall not prevent any offender who shall not be tried

according thereto from being tried for high treason within this realm according to the stat. 28 Hen. 8, c. 15.

(*y*) See 1 Vict. c. 88, s. 4, as to the punishment of accessories.

(*yy*) As to the present law in lieu of forfeiture for treason or felony, see *ante*, p. 108.

The 8 Geo. 1, c. 24, however, made an alteration with respect to the accessories described in 11 & 12 Will. 3, and declared them to be principals, and that they should be tried accordingly. Sec. 3, reciting that 'whereas there are some defects in the laws for bringing persons who are accessories to piracy and robbery upon the seas to condign punishment, if the principal who committed such piracy or robbery is not or cannot be apprehended and brought to justice,' enacts, 'that all persons whatsoever, who by the 11 & 12 Will. 3, are declared to be accessory or accessories to any piracy or robbery therein mentioned, are hereby declared to be principal pirates, felons, and robbers, and shall and may be inquired of, heard, determined, and adjudged, in the same manner as persons guilty of piracy and robbery may, according to that statute; and being thereupon attainted and convicted, shall suffer death (z) and loss of lands, &c., (zz) in like manner as pirates and robbers ought by the said Act to suffer.'

One who knowingly received and abetted a pirate within the body of a county was not triable by the common law, the original offence being cognizable alone by another jurisdiction. (a) But see now the 24 & 25 Vict. c. 94, s. 9. (b)

SEC. II.

Of the Court by which the Offence of Piracy may be tried.

The offence of piracy was formerly cognizable only by the Admiralty Courts, which proceeded without a jury, in a method much conformed to the civil law. But it being inconsistent with the liberties of the nation that any man's life should be taken away, unless by the judgment of his peers, or the common law of the land, the 28 Hen. 8, c. 15, established a new jurisdiction. That statute enacted, that this offence should be tried by commissioners nominated by the Lord Chancellor, the indictment being first found by a grand jury of twelve men, and afterwards tried by another jury as at common law, and that the course of proceeding should be according to the law of the land. Amongst the commissioners there were always some of the common-law judges; (c) and by the Admiralty Court, thus constituted, the offence of piracy, and other marine offences, may now be tried. But the 28 Hen. 8 merely altered the mode of trial in the Admiralty Court; and its jurisdiction still continues to rest on the same foundations as it did before that Act. It is regulated by the civil law, *et per consuetudines marinas* grounded on the law of nations, which may possibly give to that Court a jurisdiction that our common law has not. (d)

(z) See note (y), *ante*, p. 267; and see *ante*, p. 262.

(zz) As to the law in lieu of forfeiture for treason or felony, see *ante*, p. 108.

(a) Admiralty case, 13 Co. 53. And a little before this case the law appears to have been so considered in the case of one Scadding, who was committed by the Court of Admiralty for aiding a pirate to escape out of prison; and, on a return to a *habeas corpus*, the prisoner was remanded, though it appeared that the fact was committed by him within the body of a county. The Court of

King's Bench holding, that because Scadding's offence depended on the piracy committed by the principal, of which the temporal judges had no cognizance, and was, as it were, an accessorial offence to the first piracy which was determinable by the admiral, it was sufficient ground for remanding him. *Yelv.* 134. 2 East, P. C. c. 17, s. 14, p. 810.

(b) *Ante*, p. 184.

(c) Generally *two*. 4 Blac. Com. 269.

(d) By Mansfield, C. J. R. v. Depardo, 1 Taunt. 29.

CHAPTER THE NINTH.

OF NEGLECTING QUARANTINE, OF SPREADING CONTAGIOUS DISORDERS, AND OF INJURY TO THE PUBLIC HEALTH.

SEC. I.

Of Neglecting Quarantine.

THE performance of *quarantine*, or forty days' probation, when ships arrive from countries infected with contagious disorders, having been considered as of the highest importance, with reference to the public health of the nation, has been enforced from time to time by various legislative enactments. These were formerly of considerable severity: but the 6 Geo. 4, c. 78, repeals all former Acts upon this subject, and enforces the performance of quarantine principally by pecuniary penalties, and these are left to the discretion of the justices or court, under 29 & 30 Vict. c. 90, s. 51. (a) Some offences, however, subject the offender to imprisonment, and some are of the degree of felony. It may be here observed, that in a case which arose upon 26 Geo. 2, c. 6, which enacted, that all persons going on board ships coming from infected places should obey such orders as the King in Council should make, but did not award any particular punishment, nor contain a clause as to the jurisdiction of the justices of the peace, it was holden that disobedience of such an Order of Council was an indictable offence, and punishable as a misdemeanor at common law. (b)

By the 6 Geo. 4, c. 78, s. 17, 'If any commander, master, or other person, having charge of any vessel liable to perform quarantine, and on board of which the plague, or other infectious disease or distemper, shall not then have appeared, shall himself quit, or shall knowingly permit or suffer any seaman or passenger coming in such vessel to quit such vessel, by going on shore, or by going on board any other vessel or boat, before such quarantine shall be fully performed, unless by such licence as shall be granted by virtue of any Order in Council, to be made concerning quarantine as aforesaid, or in case any commander or other person having charge of such vessel shall not, within a convenient time after due notice given for that purpose, cause such vessel, and the lading thereof, to be conveyed into the place or places appointed for such vessel and

(a) By 38 & 39 Vict. c. 55, sched. 5, part 3, 'all penalties imposed by the 6 Geo. 4, c. 78, may be reduced by the justices or court having jurisdiction in respect of such penalties to such sum as the justices or court think just.'

(b) *R. v. Harris*, 4 T. R. 202, 2 Leach, 549.

lading to perform quarantine; then, and in every such case every such commander, master, or other person as aforesaid, for every such offence shall forfeit and pay the sum of four hundred pounds; and if any such person coming in any such vessel liable to quarantine (or any pilot or other person going on board the same, either before or after the arrival of such vessel at any port or place in the United Kingdom, or the islands aforesaid), shall, either before or after such arrival, quit such vessel, unless by such licence as aforesaid, by going on shore in any port or place in the United Kingdom, or the islands aforesaid, or by going on board any other vessel or boat, with intent to go on shore as aforesaid, before such vessel so liable to quarantine as aforesaid shall be regularly discharged from the performance thereof, it shall and may be lawful for any person whatsoever, by any kind of necessary force, to compel such pilot or other person so quitting such vessel so liable to quarantine, to return on board the same; and every such pilot or other person so quitting such vessel so liable to quarantine shall for every such offence suffer imprisonment for the space of six months, and shall forfeit and pay the sum of three hundred pounds.'

Sec. 21. 'If any officer of his Majesty's customs, or any other officer or person whatsoever, to whom it doth or shall appertain to execute any order or orders made or to be made concerning quarantine, or the prevention of infection, as notified as aforesaid, or to see the same put in execution, shall knowingly and wilfully embezzle any goods or articles performing quarantine, or be guilty of any other breach or neglect of his duty in respect of the vessels, persons, goods, or articles, performing quarantine, every such officer or person so offending shall forfeit such office or employment as he may be possessed of, and shall become from thence incapable to hold or enjoy the same, or to take a new grant thereof; and every such officer and person shall forfeit and pay the sum of two hundred pounds: and if any such officer or person shall desert from his duty when employed as aforesaid, or shall knowingly and willingly permit any person, vessel, goods, or merchandize, to depart or to be conveyed out of the said lazaret vessel or other place as aforesaid, unless by permission under an order of his Majesty, by and with the advice of his council, or under an order of two or more of the lords or others of his privy council; or if any person hereby authorized and directed to give a certificate of a vessel having duly performed quarantine or airing, shall knowingly give a false certificate thereof, every such person so offending shall be guilty of felony; (c) and if any such officer or person shall knowingly or wilfully damage any goods performing quarantine under his direction, he shall be liable to pay one hundred pounds damages, and full costs of suit, to the owner of the same.' (cc)

Sec. 36 enacts, that in any prosecution, suit, or other proceedings against any person, for any offence against this Act, or any which may hereafter be passed concerning quarantine, or for any breach or disobedience of any order made by his Majesty by the advice of his

(c) This Act specifies no punishment for principals: they are, therefore, punishable under the 7 & 8 Geo. 4, c. 28, ss. 8, 9; 1 Vict. c. 90, s. 5.
(cc) See 29 & 30 Vict. c. 90, s. 52, post.

privy council, concerning quarantine, and the prevention of infection, notified or published as aforesaid, or of any order or orders made by two or more of the privy council, the answers of the commander, master, or other person having charge of any vessel, to any question or interrogatories put to him by virtue and in pursuance of the Act, or of any Act which may hereafter be passed concerning quarantine, or of any such order or orders as aforesaid, shall be received as evidence so far as the same relate to the place from which such vessel came, or to the place or places at which she touched in the course of her voyage; and also that where any vessel shall have been directed to perform quarantine by the superintendent of quarantine, or his assistant, or, where there is no superintendent or assistant, by the principal officer of the customs at any port or place, or other officer of the customs authorized to act in that behalf; the having been so directed to perform quarantine shall be given and received as evidence that such vessel was liable to quarantine, unless satisfactory proof be produced by the defendant to show that the vessel did not come from, or touch at, any such place or places as is or are stated in the said answers, or that such vessel, although directed to perform quarantine, was not liable to the performance thereof. And it further enacts, that where any vessel shall in fact have been put under quarantine by the superintendent, &c., and shall actually be performing the same, such vessel shall, in any prosecution, &c., for any offence against this act, or any other act hereafter passed concerning quarantine, or against any orders of council as aforesaid, be deemed liable to quarantine, without proving in what manner or from what circumstances such vessel became liable to the performance thereof.

By the 29 & 30 Vict. c. 90, s. 52, it is enacted that every vessel having on board any person affected with a dangerous or infectious disorder shall be deemed to be within the provisions of the 6 Geo. 4, c. 78, although such vessel has not commenced her voyage, or has come from or is bound for some place in the United Kingdom; and the Lords and others of Her Majesty's Most Honourable Privy Council, or any three or more of them (The Lord President of the Council, or one of Her Majesty's principal Secretaries of State being one) may, by order or orders to be by them from time to time made, make such rules, orders, and regulations as to them shall seem fit, and every such order shall be certified under the hand of the Clerk in Ordinary of Her Majesty's Privy Council, and shall be published in the London Gazette, and such publication shall be conclusive evidence of such order to all intents and purposes, and such orders shall be binding and be carried into effect as soon as the same shall have been so published, or at such other time as shall be fixed by such orders, with a view to the treatment of persons affected with cholera and epidemic, endemic, and contagious disease, and preventing the spread of cholera and such other diseases as well on the seas, rivers, and waters of the United Kingdom, and on the high seas within three miles of the coasts thereof, as on land, and to declare and determine by what nuisance authority, or authorities, such orders, rules, and regulations, shall be enforced and executed; and any expenses incurred by such nuisance authority, or authorities, shall be deemed to be expenses incurred

by it, or them, in carrying into effect the Nuisances Removal Act. (*d*)

By the 35 & 36 Vict. c. 79, s. 52, (*e*) it is enacted that any person wilfully neglecting or refusing to obey or carry out, or obstructing the execution of any rule, order, or regulation made by the Local Government Board under sect. 52 of the Sanitary Act (1866), shall be guilty of an offence punishable on summary conviction before two justices, and be liable to a penalty not exceeding £50. These provisions are applied to the metropolis, by the 37 & 38 Vict. c. 89, s. 52.

SEC. II.

Of Spreading Contagious Disorders, and of Injury to the Public Health. (f)

With the same regard to the public health, upon which the statutes relating to quarantine have proceeded, the Legislature appears to have acted in former times, in making persons guilty of felony who, being infected with the plague, went abroad and into company, with infectious sores upon them, after being commanded by the magistrates to stay at home. (*g*) The statute which contained this enactment, after being continued for some time, is now expired: but Lord Hale puts the question, whether if a person infected with the plague should go abroad *with intent* to infect another, and another be thereby infected and die, it would not be murder by the common law. (*h*) And he seems to consider it as clear, that though where no such intent appears it cannot be murder, yet, if by the conversation of such a person another should be infected, it would be a great misdemeanor. (*h*)

In a case relating to the small-pox, it was held that the exposing in the public highway, with a full knowledge of the fact, a person infected with a contagious disorder is a common nuisance, and as such the subject of an indictment. The defendant was indicted for carrying her child, while infected with the small-pox, along a public highway, in which persons were passing, and near to the habitations of the King's subjects; and having suffered judgment to go by default, it was moved, in arrest of judgment, that it was consistent with the indictment that the child might

(*d*) This enactment is now repealed except so far as relates to the metropolis or to Scotland or Ireland, and the following provision enacted instead, 'Description of vessels within provisions of 6 Geo. 4, c. 78,' every vessel having on board any person affected with a dangerous or infectious disorder shall be deemed to be within the provisions of the 6 Geo. 4, c. 78, although such vessel has not commenced her voyage, or has come from or is bound for some place in the United Kingdom (38 & 39 Vict. c. 55, sched. 5, part 3).

(*e*) This enactment is now repealed except so far as it relates to the metropolis (58 & 39 Vict. c. 55, sched. 5).

(*f*) The Acts relating to the public health are consolidated by the Public Health

Act, 1875 (38 & 39 Vict. c. 55). This Act does not extend (save as by the Act is expressly provided) to the metropolis. By s. 341 the powers of the Act are cumulative. As to the duty of notifying infectious disorders to local authorities, see 52 & 53 Vict. c. 72. Offences against this Act are, however, punishable summarily (s. 3), as are also offences against The Prevention of Infectious Diseases Act, 1890, 53 & 54 Vict. c. 34 (see sec. 18). As to London, see 54 & 55 Vict. c. 76.

(*g*) 2 (vulgo 1) Jac. 1, c. 31, s. 7. See 37 & 38 Vict. c. 35. 1 Hale, 432, 695. 3 Inst. 90.

(*h*) 1 Hale, 432.

have caught the disease, and that it was not shown that the act was unlawful, as the mother might have carried it through the street, in order to procure medical advice; and that the indictment ought to have alleged, that there was some sore upon the child at the time when it was so carried. It was also urged, that the only offences against the public health of which Hawkins speaks are spreading the plague and neglecting quarantine; (i) and that it appeared that Lord Hardwicke thought the building of a house for the reception of patients inoculated with the small-pox was not a public nuisance, and mentioned that upon an indictment of that kind there had been an acquittal. (j) But Lord Ellenborough, C. J., said, that if there had been any such necessity as was supposed for the conduct of the defendant, it might have been given in evidence as matter of defence: but there was no such evidence: and as the indictment alleged that the act was done *unlawfully* and *injuriously*, it precluded the presumption that there was any such necessity. Le Blanc, J., in passing sentence, observed, that although the Court had not found upon its records any prosecution for this specific offence, yet there could be no doubt in point of law, that if any one unlawfully, injuriously, and with full knowledge of the fact, exposes in a public highway a person infected with a contagious disorder, it is a common nuisance to all the subjects and indictable as such. That the Court did not pronounce that every person who inoculated for this disease was guilty of an offence, provided it was done in a proper manner, and the patient was kept from the society of others, so as not to endanger a communication of the disease. But no person, having a disorder of this description upon him, ought to be publicly exposed, to the endangering the health and lives of the rest of the subjects. (k)

In a subsequent case, where the indictment was against an apothecary for unlawfully and injuriously inoculating children with the small-pox, and while they were sick of it, *unlawfully* and *injuriously* causing them to be carried along the public street, it was moved in arrest of judgment, that this was not any offence; that the case differed materially from that of *R. v. Vantandillo*, as it appeared that the defendant was by profession a person qualified to inoculate with this disease, if it were lawful for any person to inoculate with it. That as to its being alleged that the defendant caused the children to be carried along the street, it was no more than this, that he directed the patients to attend him for advice instead of visiting them, or that he prescribed what he might deem essential for their recovery, air and exercise. And it was observed that in *R. v. Sutton*, (l) which was an indictment for keeping an inoculating-house, and therefore much more likely to spread infection than what had been done here, the Court said that the defendant might demur. But Lord Ellenborough, C. J., said that the indictment laid the act to be done *unlawfully* and *injuriously*; and that in order to support this statement it must be shown, that what was done was, in the

(i) 1 Hawk. P. C. cc. 52, 53.

(j) Anon. 3 Atk. 750. In 2 Chitt. Crim. Law, 656, there is an indictment against an apothecary for keeping a common inoculat-

ing house near the church in a town; and the Cro. Circ. A. 865, is referred to.

(k) *R. v. Vantandillo*, 4 M. & S. 73.

(l) 4 Burr. 2116.

manner of doing it, incautious, and likely to affect the health of others. (*m*)

By an Act (*n*) to consolidate and amend the laws relating to vaccination, it is made a misdemeanor to wilfully sign a false certificate or duplicate of vaccination under that Act, and by section 32 it is enacted that any person who shall after the passing of this Act produce, or attempt to produce, in any person by inoculation, with variolous matter, or by wilful exposure to variolous matter, or to any matter, article, or thing impregnated with variolous matter, or wilfully by any other means whatsoever produce the disease of small-pox in any person, shall be guilty of an offence, and shall be liable to be proceeded against summarily, and upon conviction to be imprisoned for any term not exceeding one month.

The public health may be injured by selling unwholesome food ;¹ and it is an indictable offence to mix unwholesome ingredients in anything made and supplied for the food of man. And if a master knows that his servant puts into bread what the law has prohibited, and the servant from the quantity he puts in makes the bread unwholesome, the master is answerable criminally, for he should have taken care that more than is wholesome was not inserted. (*o*) The indictment was against the contract baker for a military asylum, for delivering for the use of the children belonging to the asylum, divers loaves containing noxious materials, which he knew. The evidence was that they contained crude lumps of alum, and that alum was an unwholesome ingredient, and that the defendant's foreman made the loaves ; but the jury found that the defendant knew he used alum. Upon a motion for a new trial the Court thought, that if the master suffered the use of a prohibited article, it was his duty to take care that it was not used to a noxious extent, and that he was answerable if it was. A rule for arresting the judgment was then moved for, on the ground that the indictment did not specify what the noxious ingredients were, or state that the loaves were delivered to be eaten by the children : but the Court held the former not necessary, because the ingredients were in the defendant's knowledge ; and the allegation that the loaves were delivered for the use and supply of the children, must mean that they were delivered for their eating ; and the rule was refused. (*p*)

'Victuallers, butchers, and other common dealers in victuals, are

(*m*) *R. v. Burnett*, 4 M. & S. 272. See the Public Health Act, 1875, ss. 1, 2, 3, *et seq.*

(*n*) 30 & 31 Vict. c. 84, s. 30.

(*o*) See 38 & 39 Vict. c. 63, entitled 'an Act to repeal the Adulteration of Food Acts, and to make better provision for the sale of food and drugs in a pure state.' See 35 & 36 Vict. c. 74, and see the Public Health Act, 1875, ss. 116, 117, 118, 119.

(*p*) *R. v. Dixon*, 3 M. & S. 11. See *Att.-Gen. v. Siddon*, 1 Tyrw. 41, as to the liability of a master for the acts of his servant. As a general rule a master cannot be held criminally responsible for the acts or defaults of his servant, see *Chisholm v. Doulton*, 22 Q. B. D. 736. *Att.-Gen. v. Riddell*, 2 Tyrw. 523, as to the liability of a husband for the acts of his wife. *Lyons v. Martin*, 8 A. & E. 512.

AMERICAN NOTE.

¹ Where the defendant had contracted to supply a city with wholesome water he was held indictable for a nuisance when the

supply was not wholesome. *Stein v. S.*, 37 Ala. 123.

not merely in the same situation that common dealers in other commodities are, and liable under the same circumstances that they are, so that if an order be sent to them to be executed they are presumed to undertake to supply a good and merchantable article; but they are also liable to punishment for selling corrupt victuals by virtue of an ancient statute, (*q*) certainly if they do so *knowingly*, and probably if they do not. (*r*)

If a person publicly exposes or causes to be exposed for sale in a market meat unfit for human food as and for meat that is fit for human food, knowing it not to be so, he is indictable at common law. (*s*) But a person is not indictable at common law for sending meat unfit for human food to a salesman in a market, unless he intend it to be sold for human food. (*t*) In a recent case the prisoner was indicted (*u*) under sec. 47 of the Public Health Act (London), 1891 (*v*), which provides for the summary punishment of persons in whose possession articles intended for the food of man, but unsound, unwholesome, or unfit for the food of man, are found. It was proved that the prisoner was a wholesale fruit dealer, and received for sale a large consignment of foreign nuts, a large proportion of which proved to be bad. He, without examining their condition, sold a quantity of them to retail dealers, who were, however, warned by him to examine the nuts, and destroy such (if any) as were bad, before offering them for sale to the public. It was held that he could not be convicted, since it was not shown that he intended to sell the bad nuts for human food. (*w*)

It is an indictable offence at common law to bring a horse infected with the glanders into a public place to the danger of infecting the people there: and an indictment, which alleges that the defendant knew that a horse was infected with a contagious and infectious disease called the glanders, and that he brought it into a public place among divers subjects of the Queen to the great danger of infecting the said subjects with the said disease, is sufficient, after verdict, without alleging that the defendant knew that the disease was communicable to man. (*x*)

Where an indictment alleged that the defendant mixed a large quantity of cantharides with rum, and gave the mixture to a woman with intent that she should drink it, and with intent thereby to injure her health, and that the woman, not knowing the cantharides to have been mixed with the rum, drank the mixture, whereby she became ill for a long space of time, and the facts corresponded with

(*q*) 51 H. 3, st. 6, repealed by the 7 & 8 Vict. c. 24, which also repeals an Act for 'the punishment of a butcher selling unwholesome flesh.' Ruffheads' St. p. 187, vol. 1, either of H. 3, E. 1, or E. 2.

(*r*) Per Parke, B., delivering the judgment of the Court in *Burnby v Bollett*, 16 M. & W. 644, and see 4 Inst. 261.

(*s*) *R. v. Stevenson*, 3 F. & F. 106. *R. v. Jarvis*, 3 F. & F. 108. *Shillito v Thompson*, 1 Q. B. D. 12. As to summary conviction for this offence, see 26 & 27 Vict. c. 117, s. 2; 38 & 39 Vict. c. 55, ss. 116, 117.

(*t*) *R. v. Crawley*, 3 F. & F. 109.

(*u*) The prisoner claimed to be tried by a jury under the provisions of 42 & 43 Vic. c. 49, s. 17, the punishment being six months imprisonment. See *ante*, p. 206.

(*v*) 54 & 55 Vic. c. 76. The judgments turned chiefly on the language of the section, which is not here set out, as it relates to summary proceedings.

(*w*) *R. v. Dennis*, 10 Times L. R. 498 (per Hawkins, Cave, Grantham, Charles, Vaughan-Williams, Lawrance, Wright, Collins, Bruce, and Kennedy, JJ.; Mathew, J., dissenting).

(*x*) *R. v. Henson*, Dears. C. C. 24.

the statements in the indictment, Williams, J., after consulting Cresswell, J., held that the offence charged was not a misdemeanor at common law. (y)

It is an indictable offence to convey the refuse of gas into a great public river, and thereby to render the water corrupt, insalubrious, and unfit for the use of man, and the directors of a gas company are responsible for the acts done by their superintendent and engineer under a general authority to manage the works, though they are personally ignorant of the plan adopted, and though such plan be a departure from the original and understood method, which the directors had no reason to suppose was discontinued: for if persons for their own advantage employ servants to conduct works, they are answerable for what is done by those servants. (z)

(y) *R. v. Hanson*, 2 C. & K. 912; 4 Cox, C. C. 238. See the 24 & 25 Vict. c. 100, ss. 23, 24, which clearly provide for such cases as the preceding, and *R. v. Walkden*, 1 Cox, C. C. 282. As to husband infecting

his wife with gonorrhoea, see *R. v. Clarence*, 22 Q. B. D. 23.

(z) *R. v. Medley*, 6 C. & P. 292. Lord Denman, C. J.

CHAPTER THE TENTH.

OF OFFENCES AGAINST THE REVENUE LAWS RELATING TO THE CUSTOMS OR EXCISE.

AMONGST the offences against the revenue laws, that of *smuggling* is one of the principal. It consists in bringing on shore, or in carrying from the shore, goods, wares, or merchandise, for which the duty has not been paid, or goods of which the importation or exportation is prohibited: an offence productive of various mischiefs to society. (a) In order to prevent the commission of offences of this kind, many statutes were passed from time to time, which, in addition to the proceedings at common law for assaulting and obstructing revenue officers when acting in the execution of their duties, (b) gave to those officers extraordinary powers and protections, and punished persons endeavouring to resist or evade the laws relating to the customs and excise. The 16 and 17 Vict. c. 107, which consolidates the laws relating to the customs, makes various enactments relating to the forfeiture of vessels engaged in illegal traffic, and of uncustomed goods, which do not come within the scope of this treatise. But some of the enactments relating to the right to proceed to extremities, when necessary, for the purpose of seizing vessels liable to seizure, and the right to search for and seize goods liable to forfeiture, may properly be here mentioned. And the offence of making signals to smuggling vessels at sea, and the several offences declared to be felonies by this statute, require to be particularly noticed.

By the 39 & 40 Vict. c. 36, s. 168, 'If any person shall in any matter relating to the Customs or under the control or management of the Commissioners of Customs, make or subscribe, or cause to be made or subscribed, any false declaration, or make or sign any declaration, certificate, or other instrument required to be verified by signature only, the same being false in any particular, or if any person shall make or sign any declaration made for the consideration of the Commissioners of Customs on any application presented to them, the same being untrue in any particular, or if any person required by this or any other Act relating to the Customs to answer questions put to him by the officers of Customs shall not truly answer such questions, or if any person shall

(a) 1 Hawk. P. C. c. 48, s. 1. 4 Blac. Com. 155. Bac. Abr. Smuggling.

(b) See many precedents for misdemeanors at common law, in assaulting and obstructing officers of excise and customs, acting in the due execution of their offices;

4 Wentw. 385, *et seq.* 2 Chitt. Crim. Law, 127, *et seq.* And see Brady's case, 1 Bos. & Pul. 188, where it was admitted that the offence charged in the indictment was an offence indictable at common law.

counterfeit, falsify, or wilfully use when counterfeited or falsified, any document required by this or any Act relating to the Customs, or by or under the directions of the Commissioners of Customs, or any instrument used in the transaction of any business or matter relating to the Customs, or shall alter any document or instrument after the same has been officially issued; or counterfeit the seal, signature, initials, or other mark of or used by any officer of the Customs for the verification of any such document or instrument, or for the security of goods, or any other purpose in the conduct of business relating to the Customs, or under the control or management of the Commissioners of Customs or their officers, every person so offending shall for every such offence forfeit the penalty of one hundred pounds.'

By sec. 181, 'If any ship or boat liable to seizure or examination under the Customs Act shall not bring to when required so to do, the master of such ship or boat shall forfeit the sum of £20, and on being chased by any vessel or boat in Her Majesty's navy having the proper pendant and ensign of Her Majesty's ships hoisted, or by any vessel or boat duly employed for the prevention of smuggling, having a proper pendant and ensign hoisted, it shall be lawful for the captain, master, or other person having the charge or command of such vessel or boat in Her Majesty's navy, or employed as aforesaid (first causing a gun to be fired as a signal), to fire at or into such ship or boat, and such captain, master, or other person acting in his aid or by his direction, shall be and is hereby indemnified and discharged from any indictment, penalty, action, or other proceeding for so doing.'

Sec. 182. 'Any officer of Customs, or other person duly employed for the prevention of smuggling may go on board any ship or boat which shall be within the limits of any port of the United Kingdom, or the Channel Islands, and rummage and search the cabin and all other parts of such ship or boat for prohibited or uncustomed goods, and remain on board such ship or boat so long as she shall continue within the limits of such port.'

Sec. 184. 'Any officer of Customs or other persons duly employed for the prevention of smuggling may search any person on board any ship or boat within the limits of any port in the United Kingdom or the Channel Islands, or any person who shall have landed from any ship or boat, provided such officer or other person duly employed as aforesaid shall have good reason to suppose that such person is carrying or has any uncustomed or prohibited goods about his person; and if any person shall rescue, destroy, or attempt to destroy any goods to prevent seizure, or obstruct any such officer or other person duly employed as aforesaid in going, remaining, or returning from on board, or in searching such ship, or boat, or person, or otherwise in the execution of his duty, every such person shall forfeit a sum not exceeding one hundred pounds.'

Sec. 185. 'Before any person shall be searched he may require to be taken with all reasonable despatch before a justice, or before the collector or other superior officer of Customs, who shall, if he see no reasonable cause for search, discharge such person; but if otherwise, direct that he be searched, and if a female she shall not be searched by any other than a female; but if any officer shall without reasonable ground cause any person to be searched, such officer shall forfeit

and pay a sum not exceeding ten pounds. If any passenger or other person on board any such ship, or boat, or who may have landed from any such ship, or boat, shall, upon being questioned by any officer of Customs or other person duly employed for the prevention of smuggling, whether he has any foreign goods upon his person or in his possession or in his baggage, deny the same, and any such goods shall after such denial be discovered to be or to have been upon his person or in his possession or in his baggage, such goods shall be forfeited, and such person shall forfeit one hundred pounds, or treble the value of such goods, at the election of the Commissioners of Customs.'

Sec. 186. 'Every person who shall import, or bring, or be concerned in importing or bringing into the United Kingdom, any prohibited goods, or any goods the importation of which is restricted, contrary to such prohibition or restriction, whether the same be unshipped or not; or shall unship, or assist, or be otherwise concerned in the unshipping of any goods which are prohibited, or of any goods which are restricted and imported contrary to such restriction, or of any goods liable to duty, the duties for which have not been paid or secured; or shall deliver, remove, or withdraw from any ship, quay, wharf, or other place previous to the examination thereof by the proper officer of Customs, unless under the care or authority of such officer, any goods imported into the United Kingdom, or any goods entered to be warehoused after the landing thereof, so that no sufficient account is taken thereof by the proper officer, or so that the same are not duly warehoused; or shall carry into the warehouse any goods entered to be warehoused or to be re-warehoused, except with the authority or under the care of the proper officer of Customs, and in such manner, by such person, within such time, and by such roads or ways as such officer shall direct; or shall assist, or be otherwise concerned in the illegal removal or withdrawal of any goods from any warehouse or place of security in which they shall have been deposited; or shall knowingly harbour, keep, or conceal, or knowingly permit or suffer, or cause or procure to be harboured, kept, or concealed, any prohibited, restricted, or uncustomed goods, or any goods which shall have been illegally removed without payment of duty from any warehouse or place of security in which they may have been deposited; or shall knowingly acquire possession of any such goods; or shall be in any way knowingly concerned in carrying, removing, depositing, concealing, or in any manner dealing with any such goods with intent to defraud Her Majesty of any duties due thereon, or to evade any prohibition or restriction of or applicable to such goods; or shall be in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any duties of Customs, or of the law and restrictions of the Customs relating to the importation, unshipping, landing, and delivery of goods, or otherwise contrary to the Customs Acts; shall for each such offence forfeit either treble the value of the goods, including the duty payable thereon, or one hundred pounds, at the election of the Commissioners of Customs; and the offender may either be detained or proceeded against by summons.'

Sec. 187. 'Every person who shall rescue, or endeavour to rescue, any goods seized by any officer of Customs or other person author-

ised to seize the same, or before or after the seizure shall stave, break, or destroy, or endeavour to stave, break, or destroy any goods, to prevent the seizure or the securing thereof by such officer or other person; or shall rescue any person apprehended for any offence punishable by fine or imprisonment under the Customs Acts, or prevent or attempt to prevent his apprehension; or shall assault or obstruct any officer of the army, navy, marines, coastguard, customs, or other person duly employed for the prevention of smuggling, in the execution of his duty, or in the seizing of any goods liable to forfeiture under the Customs Acts, or shall aid, abet, or assist in committing any of the foregoing offences, shall for each such offence forfeit a penalty of one hundred pounds.'

By the Customs Act, 1879 (41 & 42 Vict. c. 21, s. 10), 'All persons to the number of three or more who shall assemble for the purpose of unshipping, landing, running, carrying, concealing, or having so assembled shall unship, land, run, carry, convey, or conceal any spirits, tobacco, or any prohibited, restricted, or uncustomed goods, shall each forfeit a penalty not exceeding 500*l.* nor less than 100*l.*'

By 39 & 40 Vict. c. 36, s. 189, 'every person who shall by any means procure or hire, or shall depute or authorise any other person to procure or hire, any person or persons to assemble for the purpose of being concerned in the landing or unshipping, or carrying, conveying, or concealing any goods which are prohibited to be imported, or the duties for which have not been paid or secured, shall be imprisoned for any term not exceeding twelve months, and if any person engaged in the commission of any of the above offences be armed with fire-arms or other offensive weapons, or whether so armed or not be disguised in any way, or be so armed or disguised, shall be found with any goods liable to forfeiture under the Customs Acts, within five miles of the seacoast or of any tidal river, shall be imprisoned with or without hard labour for any term not exceeding three years.' (c)

Sec. 190. 'No person shall after sunset or before sunrise, between the twenty-first day of September, and the first day of April, or after the hour of eight in the evening, and before the hour of six in the morning, at any other time of the year, make, aid, or assist in making, any signal in or on board or from any ship or boat, or on or from any part of the coast or shore of the United Kingdom, or within six miles of any part of such coast or shore, for the purpose of giving notice to any person on board any smuggling ship or boat, whether any person so on board of such ship or boat be or not within distance to notice any such signal; and if any person, contrary to the Customs Acts, shall make or cause to be made, or aid or assist in making any such signal, he shall be guilty of a misdemeanor, and may be stopped, arrested, detained, and conveyed before any justice, who, if he see cause, shall commit the offender to the next county gaol, there to remain until delivered by due course of

(c) The intention of these two sections probably is that three or more persons assembling are to be liable to a penalty, and persons procuring them to assemble are to be liable to twelve months imprisonment; but if persons assemble armed, or procure others to assemble armed, they are to be liable to three years' imprisonment. The sections are difficult to construe. See Stephen's Digest, p. 52.

law; and it shall not be necessary to prove on any indictment or information in such case that any ship or boat was actually on the coast; and the offender being duly convicted, shall, by order of the Court before whom he shall be convicted, either forfeit the penalty of one hundred pounds, or at the discretion of such Court, be committed to a gaol or house of correction, there to be kept to hard labour for any term not exceeding one year.' (d)

Where an indictment upon the 6 Geo. 4, c. 108, s. 52, which was similar to sec. 190 of the present Act, stated that the defendants between sunset on the 8th and sunrise on the 9th of March, that is to say, on the morning of the said 9th of March about three o'clock, did make certain lights, &c.; it was proved that the lights were made on the morning of the 9th, and it was objected that the indictment did not state the offence to have been committed between the 21st of September and the 1st of April, and that the allegation that the offence was committed on the 9th of March was not sufficient, because the prosecutor was not bound to the day laid, but might prove the offence to have taken place on any other day; that the time was of the essence of the offence, and therefore it ought to have formed a distinct and substantive averment in the words of the Act; but it was held that the day having been proved as laid, the objection could only properly be made in arrest of judgment, and even then it was no valid objection; for judicial notice must be taken that the day averred in the indictment is, in fact, within the period mentioned in the statute, and therefore the indictment was good. (e)

Sec. 191. 'If any person be charged with having made or caused to be made, or for aiding or assisting in making, any such signal as aforesaid, the burden of proof that such signal so charged as having been made with intent and for the purpose of giving such notice as aforesaid was not made with such intent and for such purpose, shall be upon the defendant against whom such charge is made.'

Sec. 192. 'Any person whatsoever may prevent any signal being made as aforesaid, and may go upon any lands for that purpose, without being liable to any indictment, suit, or action for the same.'

Sec. 193. 'If any person shall maliciously shoot at any vessel or boat belonging to Her Majesty's navy, or in the service of the revenue, or shall maliciously shoot at, maim, or wound any officer of the army, navy, marines, or coastguard, being duly employed in the prevention of smuggling, and on full pay, or any officer of customs or excise, or any person acting in his aid or assistance, or duly employed for the prevention of smuggling, in the execution of his office or duty,

(d) Two persons were separately convicted of unshipping goods against the 3 & 4 Will. 4, c. 53, s. 44, by which 'every person concerned in the unshipping of goods, the duties of which have not been paid, shall forfeit either the treble value thereof, or be liable to a penalty of £100, and it was held that each was liable to the penalties imposed by the clause. *R. v. Dean*, 12 M. & W. 39; and per Alderson, B., 'We must look at the statute to see whether

it was intended that every person offending should be punished, or merely that every offence should be punished. The question is whether an offence that is committed by several persons is to be visited by one penalty, or each person is to be visited by a penalty.'

(e) *R. v. Brown*, Moo. & M. 163, Little-dale, J., after consulting Gaselee, J., see Martin's case, *ante*, p. 241.

every person so offending, and every person aiding, abetting, or assisting therein, shall, upon conviction, be adjudged guilty of felony, and shall be liable, at the discretion of the Court, to penal servitude for any term not less than five years, (*f*) or to be imprisoned for any term not exceeding three years.'

Sec. 198. 'Where any person, being part of the crew of any ship in Her Majesty's employment or service, shall have been detained under the Customs Acts, such person, upon notice thereof to the commanding officer of the ship, shall be placed in security by such commanding officer on board such ship or vessel, until required to be brought before a justice to be dealt with according to law, for which purpose such commanding officer shall deliver him to the detaining officer.'

Sec. 199. 'If any person liable to be detained under the Customs Acts shall not be detained at the time of committing the offence, or being detained, shall escape, he may afterwards be detained at any place in the United Kingdom within three years from the time such offence was committed, and if detained, may be taken before any justice to be dealt with as if he had been detained at the time of committing such offence, or if not so detained, may be proceeded against by information and summons.'

Sec. 200. 'If any person, not being an officer of the navy, customs, or excise, shall intermeddle with or take up any spirits being in casks of less content than twenty gallons found floating upon or sunk in the sea, such spirits shall be forfeited, together with any vessel or boat in which they may be found; but if any person shall give information to any such officer so that seizure of such spirits may be made, he shall be entitled to such reward as the Commissioners of Customs may direct.'

Sec. 201. 'If any person shall offer for sale any goods under pretence that the same are prohibited, or have been unshipped and run ashore without payment of duties, all such goods (although not liable to any duties or prohibited) shall be forfeited, and every person so offering the same for sale shall forfeit treble the value of such goods.'

Sec. 202. 'All ships, boats, carriages, or other conveyances, together with all horses and other animals and things made use of in the importation, landing, removal, or conveyance of any uncustomed, prohibited, restricted, or other goods liable to forfeiture under the Customs Acts, shall be forfeited, and all ships, boats, goods, carriages, or other conveyances, together with all horses and other animals and things liable to forfeiture, and all persons liable to be detained for any offence under the Customs Acts, or any other Act whereby officers of customs are authorized to seize or detain persons, goods, or other things, shall or may be seized or detained in any place either upon land or water by any of the following persons, being duly employed for the prevention of smuggling; that is to say, any officer of Her Majesty's army, navy, marines, coastguard, customs, or excise, or by any person having authority from the Commissioners of Customs or Inland Revenue to seize, or by any constable or police officer of any county, city, or borough in the United Kingdom so employed with the sanction of the magistrates having jurisdiction therein, or under or by virtue of any Act in relation thereto, and all ships, boats, goods, car-

(*f*) Now 3 years.

riages, or other conveyances, together with all horses and other animals and things so seized, shall forthwith be delivered into the care of the collector or other proper officer of customs at the nearest custom-house; and the forfeiture of any ship, boat, carriage, animal, or other things shall be deemed to include the tackle, apparel, and furniture thereof, and the forfeiture of any goods shall be deemed to include the package in which the same are found, and all the contents thereof.'

Sec. 203. 'Any officer of customs, excise, coastguard, constabulary police, or other person duly employed for the prevention of smuggling may, upon reasonable suspicion, stop and examine any cart, waggon, or other conveyance to ascertain whether any smuggled goods are contained therein; and if none shall be found, the officer or other person shall not, on account of such stoppage and examination, be liable to any prosecution or action at law on account thereof; and any person driving or conducting such cart, waggon, or other conveyance, refusing to stop or allow any such examination when required in the Queen's name, shall forfeit not less than twenty nor more than one hundred pounds.'

Sec. 204. 'All writs of assistance issued from the Court of Exchequer or other proper court, shall continue in force during the reign for which they were granted, and for six months afterwards, and any officer of customs, or person acting under the direction of the Commissioners of Customs, having such writ of assistance or any warrant issued by a justice of the peace, may, in the daytime, enter into and search (g) any house, shop, cellar, warehouse, room, or other place, and in case of resistance break open doors, chests, trunks, and other packages, and seize and bring away any uncustomed or prohibited goods, and put and secure the same in the Queen's warehouse, and may take with him any constable or police officer, who may act as well without as within the limits of the place for which he shall have been sworn or appointed.'

Sec. 205. 'If any officer of customs shall have reasonable cause to suspect that any uncustomed or prohibited goods are harboured, kept, or concealed in any house or other place either in the United Kingdom or the Channel Islands, and it shall be made to appear by information on oath before any justice of the peace in the United Kingdom or the Channel Islands, it shall be lawful for such justice, by special warrant under his hand, to authorize such officer to enter and search such house or other place, and to seize and carry away any such uncustomed or prohibited goods as may be found therein; and it shall be lawful for such officer, and he is hereby authorized, in case of resistance, to break open any door, and to force and remove any other impediment or obstruction to such entry, search, or seizure as aforesaid; and such officer may, if he see fit, avail himself of the service of any constable or police officer to aid and assist in the execution of such warrant, and any constable or other police officer is hereby required when so called upon, to aid and assist accordingly.'

(g) The power to search was introduced in consequence of *R. v. Watts*, 1 B. & Ad. 166, where it was doubted whether that power existed under the 6 Geo. 4, c. 108,

s. 40, and where it was also doubted whether the ordinary writ of assistance was not too general.

Sec. 206. 'If any such goods liable to duties of customs, or prohibited to be imported, or in any way restricted, shall be stopped or taken by any police officer on suspicion that the same had been feloniously stolen, he may carry the same to the police office to which the offender if detained is taken, there to remain until, and in order to be produced at the trial of such offender, and in such case the officer is required to give notice in writing to the Commissioners of Customs of such stoppage or detention, with the particulars of the goods; but immediately after such stoppage, if the offender be not detained, or if detained immediately after the trial of such offender, such officer shall convey to and deposit the goods in the nearest customs warehouse, to be proceeded against according to law; and if any police officer so detaining any such goods shall neglect to convey the same to such warehouse, or to give the notice hereinbefore prescribed, he shall forfeit a sum not exceeding twenty pounds.'

Sec. 207. 'Whenever any seizure shall be made, unless in the possession or in the presence of the offender, master, or owner, as forfeited under the Customs Acts or under any Act by which customs officers are empowered to make seizures, the seizing officer shall give notice in writing of such seizure and of the grounds thereof to the master or owner of the things seized, if known, either by delivering the same to him personally or by letter addressed to him and transmitted by post to or delivered at his last known place of abode or business, if known; and all seizures made under the Customs Acts, or under any Act by which customs officers are empowered to make seizures, shall be deemed and taken to be condemned, and may be sold or otherwise disposed of in such manner as the Commissioners of Customs may direct, unless the person from whom such seizure shall have been made, or the master or owner thereof, or some person authorized by him, shall, within one calendar month from the day of seizure, give notice in writing, if in London, to the person seizing the same, or to the secretary or solicitor for the customs, and if elsewhere, to the person seizing the same, or to the collector or other chief officer of customs at the nearest port, that he claims the things so seized or intends to claim them, whereupon proceedings shall be taken for the forfeiture or condemnation thereof either by information filed in the Exchequer Division of the High Court of Justice in England on the Revenue side, or exhibited before any justice of the peace; but if any things so seized shall be of a perishable nature, or consist of horses or other animals, the same may by direction of the Commissioners of Customs be sold, and the proceeds thereof retained to abide the result of any claim that may legally be made in respect thereof.'

Sec. 208. 'All seizures whatsoever which shall have been made and condemned under the Customs Acts or any other Act by which seizures are authorized to be made by officers of customs shall be disposed of in such manner as the Commissioners of Customs may direct.'

Sec. 209. 'When any seizure shall have been made, or any fine or penalty incurred or inflicted, or any person committed to prison for any offence under the Customs Acts, the Commissioners of the Treasury or Customs may direct the restoration of such seizure, whether condemnation shall have taken place or not, or waive pro-

ceedings, or mitigate, or remit such fine or penalty, or release from confinement either before or after conviction such person on any terms and conditions as they shall see fit.'

Sec. 229. 'Where any offence shall be committed in any place upon the water not being within any county of the United Kingdom, or where the officers have any doubt whether such place is within the boundaries or limits of any such county, such offence shall for the purposes of the Customs Acts be deemed and taken to be an offence committed on the high seas; and for the purpose of giving jurisdiction under such Acts, every offence shall be deemed to have been committed, and every cause of complaint to have arisen, either in the place in which the same actually was committed or arose, or in any place on land where the offender or person complained against may be or be brought.'

Sec. 237. 'When any verdict shall pass or conviction be had against any person for any offence against the Customs Acts, and he shall have been adjudged to pay a penalty exceeding one hundred pounds, the presiding judge or justice may, if for a first offence, commit the offender to prison for not less than six nor more than nine months, and if for a subsequent offence, may order that the offender shall, in lieu of payment of the penalty, be imprisoned in gaol, or house of correction, with or without hard labour, for a period of not less than six nor more than twelve months, and the governor or keeper of such gaol or house of correction is hereby required to receive any person committed under such order.'

Sec. 255. 'All indictments or suits for any offences or the recovery of any penalties or forfeitures under the Customs Acts shall, except in cases where the summary jurisdiction is given to justices, be preferred or commenced in the name of Her Majesty's Attorney-General for England or Ireland, or of the Lord Advocate of Scotland, or of some officer of customs or inland revenue.'

Sec. 256. 'In any prosecution for recovery of any fine, penalty, or forfeiture incurred under the Customs Acts, Her Majesty's Attorney-General for England, Her Majesty's Attorney-General for Ireland, or the Lord Advocate of Scotland, if satisfied that such fine, penalty, or forfeiture was incurred without any intention of fraud, or that it may be inexpedient to proceed in the said prosecution, may enter a *nolle prosequi* or otherwise on such information.'

Sec. 257. 'All suits, indictments, or informations brought or exhibited for any offence against the Customs Acts in any court or before any justice, shall be brought or exhibited within three years next after the date of the offence committed.' (h)

Sec. 258. 'Any indictment, prosecution, or information which may be instituted or brought under the direction of the Commissioners of Customs for offences against the Customs Acts shall and may be inquired of, examined, tried, and determined in any county of England when the offence is committed in England, and in any county in Scotland when the offence is committed in Scotland, and in any county in Ireland when the offence is committed in Ireland, in such manner and form as if the offence had been committed in the said county where the said indictment or information shall be tried.'

(h) See *R. v. Thompson*, 20 L. J. M. C. 13, 16 Q. B. 832.

Sec. 259. 'If in any prosecution in respect of any goods seized for non-payment of duties, or any other cause of forfeiture, or for the recovering any penalty or penalties under the Customs Acts, any disputes shall arise whether the duties of customs have been paid in respect of such goods, or whether the same have been lawfully imported or lawfully unshipped, or concerning the place from whence such goods were brought, then and in every such case the proof thereof shall be on the defendant in such prosecution, and where any such proceedings are had in the Exchequer Division of the High Court of Justice on the Revenue side, the defendant shall be competent and compellable to give evidence.'

Sec. 260. 'The averment that the Commissioners of Customs or Inland Revenue have directed or elected that any information or proceeding under the Customs Acts shall be instituted, or that any ship or boat is foreign or belonging wholly or in part to Her Majesty's subjects, or that any person detained or found on board any ship or boat liable to seizure is or is not a subject of Her Majesty, or that any goods thrown overboard, staved, or destroyed, were so thrown overboard, staved, or destroyed to prevent seizure, or that any goods thrown overboard, staved, or destroyed during chase by any ship or boat in Her Majesty's service, or in the service of the Revenue, were so thrown overboard, staved, or destroyed to avoid seizure, or that any person is an officer of customs or excise, or that any person was employed for the prevention of smuggling, or that the offence was committed within the limits of any port, or where the offence is committed in any port of the United Kingdom, the naming of such port in any information or proceedings shall be deemed to be sufficient, unless the defendant in any such case shall prove to the contrary.'

Sec. 261. 'If, upon any trial, a question shall arise whether any person is an officer of the army, navy, marines, or coastguard, duly employed for the prevention of smuggling, or an officer of customs or excise, his own evidence thereof, or other evidence of his having acted as such, shall be deemed sufficient, without production of his commission or deputation; and every such officer, and any person acting in his aid or assistance, shall be deemed a competent witness upon the trial of any suit or information on account of any seizure or penalty as aforesaid, notwithstanding such officer or other person may be entitled to the whole or any part of such seizure or penalty, or to any reward upon the conviction of the party charged in such suit or information.'

Sec. 262. 'Upon the trial of any issue, or upon any judicial hearing or investigation touching any seizure, penalty, or forfeiture, or other proceeding under the Customs Acts, or any Act relating to the excise, or incident thereto, where it may be necessary to give proof of any order issued by the Commissioners of the Treasury, or by the Commissioners of Customs, or Inland Revenue respectively, the order, or any letter or instructions referring thereto, which shall have been officially received by any officer of customs or excise for his government, and under which he shall have acted as such officer, shall be admitted and taken as sufficient evidence and proof of such order.'

Sec. 263. 'Condemnation by any justice under the Customs laws may be proved in any court of justice, or before any competent tribunal,

by the production of a certificate of such condemnation purporting to be signed by such justice, or an examined copy of the record of such condemnation certified by the clerk to such justice.'

Sec. 284. 'For the purposes of this or any other Act relating to the Customs and in construing the same, the following terms, when not inconsistent with the context or subject matter, shall have the several meanings, and include the several matters and things herein-after prescribed and assigned to them; that is to say:

'Attorney-General' shall include solicitor-general, attorney-general in the Isle of Man, procureur, or other chief law officer of the Crown, in any of Her Majesty's possessions abroad, where there is no attorney-general.

'British possession' shall mean and include colony, plantation, island, territory, or settlement belonging to Her Majesty.

'County' shall mean and include any city, county of a city, county of a town, borough, or other magisterial jurisdiction where such construction is not inconsistent with the context.

'Customs Acts' shall mean and include this and all or any other Acts or Act relating to the Customs.

'Drawback' shall include bounty.

'Gaoler' shall mean and include any governor or keeper of Her Majesty's prisons.

'Her Majesty' shall mean Her Majesty, her heirs and successors.

'Importer' shall mean, include, and apply to any owner or other person for the time being possessed of or beneficially interested in any goods at and from the time of the importation thereof, until the same are duly delivered out of the charge of the officers of Customs.

'Justice' shall mean and include justice of the peace, county court judge, recorder, sheriff depute, governor, deputy-governor, lieutenant-governor, bailiff, chief magistrate, deemster, jurat, and any other magistrate in the United Kingdom and the Channel Islands.

'Master' shall mean the person having or taking the charge or command of any ship.

'Official import lists and official export lists' shall mean any lists which are now or shall from time to time be issued under the authority of the Commissioners of the Treasury or Customs, prescribing the denominations, descriptions, and quantity by tale, weight, measure, value, or otherwise, by which articles of merchandise shall be required to be entered on their importation into or exportation from the United Kingdom.

'Proper officer of Inland Revenue,' in the fourth section of the Act of the thirty-seventh and thirty-eighth years of Her Majesty's reign, shall mean 'proper officer of customs.'

'Queen's warehouse' shall mean any place provided by the Crown or approved by the Commissioners of Customs for the deposit of goods for security thereof and of the duties due thereon.

'Warehouse' shall mean any place in which goods entered to be warehoused may be lodged, kept, and secured.'

In a case under the 6 Geo. 4, c. 108, s. 34, a count alleged that certain spirituous liquors were about to be imported, in respect of which certain duties would be payable, and that R. H. was a person employed in the service of the customs of our Lord the King, and that

it was the duty of R. H., as such person so employed in the service of the customs as aforesaid, to arrest and detain all such good and merchandizes as should within his knowledge be imported, which, upon such importation thereof, would become forfeited; and that the defendant unlawfully solicited R. H. to forbear to arrest and detain the said goods; it was objected, in arrest of judgment, that as the law did not cast upon all persons in the service of the customs the duty of making seizures, and the count did not show that H. was a person coming within any of the three classes described in sec. 34 of 6 Geo. 4, c. 108, the count was bad: and the Court held that the allegation that it was H.'s duty to seize the goods, which upon importation were forfeited, was an allegation of matter of law. That being so, the facts from which that duty arose ought to have been stated in the count. If, indeed, it could be said to be the duty of every person employed in the service of the customs to seize such goods, then the allegation would have been sufficient. But it clearly was not the duty of every such person, and therefore the indictment was bad. (g)

Upon a clause in the 52 Geo. 3, c. 143, s. 11 (now repealed), which was similar to s. 193 of the present Act, it was determined that where a custom-house vessel had chased a smuggler and fired into her without hoisting the pendant and ensign then required by the 56 Geo. 3, c. 104, s. 8, the returning such fire was not malicious. The indictment was for shooting at a vessel in the service of the customs on the high seas within one hundred leagues of the coast of Great Britain; and also for maliciously shooting at an officer of the customs, &c. It appeared that the vessel chased a smuggler within the limits; the smuggler did not bring to upon being chased and a signal-gun fired; whereupon the custom-house vessel fired at the smuggler, and the smuggler returned the fire, and they had a regular engagement, in which one of the custom-house officers was severely wounded. In order to prove the right of firing at the smuggler, the 56 Geo. 3, c. 104, s. 8, was referred to, which, in the case of ships employed to prevent smuggling by the Treasury, Admiralty, Customs, or Excise, gave the power of firing at the smuggler, if the ship had a pendant and ensign hoisted of such description as his Majesty by any order in council, or by royal proclamation under the great seal, should direct. There had been no proclamation, nor was any order in council proved; though, after the trial, an order in council was discovered, which required certain particulars in the pendant and ensign which this ship's pendant and ensign had not. Upon a case reserved, eleven judges (Best, J., being absent) were clear that, as the custom-house vessel had not complied with what was required to make her shooting legal, the smuggler's firing was not in law malicious. (h)

Upon a clause in the 19 Geo. 2, c. 34 (now repealed), which relates to offences committed by persons, to the number of three or more, armed with firearms, or other offensive weapons, it was decided that in order to bring offenders within its penalties, it was necessary that they should be armed with weapons which might properly be called *offensive*. (i) It seems that a person catching

(g) R. & Everett, 8 B. & C. C. 114. 2 M. & R. 35.

(h) R. v. Reynolds, Mich. T. 1821. MS. Bayley, J. R. & R. 465.

(i) Hutchinson's case, 1 Leach, 342.

up a *hatchet* accidentally, during the hurry and heat of an affray, was not armed with an offensive weapon within the meaning of that Act; (*j*) and in one case it was held, that *large sticks* about three feet long, with large knobs at the end, with several prongs, the natural growth of the stick, arising out of them, were not offensive weapons; and that, from the preamble of the statute, the weapons must be such as the law calls dangerous. (*k*) But in a subsequent case, the Court said, that although it was difficult to say what should or should not be called an offensive weapon, it would be going a great deal too far to say that nothing but guns, pistols, daggers, and instruments of war, should be so considered; and that bludgeons properly so called, clubs, and anything that was not in common use for any other purpose but a weapon, were clearly offensive weapons within the meaning of the Legislature. (*l*) In a case upon a former statute (9 Geo. 2, c. 35, s. 10), where the same words, 'armed with firearms, or other offensive arms or weapons,' occurred, it was held that a person armed only with a *common whip* was not an offender within the meaning of the Act; though he aided and assisted other persons who were armed with firearms and weapons which were clearly offensive. (*m*) But with respect to the latter part of this judgment, a different doctrine appears to have been held by Lord Mansfield upon the 19 Geo. 2, c. 34, who is reported to have said, that where a person was assembled together with others who were armed, and was active, it was not necessary that such individual should be armed. (*n*)

Where a number of persons were assembled for the purpose of landing smuggled goods, and they were, as is usual on such occasions, divided into two different parties, one called the company, who had bats in their hands for the purpose of carrying the tubs of spirits (which bats were hop-poles about seven feet in length), and the other called the protecting party, who were armed with muskets; and the prisoner was one of the company, and carried a bat, but he did not strike any one with it, but some of the men with bats struck some of the preventive men; as the bats might be used for offensive purposes, it was left to the jury to say whether the bats were offensive weapons or not. (*o*)

Upon the 7 Geo. 2, c. 21 (now repealed), by which any person who should, with an offensive weapon or instrument, assault with intent to rob, was made guilty of felony, it was decided that the words 'offensive weapon or instrument,' would apply to a stick, though not of extraordinary size, and though it might in general have been used as a walking-stick. An indictment was for assaulting with an offensive weapon, viz., a stick, with intent to rob; and it appeared that the stick was like a common walking-stick, about a yard long, and not very thick, but that the prisoner, when he came up to the prosecutor, struck him violently on the head with it, so as to cut his head and make it bleed; and two of the prisoner's comrades afterwards came up and

(*j*) Rose's case, 1 Leach, 342, note (*a*).

(*k*) Ince's case, 1 Leach, 342, note (*a*).

(*l*) Cosan's case. In this case it was contended, upon the authority of Ince's case, that very large club sticks, such as people ride with, to defend themselves, are not offensive weapons. 1 Leach, 342, 343, note (*a*).

(*m*) Fletcher's case, 1 Leach, 23.

(*n*) Franklin's case, 1 Leach, 255. S. C. Cald. 244. And this appears to be the correct doctrine, see R. v. Smith, R. & R. 368, *post*. Night poaching.

(*o*) R. v. Noakes, 5 C. & P. 326, Little-dale, J., Alderson, J., Bolland, B.

beat the prosecutor on the head with similar sticks. Holroyd, J. told the jury, that as the prisoner had used the stick as a weapon of offence, he thought it ought to be considered as an offensive weapon; and the jury having convicted the prisoner, the judges agreed with Holroyd, J., and held the conviction right. (p) And in a similar case on the 9 Geo. 4, c. 69, s. 9 (the Night Poaching Act), it was held to be a question for the jury whether the prisoner had taken out a stick, large enough to be called a bludgeon, which he, being lame, was in the habit of using as a crutch, with intent to use it as an offensive weapon, or merely for the purpose to which he usually applied it. (q) From a case upon the same repealed statute (7 Geo. 2, c. 21), where the indictment was for assaulting with a certain offensive weapon called a wooden staff, and the evidence proved a violent blow with a great stone, as it was holden that the conviction of the prisoner was proper, it appears to follow that both a wooden staff and a great stone were considered as offensive weapons within the meaning of that statute. (r)

The term, weapon, would seem to include any instrument of metal or wood, or any club, stone, or other thing which is had for the purpose of effecting an injury on the person, according to the doctrine of the Roman law, *Teli appellatione et ferrum, et fustis, et lapis, et denique omne quod nocendi causâ habetur, significatur.* (s)

As to the *assembling*, it was determined upon the repealed statute (19 Geo. 2, c. 34), that it must be *deliberate*, and for the purpose of committing the offence described in the statute. So that where a set of drunken men came from an alehouse, and hastily set themselves to carry away some Geneva which had been seized by the excise officers, it was thought very questionable whether the object which the Legislature had in view could be extended to such a case; and the Court said, that the words of the statute manifestly alluded to the circumstance of great multitudes of persons coming down upon the beach of the sea for the purpose of escorting uncustomed goods to the places designed for their reception. (t)

Upon a clause of the repealed statute (9 Geo. 2, c. 35, s. 26), by which it was enacted, that an assault committed upon any of the officers of the customs and excise should be tried in any county in England, in such manner and form as if the offence had been therein committed, it was decided that the provision extended only to revenue officers, *qua* officers: and a defendant having been found guilty, on an indictment, of a *common assault* on the prosecutor, who was an excise officer, the Court of King's Bench arrested the judgment, though the prosecutor was described to be an excise officer, the offence being laid in Surrey, and the venue in Middlesex. (u)

(p) R. v. Johnson, Mich. T. 1822. R. & R. 492.

(q) R. v. Palmer, 1 M. & Rob. 70. Taunton, J. See *post*. Night poaching.

(r) Sherwin's case, Oakham. 1785, 1 East, P. C. c. 8, s. 13, p. 421. The ground upon which the judges held in this case, that the evidence was sufficient to maintain the charge in the indictment, was that the weapon laid in the indictment, and the weapon proved, produce the same sort of mischief, viz., by blows and bruises; and that the description would have been sufficient in an indictment for murder.

(s) Heinec. Antiq. Tit. 1, s. 9.

(t) Hutchinson's case, 1 Leach, 343.

The Court offered the Attorney-General a special verdict upon this case: but he declined to take it, and the prisoners were acquitted. This construction of the statute as to the assembling being *deliberate*, and for the purpose of committing the offence, is stated to have been adopted by Willea, J., and Hotham, B., in Spice's case, Old Bailey, December, 1785, and by Heath, J., in Gray's case, Old Bailey, July in the same year. 1 Leach, 343, note (a).

(u) R. v. Cartwright, 4 T. R. 490.

CHAPTER THE ELEVENTH.

OF HINDERING THE EXPORTATION OF CORN, OR PREVENTING ITS CIRCULATION WITHIN THE KINGDOM.

By the 11 Geo. 2, c. 22, s. 1, persons hindering the exportation of corn by violence may be dealt with summarily by two justices of the peace. (a)

By sec. 2, 'if any person or persons shall wilfully and maliciously pull, throw down, or otherwise destroy, any storehouse or granary, or other place where corn shall be then kept in order to be exported; or shall unlawfully enter any such storehouse, granary, or other place, and take and carry away any corn, flour, meal, or grain therefrom; or shall throw abroad, or spoil the same, or any part thereof; or shall unlawfully enter on board any ship, barge, boat, or vessel, and shall wilfully and maliciously take and carry away, cast or throw out therefrom, or otherwise spoil or damage, any meal, flour, wheat, or grain, therein intended for exportation;' every such offender being convicted, shall be adjudged guilty of felony, and transported (b) for seven (c) years. (d)

By the 36 Geo. 3, c. 9, s. 1, persons using violence to deter others from buying corn within the kingdom, or stopping any corn, breaking waggons, &c., carrying corn, or taking off the horses, or beating the drivers, or scattering or taking corn, may be summarily convicted.

By sec. 2, 'if any person or persons with intent to prevent or hinder any corn, meal, flour, malt, or grain, from being lawfully carried or removed from any place whatsoever, shall wilfully and maliciously pull, throw down, or otherwise destroy any storehouse or granary, or other place, in which corn, meal, flour, malt, or grain, shall be then kept; or shall unlawfully enter any such storehouse, granary, or other place, and take and carry away any corn, flour, meal, malt, or grain, therefrom; or shall throw abroad or spoil the same or any part thereof; or shall unlawfully enter on board any ship, barge, boat, or vessel, and wilfully and maliciously take and carry away, cast, or throw out therefrom, or otherwise spoil or damage, any corn, flour, meal, malt, or

(a) Sec. 3 provides that attainder shall not work corruption of blood, loss of dower, or disinheritance; and by sec. 4, no person, who shall be punished for any offence by virtue of this Act, shall be punished for the same offence by any other law or statute. Secs. 5, 6, 7, and 8, relating to actions by persons against the hundred for damages done to their properties, are repealed by the 7 & 8 Geo. 4, c. 27; and so much of this

statute as relates to any person who shall beat, wound, or use any other violence to any person or driver, and so much thereof as makes any second offence felony, is repealed by the 9 Geo. 4, c. 31.

(b) Penal servitude by the 20 & 21 Vict. c. 3, s. 2.

(c) And not less than three years. See 54 & 55 Vic. c. 69.

(d) See 30 & 31 Vict. c. 59.

grain therein; every person so offending, and being convicted, shall be adjudged guilty of felony, and be transported *(e)* for seven *(f)* years; and if such offender shall return into this kingdom before the expiration of the seven years, he or she shall suffer death as a felon without benefit of clergy. *(g)* The section further provides that attainder shall not work corruption of blood, loss of dower, or disinherittance of heirs. And by the sixth section it is provided that nothing contained in the Act shall abridge or take away any provision already made by the law of the realm, for the suppression or punishment of any offence whatsoever, mentioned or described in this Act; and it is provided also, that no person who shall be punished by virtue of this Act shall be punished for the same offence by virtue of any other law or statute whatsoever. *(h)*

By the 24 & 25 Vict. c. 100, s. 39, 'Whoever shall beat, or use any violence or threat of violence to any person, with intent to deter or hinder him from buying, selling, or otherwise disposing of, or compel him to buy, sell, or otherwise dispose of, any wheat or other grain, flour, meal, malt, or potatoes, in any market or other place, or shall beat or use any such violence or threat to any person having the care or charge of any wheat or other grain, flour, meal, malt, or potatoes, whilst on the way to or from any city, market-town, or other place, with intent to stop the conveyance of the same, shall, on conviction thereof before two justices of the peace, be liable to be imprisoned and kept to hard labour in the common gaol or house of correction for any term not exceeding three months: provided that no person who shall be punished for any such offence by virtue of this section shall be punished for the same offence by virtue of any other law whatsoever.'

(e) See note *(b)*, *supra*.

(f) See note *(c)*, *supra*.

(g) See 4 & 5 Will. 4, c. 67.

(h) Secs. 3, 4, and 5, relating to proceedings against the hundred for damages done to the properties of persons, by offender against this Act, are repealed by the 7 & 8

Geo. 4, c. 27, and the Stat. Law Rev. Act 1871. And so much of this statute as relates to any person who shall beat, wound, or use any other violence to any person or driver, and so much thereof as makes any second offence felony, is repealed by the 9 Geo. 4, c. 31.

Perjury Act, 1911

CHAPTER THE TWELFTH.

OF PERJURY¹ AND SUBORNATION OF PERJURY.²

At common law.—Perjury by the common law appears to be a wilful false oath by one who, being lawfully required to depose the truth in any proceeding in a court of justice, swears absolutely in a matter of some consequence to the point in question, whether he be believed or not. (a)

Subornation of perjury by the common law is an offence in procuring a man to take a false oath amounting to perjury, who actually takes such oath. But it seems clear that if the person incited to take such an oath do not actually take it, the person by whom he was so incited is not guilty of subornation of perjury, yet it is certain that he is liable to be punished, not only by fine, but also by infamous corporal punishment. (b)

An indictment charged that the defendant, an attorney, being retained to defend Wood against a charge of picking Lewis's pocket, deceitfully procured himself to be employed by Lewis, and persuaded Lewis to swear before the grand jury that he did not know who picked his pocket, which he did, and no bill was returned. An objection was made that Lewis's evidence was not stated to have been false; but, upon a case reserved, the judges thought it unnecessary, as the defendant's crime was the same, unless he knew it to be true, and *that* he should have proved. (c)

The false oath must be wilful, and taken with some degree of deliberation; thus if it appears that it was occasioned by surprise, or inad-

(a) 1 Hawk. P. C. c. 69, s. 1. 3 Inst. 164. Com. Dig. tit. *Justice of Peace*, B. 102. Bac. Ab. tit. *Perjury*.

(b) 1 Hawk. P. C. c. 69, s. 10. Bac. Ab. tit. *Perjury*, and the authorities there cited.

(c) R. v. Edwards, East. T. 1764, MS. Bayley, J. And as to dissuading witnesses from giving evidence, see *ante*, p. 197.

AMERICAN NOTES.

¹ See P. v. Evans, 40 N. Y. 1; Rump v. C., 6 Casey, 475; P. v. Sweetman, 3 Parker, C. R. 358; Cathran v. S., 39 Miss. 541; Chapman v. Gillett, 2 Conn. 40; Shaffer v. Kinizer, 1 Binn. 548; S. v. Hanson, 39 Maine, 337; S. v. Beard, 1 Dutch. 384; S. v. Kennerly, 10 Rich. (Laws) 152; S. v. Lamont, 2 Wis. 437; C. v. Powell, 2 Met. (Ky.) 10. In some States in America perjury is a felony. In some States statutes have been passed against 'false swearing' rendering persons making false declarations upon oath liable to indictment. Bishop, vol. ii., ss. 1014, 1054. Perjury against the

United States must be tried in a United States Court, not in a State Court. Bishop, vol. ii., ss. 1022 *et seq.*

² In America there are statutes regulating this offence, and false swearing not always being there perjury, a procuring of such false swearing is not subornation of perjury, S. v. Wymberley, 40 La. An. 460. Both the suborner and the suborned must know the testimony to be false, and the former must know that the latter knows it to be false, otherwise there is no corruption. U. S. v. Evans, 10 Saw. 132, 19 Fed. Rep. 912; Coyne v. P., 124 Ill. 17, 7 Am. St. 324.

vertency, or a mistake of the true state of the question, it cannot be considered to amount to voluntary and corrupt perjury. (*d*)

It has been said that no oath will amount to perjury unless it be sworn absolutely and directly, and, therefore, that he who swears a thing according as he *thinks, remembers, or believes*, cannot, in respect of such an oath, be found guilty of perjury. (*e*) But De Grey, C. J., appears to have laid down a different doctrine. (*f*) And Lord Mansfield, C. J., is stated to have said, 'It is certainly true that a man may be indicted for perjury in swearing that he *believes* a fact to be true which he must know to be false.' (*g*) It is further said that, upon this question being agitated in the Court of Common Pleas, all the judges were unanimous that *belief* was to be considered as an absolute term, and that an indictment might be supported upon such a statement. (*h*)

An indictment for perjury alleged that the defendant swore that he *thought* that certain words written in red ink were not his writing; whereas the defendant, when he so deposed, *thought* that the said words were his writing; and the Court of Queen's Bench held that the assignment was sufficient. If a witness swore that he thought a certain fact took place, it might be difficult indeed to show that he committed wilful perjury. But it was certainly possible, and the averment was as properly a subject of perjury as any other. (*i*)

The important requisites in a case of perjury appear to be these: *the false oath must be taken in a judicial proceeding, before a competent jurisdiction, and it must be material to the question depending.* (*j*)

With respect to the falsity of the oath it should be observed, that it has been considered not to be material whether the fact, which is sworn, be in itself true or false; for, howsoever the thing sworn may happen to prove agreeable to the truth, yet, if it were not known to be so by him who swears to it, his offence is altogether as great as if it had been false, inasmuch as he wilfully swears that he knows a thing to be true which at the same time he knows nothing of, and impudently endeavours to induce those before whom he swears to proceed upon the credit of a deposition which any stranger might make as well as he. (*k*)

The oath must be taken either in a judicial proceeding, or in some other public proceeding of the like nature, wherein the King's honour or interest are concerned; as before commissioners appointed by the King to inquire of the forfeitures of his tenants, or of defective titles wanting the supply of the King's patents. But it is not material

(*d*) See 1 Hawk. P. C. c. 69, s. 2.

(*e*) 3 Inst. 166.

(*f*) Miller's case, 3 Wils. 427. 2 Black. Rep. 881.

(*g*) Pedley's case, 1 Leach, 325.

(*h*) Anon. C. P. Mich. T. 1780. 1 Hawk. P. C. c. 69, s. 7, note (*a*), p. 88 (ed. 1795). See R. v. Crespigny, 1 Esp. 280. Lord Kenyon, C. J.

(*i*) R. v. Schlesinger, 10 Q. B. 670.

(*j*) By Lord Mansfield, C. J., in R. v. Aylett, 1 T. R. 69.

(*k*) 1 Hawk. P. C. c. 69, s. 6. R. v. Edwards, cor. Adams, B., Shrewsbury Lent Ass. 1764; and subsequently considered of by the judges, MS. And see per Lawrence, J., in R. v. Mawbey, 6 T. R. 619. 2 Rolle Abr. Indictment (E), pl. 5, p. 77. Allen v. Westley, Hetley, 97. Gurney's case, 3 Inst. 166. See R. v. Newton, 1 C. & K. 469, for a count framed to meet such a case.¹

AMERICAN NOTE.

¹ See Bishop, s. 1048, citing S. v. Gates, 17 N. H. 373; Byrnes v. Byrnes, 102 N. Y. 4; S. v. Knox, Phillips N. C. 312.

whether the Court, in which a false oath is taken, be a court of record or not, or whether it be a court of common law, or a court of equity, or civil law, &c., or whether the oath be taken in the face of the Court, or out of it before persons authorized to examine a matter depending in it, as before the sheriff on a writ of inquiry, &c., or whether it be taken in relation to the merits of a cause, or in a collateral matter, as, where one who offers himself to be bail for another, swears that his substance is greater than it is. (*l*) But neither a false oath in a mere private matter, as in making a bargain, &c., nor the breach of a promissory oath, whether public or private, is punishable as perjury. (*m*)

Much doubt formerly prevailed in certain cases as to the power to administer an oath; but this doubt is, to a great extent, removed by the Act to Amend the Law of Evidence, 14 & 15 Vict. c. 99, s. 16, by which 'every court, judge, justice, officer, commissioner, arbitrator, (*n*) or other person now or hereafter having by law or by consent of parties, authority to hear, receive, and examine evidence, is hereby empowered to administer an oath to all such witnesses as are legally called before them respectively.'

Oath to procure a marriage licence. — It was at one time doubted whether a false oath taken in Doctors' Commons, for the purpose of obtaining a *marriage licence*, amounts to perjury. But it has been since decided that a false oath before a surrogate, taken in order to procure a marriage licence, will not support a prosecution for perjury; and, further, that if the indictment only charges the taking the false oath without stating that it was for the purpose of procuring a licence, or that a licence was procured thereby, the party cannot be punished thereupon as for a misdemeanor. The indictment stated that the prisoner, being minded to procure a marriage between himself and A. B., went before a surrogate, and was sworn to an affidavit in writing, that the said A. B. had been residing four weeks in the parish of S., whereas she had not, and so he had committed perjury; and the indictment had all apt allegations of an indictment for perjury. But a case being reserved upon the question whether on such an affidavit the party could be prosecuted for perjury, and if not, whether upon this indictment any offence was charged, the judges were unanimous that upon an oath before a surrogate, perjury could not be assigned; and that as this indictment did not charge that the defendant took the oath to procure a licence, or that he did procure one, no punishment could be inflicted, and he was therefore pardoned. (*o*)

The third count of an indictment stated that W. James was a surrogate having authority to grant licences for marriages, and that the defendant applied to the said W. James to grant a licence for the solemnization of a marriage between J. Baker and S. Fry, and that the defendant, unlawfully intending to obtain such licence for the said

(*l*) 1 Hawk. P. C. c. 69, s. 3. Bac. Abr. tit. *Perjury* (A). See *R. v. Crossley*, 7 T. R. 315.

(*m*) 1 Hawk. P. C. c. 69, s. 3. Bac. Abr. tit. *Perjury* (A).

(*n*) *R. v. Hallett*, 2 Den. C. C. 237, a case before this Act.

(*o*) *R. v. Forster*, MS. Bayley, J., and R. & R. 459. See *Alexander's case*, 1 Leach,

63. The point was submitted to the judges, and several times agitated; but the result was not communicated, as the prisoner died in Newgate. *Woodman's case*, 1 Leach, 64, note (*a*). The point appears to have been submitted also in this case to the consideration of the twelve judges; but their opinion was not publicly communicated. See 3 Chit. Crim. L. 713.

marriage in fraud of the 4 Geo. 4, c. 76, (*p*), for the purpose of obtaining such licence, before the said W. James took his corporal oath upon the Holy Gospel of God, and that the defendant being so sworn as aforesaid before the said W. James as such surrogate (he the said W. James having competent authority, as such surrogate, to administer the said oath) did, for the purpose of thereby obtaining such licence for the marriage of the said J. Baker and S. Fry, falsely, corruptly, &c., swear, &c., that the name of him, the defendant, was J. Baker, and that he was one of the parties for whose marriage a licence was then applied for, and that he was a yeoman and widower, and that the said S. Fry had had her usual place of abode within the parish of W. in the county of S. for the space of fifteen days then last past. (The count then negatived the matter sworn in the usual manner.) By means of which false oath the defendant did then obtain from the said W. James, so being such surrogate, a licence for the solemnization of a marriage between the said J. Baker and S. Fry. The prisoner having been convicted, upon a case reserved, it was contended that this count charged no offence. That a surrogate had no authority to administer an oath, and at all events not this oath, to the defendant. That the count did not aver that a written licence was obtained, or the marriage celebrated by means of such licence. But it was held that the count charged a misdemeanor. It distinctly averred that the prisoner swore falsely as to S. Fry; and any one material fact falsely sworn to was sufficient to support the charge. Then the only question was as to the surrogate's power to administer the oath; not such an oath as would support an indictment for perjury, but as would make a party guilty of a misdemeanor. By the canon law the surrogate had such power, and the 4 Geo. 4, c. 76, seemed to assume that power. To make a false oath in order to procure a marriage licence from an officer empowered to grant such licence was a misdemeanor, because it was a step toward the accomplishment of a misdemeanor. The actual celebration of the marriage was immaterial. Anything essentially connected with marriage was a matter of public concern, and therefore might involve criminal consequences. (*q*)

(*p*) In one case the question whether a father of an illegitimate child was included in the 4 Geo. 4, c. 76, s. 16, was raised on an indictment against the prisoner for falsely swearing before a surrogate that the father had given his consent to the marriage of his daughter, but not decided. *R. v. Fairlie*, 9 Cox, C. C. 209. The defendant was acquitted on the ground of a variance. The indictment alleged that the prisoner, intending to procure a marriage to be solemnized between himself and E. A. E., she being under the age of twenty-one years, without the consent of the natural and lawful father of the said E. A. E., to wit, without the consent of G. E., he being the person whose consent was by law required before the licence was granted, falsely swore that G. E., the natural and lawful father of the said minor, was consenting. The affidavit sworn by the prisoner contained the statement set out in the indictment; but it appeared that

the girl was the illegitimate daughter of G. E., who had not given his consent to her marriage. The Recorder held that, as the indictment had described G. E. as the natural and lawful father, and the evidence showed that E. A. E. had no natural and lawful father, the prisoner must be acquitted.

(*q*) *R. v. Chapman*, 1 Den. C. C. 432, 18 L. J. M. C. 152. 2 C. & K. 846. Anonymous, cited by the C. J. of the K. B. 1 Vent. 370. The prisoner was indicted for wilful and corrupt perjury in making a false affidavit before a commissioner for taking oaths in the Court of Queen's Bench, for the purpose of getting a bill of sale filed under the Bills of Sale Act, 1854. Held, a misdemeanor, though not wilful and corrupt perjury. Held also, that the conclusion of an indictment for perjury, "that so the defendant did commit wilful and corrupt perjury" might be rejected as surplusage, and a conviction for the misdemeanor was right upon

Before the C. L. P. Act, 1852, if an action had abated by the death of a co-plaintiff, and no suggestion had been entered according to the 8 & 9 Will. 3, c. 11, s. 6, a trial was *extra-judicial*, and no perjury could be assigned upon any false evidence given at such trial. (r)

Oath must be taken before a competent jurisdiction.²—The oath must be taken before a competent jurisdiction, that is, before some person or persons lawfully authorized to administer it. So that a false oath taken in a court of requests, in a matter concerning lands, has been holden not to be indictable, that court having no jurisdiction in such cases. (s) And it seems clear, that no oath whatsoever taken before persons acting merely in a private capacity, or before those who take upon them to administer oaths of a public nature, without legal authority for their so doing, or before those who are legally authorized to administer some kinds of oaths, but not those which happen to be taken before them, or even before those who take upon them to administer justice by virtue of an authority seemingly colourable, but in truth unwarrantable and merely void, can ever amount to perjuries in the eye of the law, because they are of no manner of force, but are altogether idle. (t) But a false oath taken before commissioners, whose commission at the time is in strictness determined by the demise of the King, is perjury, if taken before such time as the commissioners had notice of the demise; for it would be of the utmost ill consequence in such case to make their proceedings wholly void. (u)

By 27 & 28 Vict. c. 19, entitled 'An Act to make provision for the discipline of the Navy,' s. 63, every person who, upon any examination upon oath or upon affirmation before any court-martial held in pursuance of this Act, shall wilfully and corruptly give false evidence, shall be deemed guilty of wilful and corrupt perjury, and every such offence, wheresoever committed, shall be triable and punishable in England; and where any such offence committed out of England is tried in England, all statutes and laws, applicable to cases of perjury, shall apply to the case.

Wilful and corrupt false swearing before a local marine board, duly and lawfully appointed and constituted, under 17 & 18 Vict. c. 104, upon a matter material to an inquiry then being lawfully investigated by them, under 25 & 26 Vict. c. 63, s. 23, is perjury. (v)

such an indictment. *R. v. Hodgkiss*, 39 L. J. M. C. 14, L. R. 1 C. C. R. 212.¹

(r) *R. v. Cohen*, 1 Stark. R. 511. See now the 15 & 16 Vict. c. 76, s. 135.

(s) *Buxton v. Gouch*, 3 Salk. 269.

(t) 1 Hawk. P. C. c. 69, s. 4, and the authorities there cited; 4 Black. Com. 137. See the 5 & 6 Will. 4, c. 62, s. 13, *post*.

(u) 1 Hawk. P. C. c. 69, s. 4. Bac. Ab. tit. *Perjury* (A).

(v) *R. v. Tomlinson*, 36 L. J. M. C. 41; 1 L. R. C. C. 49. It seems that the taking of a false oath before a court-martial is perjury at common law, *R. v. Heane*, 4 B. & S. 947; 33 L. J. M. C. 115.

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¹ See *C. v. Still*, 83 Ky. 275; *Tuttle v. P.*, 36 N.Y. 431; *Warner v. Fowler*, 8 Md. 25; *Smith v. Myers*, 41 Md. 425.

² A number of instances are given in Mr. Bishop's *New Criminal Law*, vol. ii., ss. 1024

et seq. of cases of perjury before special and peculiar tribunals, but they are too numerous to be given here. Neither in America nor in England can perjury be assigned on an extra-judicial oath, s. 1027.

1911 By 38 & 39 Vict. c. 35 (The Public Health Act, 1875), s. 263, any person who on any examination on oath, under any of the provisions of this Act, wilfully and corruptly gives false evidence, shall be liable to the penalties inflicted on persons guilty of wilful and corrupt perjury. (*w*)

By 32 & 33 Vict. c. 62 (The Debtor's Act, 1869), s. 14, if any creditor in any bankruptcy or liquidation by arrangement or composition with creditors in pursuance of the Bankruptcy Act, 1869, wilfully and with intent to defraud makes any false claim, or any proof, declaration, or statement of account which is untrue in any material particular, he shall be guilty of a misdemeanor, punishable with imprisonment not exceeding one year, with or without hard labour.

By s. 13 of the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), in a reference under the Act the referees or umpire 'may take the examination of the parties and witnesses on oath, and may administer oaths and take affirmations, and if any person so sworn or affirming wilfully and corruptly gives false evidence he shall be guilty of perjury.'

By s. 47 of the Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), 'If any person making any affidavit under this Act shall therein swear falsely such person shall be deemed guilty of wilful and corrupt perjury.'

False evidence given at an inquiry before commissioners under the Pluralities Act, 1884 (48 & 49 Vict. c. 54), is by s. 7 to be deemed perjury.

Wilfully and falsely taking an oath or making an affirmation at the election of a coroner is made perjury by 50 & 51 Vict. c. 71, s. 14, (4).

1911 Sec. 8 of the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), provides that every person bringing a watch case to any assay office for the purpose of its being assayed, stamped, or marked, shall make a declaration before an officer of the assay office appointed for that purpose or before a justice of the peace or a commissioner for oaths, as to the country or place in which the case was made, and goes on (3), 'Every person who makes a false declaration for the purposes of this section shall be liable ~~on conviction or indictment to the penalties of perjury, and~~ on summary conviction to a fine not exceeding £20 for each offence.'

By s. 15 of the Foreign Marriage Act 1892, (*x*) persons making false oaths or signing false notices under the Act or falsely representing themselves to be persons whose consent to the marriage is required by law are made liable to the penalties of perjury.

By the Commissioners for Oaths Act, 1889 (52 Vict. c. 10, s. 7), 'Whoever wilfully and corruptly swears falsely in any oath or affidavit taken or made in accordance with the provisions of this Act, shall be guilty of perjury in every case where if he had so sworn in a judicial proceeding before a court of competent jurisdiction he would be guilty of perjury.'

(*w*) False evidence given on oath before a referee appointed under the Agricultural Holdings Act, 1875 (38 & 39 Vict. c. 92), is by s. 26 made the subject of perjury. See also 46 & 47 Vict. c. 61, s. 13. As to inquiries before Public Works Loan Commissioners, see 38 & 39 Vict. c. 89, s. 44; before Commissioners of Customs, 39 & 40 Vict. c. 36, s. 36.

(*x*) See *post*.

By s. 9, any offence under this Act whether committed within or without her Majesty's dominions may be tried in any county in the United Kingdom in which the person charged was apprehended, or is in custody.

Where after a writ had issued, but before the appearance of the defendant, a commission was issued to examine a witness on behalf of the plaintiff, and a rule had been obtained to rescind the order for the commission, it was urged in support of the rule that for a commission to go the proceedings should be in such a state that perjury could be assigned on the depositions; and that could not be without an issue joined, to which the matter sworn would be material. Lord Campbell, C. J., 'I do not agree that there could be no indictment for perjury where the examination of the witness has taken place before issue joined, if his evidence be material to the issue afterwards joined.' (y)

A master extraordinary in chancery had no authority, by virtue of his commission, to administer an oath in matters in the court of admiralty, and therefore an indictment for perjury cannot be supported on an oath so administered. (z) But any person who made such an affidavit, with a view to its being received by the court of admiralty, knowing at the same time it was false, was guilty of a misdemeanor at common law. (a)

An indictment for perjury committed before the insolvent court held under the now repealed Acts 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, alleged that notice of the insolvent's petition was inserted in the 'London Gazette,' and thereby a public sitting was appointed for the first examination of the insolvent, and that that sitting was adjourned. No evidence was given in support of these allegations, although the perjury was alleged to have been committed on the day to which the sitting was adjourned; the filing of the insolvent's petition, however, was proved; and upon a case reserved, it was held that upon the filing of the petition the Court had jurisdiction to institute the examination upon which the prisoner swore falsely; and as the Insolvent Debtors Court was a court of record, it must be presumed that its sittings in a matter within its jurisdiction were lawfully and rightfully holden; and as the indictment contained the general allegation that the Court had competent power to administer the oath to the prisoner, that was sufficient under the 14 & 15 Vict. c. 100, s. 20, and the allegations, of which no proof was given, might be rejected as surplusage. (b)

Where an affidavit of debt was sworn under the 1 & 2 Vict. c. 110, s. 8, with a view to make a trader a bankrupt, unless he paid or gave security, &c., perjury might be assigned upon it, notwithstanding the alterations introduced by the 5 & 6 Vict. c. 122, as to this mode of proceeding against a trader: and such an affidavit fell within the 5 &

(y) *Finney v. Beesley*, 20 L. J. Q. B. 396, 17 Q. B. 86.

(z) *R. v. Stone*, Dears. C. C. 251; 23 L. J. M. C. 14.

(a) *Per Pollock*, C. B., and *Parke*, B., *ibid.*

(b) *R. v. Westley*, Bell, C. C. 193, 29 L. J. M. C. 35. The prisoner was convicted

of perjury in an examination 'by the Court' under s. 27 of the Bankruptcy Act, 1883. It appeared that the registrar after administering the oath left the room, it was held that there had been no valid examination by 'the Court,' and the conviction was quashed. *R. v. Lloyd*, 19 Q. B. D. 213.

6 Vict. c. 122, s. 67, and therefore might be sworn before a registrar or deputy registrar of the court of bankruptcy. (c)

Where an unmarried woman obtained judgment in a county court against the prisoner, and obtained a judgment summons against him under the City of London Small Debts Act, 15 & 16 Vict. c. 77, and on the hearing of the summons it appeared that the woman had married after she had recovered judgment in the county court, and thereupon the judge of the London court amended the summons by adding the name of the husband, and the prisoner was charged with perjury in his examination before the judge of the London court after the said amendment; it was held that the judge had no power to make the amendment, and consequently the false swearing was in a cause which had no existence and *coram non judice*. (d)

A person may be indicted for perjury who gives false evidence before a grand jury when examined as a witness before them upon a bill of indictment, and any person, not being a grand jurymen, who hears the evidence given before the grand jury, is competent to prove the evidence so given. (e)

Perjury was alleged to have been committed in taking a false oath on a material issue at the hearing of a county coroner's inquisition held before a deputy coroner in the absence of the coroner. The 6 & 7 Vict. c. 83, s. 1, gives a county coroner power to appoint a deputy, provided that no such deputy shall act for any coroner except during the illness of the said coroner, or during his absence from any lawful or reasonable cause. On the trial of the indictment for perjury, the prosecution gave evidence that the coroner, who was an attorney in practice, and registrar of the county court, and held other offices, was absent from his home and place of business in order to take a vacation, such absence and vacation and air and exercise having been recommended to him by his medical advisers as necessary for his health, which had become permanently impaired from an operation which he had undergone. He spent three or four days in every week shooting. The vacation for registrars was appointed at that period of the year, and that was the only time of the year during which he obtained a vacation. The judge held at the trial that there was lawful or reasonable cause for the absence of the coroner, and the prisoner was found guilty. Held, that the question of lawful or reasonable cause was to be decided by the judge, and not by the jury, and that there was some evidence upon which the judge could so decide, and that the conviction was right. (f)

The rule of law is that, unless a statute requires it, an information before a magistrate need not be on oath, or even in writing. (g) Where,

(c) *R. v. Dunn*, 12 Q. B. 1026.

(d) *R. v. Pearce*, 3 B. & S. 531; 9 Cox, C. C. 258.

(e) *R. v. Hughes*, 1 C. & K. 519, Tindal, C. J. See *post*, as to whether a grand jurymen can give evidence of what passes in the grand-jury room.

(f) *R. v. Johnson*, 42 L. J. M. C. 41.

(g) Per Parke, B. *R. v. Millard*, Dears. C. C. 166. See *R. v. Shaw*, 34 L. J. M. C. 169, where, per M. Smith, J., 'Unless it is required by statute there need not be an

information in writing nor a summons in writing. Upon a warrant issued by a justice under 16 & 17 Vict. c. 119, s. 11 (An Act for the Suppression of Betting Houses), founded upon an information that a certain house was used as a common gaming house, within the meaning of the 8 & 9 Vict. c. 109 (An Act to amend the law concerning gaming and wagers); the house was searched and the appellant and others apprehended and brought before the petty sessions, when the appellant was charged with having

therefore, an information, but not on oath, was laid before a justice against a person for wilful damage to a carriage, and the prisoner was indicted for perjury committed on the hearing of that information, it was objected that by the 7 & 8 Geo. 4, c. 30, s. 30, (*h*) the information ought to have been on oath; but it was held that that section did not render an oath necessary in all cases, but was a cumulative provision in order to compel the appearance of the party charged, or to hear the case *ex parte* if he did not appear, and therefore the justices had jurisdiction. (*i*)

Owen Hughes was convicted of perjury, committed by him on the hearing of a charge against John Stanley for assault upon him, Owen Hughes, upon which charge the magistrates had convicted John Stanley. On the trial of Owen Hughes for perjury it was objected that he could not be convicted because the magistrates who heard the charge of assault had no jurisdiction, and therefore perjury could not be committed on the hearing. No written information or oath had been made before the issue of the warrant upon which John Stanley had been brought before the magistrates; but he took no objection to this although he defended himself on the merits, and called a witness on the facts. It was held that, as John Stanley was before justices who were competent to entertain the charge, and had jurisdiction in respect of time and place over the offence, the false oath taken by Owen Hughes before them was perjury, although the warrant was illegal.

Hawkins, J., in an elaborate judgment, in which Lopes and Lindley, JJ., Pollock, B., and Lord Coleridge, C. J., concurred, (*j*) said: 'I am of opinion that the conviction was right, and ought to be affirmed. In arriving at this opinion I have assumed as a fact, from the case as stated, that Stanley was arrested and brought before the justices upon as illegal a warrant as ever was issued,—a warrant signed by a magistrate not only without any written information or oath to justify it, but without any information at all. . . . Wrongful, however, as were the proceedings by which Stanley was brought into the presence of the magistrates to answer a charge which up to that moment had never been legally preferred against him; before those magistrates and in his presence a charge was made over which, if duly made, they had jurisdiction. Upon that charge it was that the hearing pro-

the management of a room in the said house for the purpose of betting with persons resorting thereto, upon horse races, contrary to the statute. No information charging such offence, or summons embodying such information had been issued or served. Held, by the majority of the Court (Cleasby, B., and Grove, J.), Field, J., dissenting, that the want of such information or summons rendered the proceedings on the hearing invalid, and that the conviction thereon must be quashed. Held, further, that a month's notice of the taking of such proceedings was not necessary before laying an information under 16 & 17 Vict. c. 119, s. 17. *Blake v. Beech*, 45 L. J. M. C. 111. If, however, the information is in writing it must be produced at the trial. *R. v. Dillon*,

14 Cox, C. C. 4. On the trial of an indictment for perjury committed on the hearing of an information under the Licensing Act for refusing to quit licensed premises, the licence itself must be produced to show that the premises were licensed, and therefore that the justices had jurisdiction. *R. v. Evans*, 17 Cox, C. C. 37.

(*h*) The 24 & 25 Vict. c. 97, s. 62, re-enacts sec. 30 of the former Act. See the clause in the Appendix.

(*i*) *R. v. Millard*, Dears. C. C. 166.

(*j*) *R. v. Hughes*, 4 Q. B. D. 614. The conviction was affirmed by Lord Coleridge, C. J., Pollock and Huddleston, BB., Denman, Field, Lindley, Manisty, Hawkins, and Lopes, JJ.; Kelly, C. B., *diss.*

ceeded ; and in support of that charge it was that the defendant was sworn, and in giving his evidence swore corruptly and falsely. The case expressly finds that the alleged perjury was committed "on the hearing of a charge against John Stanley at petty sessions for an assault on him, Owen Hughes, and for obstructing him, being a police constable in the discharge of his duty." Comparing this finding with the language of 24 & 25 Vict. c. 100, s. 38, which enacts that "who-soever shall assault, resist, or wilfully obstruct any peace officer in the due execution of his duty shall be guilty of a misdemeanor," I come without hesitation to the conclusion that the charge was that of the indictable offence created by that statute ; and I do not think a doubt could have been suggested as to this had we not been informed in the course of the argument that the justices, in the result, dealt summarily with the case, and convicted Stanley under s. 12 of 34 & 35 Vict. c. 112, of an assault upon Hughes, being a constable in the "execution" of his duty, and sentenced him to six months' imprisonment with hard labour. . . . Now, a charge having been made before them of an indictable offence, committed within their jurisdiction, by a person then bodily present, it seems to me the justices were bound to take cognizance of it. The seventeenth section of 11 & 12 Vict. c. 42, expressly recognizes the legality of depositions of witnesses taken in cases in which persons charged with indictable offences are brought before the justices with or without warrant. Had the justices proceeded upon the defendant's deposition to commit Stanley for trial, instead of convicting him summarily, it is difficult to see what possible objection could have been made to the legality of their proceedings. They did not, however, think fit to adopt that course. They took, it is true, the evidence on oath of the defendant upon the charge for the indictable misdemeanor created by 24 & 25 Vict. c. 100, but having done so, they proceeded to convict summarily under a different statute,—34 & 35 Vict. c. 112,—without, as I recollect, any new information or charge of the latter offence. In short, they convicted him of an offence with which he had never been legally charged. . . . In the case before us we have only to determine whether the justices, at the moment when they swore the defendant in the support of the charge which was made, had jurisdiction to hear that charge. Whether they afterwards pronounced a legal or an illegal judgment is immaterial to the present inquiry. Assuming, however, contrary to the view I have taken, that the charge upon which the defendant was sworn was of an offence punishable upon summary conviction under 34 & 35 Vict. c. 112, and that verbal information of that offence was made before the magistrate, who, without written information or oath, illegally issued the warrant under which Stanley was brought before the petty sessions, I should still be of opinion that the justices in hearing that charge and taking evidence in support of it were acting within their jurisdiction. There is a marked distinction between the jurisdiction to take cognizance of an offence and the jurisdiction to issue a particular process to compel the accused to answer it. The former may exist, the latter may be wanting. To found jurisdiction to take cognizance of an offence, notwithstanding the dictum of Lord Mansfield in *R. v. Fearshire*, 1 Leach, C. C. 202, it has been constantly held that

written information is not necessary. (Per Grose, J., in *R. v. Thomson*, 2 T. R. 18; Park, B., in *R. v. Millard*, 22 L. J. M. C. 108; per Erle, C. J., in *R. v. Shaw*, 34 L. J. M. C. 169, and per Crompton, J., in *Turner v. Postmaster-General*, 5 B. & S. 756; see also old forms of conviction, in which the information is set out thus: "A. B. . . . giveth me to understand and be informed," &c.) The information, which is in the nature of an indictment, of necessity precedes the process; and it is only after the information is laid that the question as to the particular form and nature of the process can properly arise. Process is not essential to the jurisdiction of the justices to hear and adjudicate; it is but the proceeding adopted to compel the appearance of the accused to answer the information already duly laid, without which no hearing in the nature of a trial could take place (unless under special statutory enactment). If a mere summons is required, no writing or oath is necessary. A bare verbal information is sufficient. If a warrant is required, then, and for that purpose only, an oath substantiating the mere information is requisite not only by the provisions in Jervis's Acts, so often referred to, but by the common law, of which it was always a doctrine that a warrant which deprives a man of liberty ought not to issue without oath of the truth of the information. (See *R. v. Heber*, 2 Barn. 101.) To justify a warrant, I am also of opinion that a written information is necessary. In the case of indictable offences it is expressly made so by sec. 8. of 11 & 12 Vict. c. 42. The illegality of the warrant and of the arrest did not, however, affect the jurisdiction of the justices to hear the charge, whether that hearing proceeded upon a valid verbal information followed by an illegal process, or upon an information for the first time laid in the presence of Stanley, upon which he was then and there instantly discharged. The dictum of Holt, C. J., in *R. v. Fuller*, 1 Ld. Raymond, 509, is an express authority recognizing the legality of a conviction upon an information *instantly*. Stanley might, it is true, had he known of the illegality of his arrest, have demanded his release from it, and prayed for an adjournment to a future day to enable him to prepare his defence. This I think it would have been the duty of the magistrates to grant; see per Crompton J., in *Turner v. Postmaster-General*, 5 B. & S. 756, and per Blackburn, J., in *R. v. Shaw*, 34 L. J. M. C. 169. A refusal to do this however would not have destroyed their jurisdiction, though it might possibly have afforded good ground for setting aside the conviction on the ground that they had not allowed the accused sufficient opportunity to answer the charge. Another course might have been pursued, viz., to commence to hear, and if necessary adjourn the further hearing to a future day, a power expressly given by 11 & 12 Vict. c. 43, s. 16. It so happens, however, in the case before us, that neither the magistrate nor Stanley were aware of the illegality of the warrant, and so the hearing proceeded without objection, and as if all things were in order. To use the language of the case, "The case was gone into of assault and obstruction." Stanley defended himself, and called a witness to show he was not guilty, and, in the result was convicted as I above stated. Possibly that conviction may be open to the objections that the justices had no jurisdiction to convict of the offence created by statute 34 & 35 Vict. c. 112, when the only charge made against him was of misdemeanor created

by 24 & 25 Vict. c. 100, on the authority of *R. v. Brickhall*, 33 L. J. M. C. 156; or upon the ground that under the circumstances Stanley had not such opportunity of answering and time to answer as he was in common justice entitled to; see *Blake v. Beech*, 1 Ex. D. 320. If the contention on the part of the defendant be correct, then Stanley, even though he had suffered the whole imprisonment, to which he was sentenced, would be liable to be tried again and could not plead *autrefois convict*, and if he had been acquitted would have been in no condition to plead *autrefois acquit*, — two very startling consequences. A flood of authorities might be cited in support of the proposition that no process at all is necessary when, the accused being bodily before the justices, the charge is made in his presence, and he appears and answers it. In 2 Hawk. 28, it is said, "It seemeth plain from the nature of the thing that there can be no need of process where the defendant is present in Court, but only where he is absent." In *R. v. Stone*, 1 East, 649, Lord Kenyon said, "Justice requires that a party should be duly summoned and fully heard before he is condemned; but if he be stated to be present at the time of the proceedings and to have heard all the witnesses, and not to have asked for any further time to bring forward his defence, if he had any, this at all times has been deemed sufficient." *R. v. Shaw*, 34 L. J. M. C. 169, is to the same effect, and appears to me to be decisive of the present case. The defendant in that case was convicted of perjury committed on the hearing of a charge punishable on summary conviction against one Kilshaw, a beer-shop keeper, under 18 & 19 Vict. c. 118. The proceedings, not being prescribed by that Act, were regulated as are proceedings for the offence of which Stanley was convicted, by Jervis' Act, 11 & 12 Vict. c. 43. At the trial no proof was given of any written information warranting a summons; indeed the evidence showed that the summons was filled up by the magistrate's clerk, and handed to a superintendent of police who took it to the magistrate, who read and signed it without making any inquiry or requiring any statement of fact, — very like the circumstances of the present case. It was proved that Kilshaw appeared before the justices, that the charge was then made against him, that he answered it, and that the defendant committed perjury in evidence which he gave on his behalf. It was objected that the justices had no jurisdiction to hear the charge against Kilshaw, because there was no information to justify the issuing of a summons. Erle, C. J., said, "In my opinion if a party is before the magistrate, and he is then charged with the commission of an offence within the jurisdiction of that magistrate, the latter has jurisdiction to proceed with that charge without any information or summons having been previously issued, unless the statute creating the offence imposes the necessity of taking some such step." See also, per Blackburn, J., "I think when a man appears before justices and a charge is then made against him, if he has not been summoned he has good ground for asking for an adjournment; if he waives that and answers the charge, a conviction would be perfectly good against him, and the witnesses if they swore falsely would be liable to indictment for perjury." To the same effect, are *R. v. Millard*, 22 L. J. M. C. 108; *R. v. Berry*, 28 L. J. M. C. 86; *R. v. Simmons*, Bell, C. C. 168; *R. v. Smith*, L. R. 1 C. C. R. 110; *R. v. Fletcher*, 40 L. J. M. C. 128; *Turner v. Postmaster-General*, 5 B. & S. 756, in which latter case the

defendants were in custody upon a charge of felony, which could not be sustained, but before the magistrate were charged with and convicted of a different offence for which they could not be legally arrested without a warrant on information on oath, yet the Court upheld the conviction. I do not look upon *Blake v. Beech*, 1 Ex. D. 320, as deciding that the magistrates in the case then before them had no jurisdiction, but only that the conviction ought to be quashed for irregularity under the peculiar circumstances of the case. *R. v. Pearce*, 3 B. & S. 531, only decides that perjury cannot be committed by a witness who is sworn in a nonexistent cause, which is undeniable. That case would have been a strong authority for the defendant if no charge had been made against Stanley before the defendant was sworn. *R. v. Scotton*, 5 Q. B. 493, was the strongest authority cited in favour of the defendant. That case however turned upon the peculiar language of the 6 & 7 Wm. 4, c. 65, s. 9. "provided that before any proceedings shall be had or taken upon such information, the charge shall be deposed to on oath, &c." It does not become necessary therefore to consider how far that case has been affected by more recent decisions. In the course of the argument there was some discussion as to whether the warrant was produced before the justices. In my opinion, whether it was or not is immaterial; had it been so it would have proved nothing, for it could not in any case be treated as the information. It was the act and process of the magistrate alone, not the information of the informer, and the recital of an information in it would be no evidence that there was such an information, in fact: see *Stevens v. Clark*, per Cresswell, J., 1 Car. & M. 509. I have carefully considered the provisions of Jervis's Acts, 11 & 12 Vict. cc. 42 & 43, but I find in them nothing at all militating against the view I have expressed. The sections of those statutes to which our attention was called, which regulate the formalities to be observed when a charge is made against an absent person whose presence it is desired to procure, do not seem to me to have any bearing upon a case like the present where the charge is made in the presence of the accused, who is then and there called upon to answer it, as he lawfully may be, according to the dictum of Holt, C. J., to which I have referred. In such a case it is in my opinion altogether immaterial, so far as the jurisdiction of the justices to hear that charge is concerned, whether the accused was before them voluntarily or otherwise, or on legal or illegal process. I have already pointed out that Stanley may have good grounds for asking that his conviction may be quashed irrespective of the invalid objection raised by the defendant. But this conviction in my opinion ought to be affirmed.'

Under the 7 & 8 Vict. c. 101, s. 2, an application for an order in bastardy is to be made to the justices acting for the petty sessional division in which the mother 'may reside;' and they have no jurisdiction to entertain such an application, unless she does reside within their division, and consequently, if she do not so reside, perjury cannot be committed on such an application. (*k*)

(*k*) *R. v. Hughes*, D. & B. C. C. 188. In this case the mother was delivered in March, and resided with her parents till November. She then went and lodged at D. in another petty sessional division for three weeks, and

then applied to the justices of that division. Her lodging there was not for any improper or fraudulent purpose, but because the justices met in the town, and it was more convenient for her than to go a distance from

Upon an indictment for perjury alleged to have been committed by the prisoner upon the hearing of an application by Martha Humphreys for an order upon him for the maintenance of her bastard child, it appeared that the summons was issued by a magistrate on the personal application of M. Humphreys, who stated, but not on oath, that she had been delivered of a bastard child more than twelve months previous, and that money had been paid by the prisoner for its maintenance within twelve months of its birth. The summons alleged that the prisoner had 'paid money for its maintenance within twelve months after its birth,' instead of stating that proof thereof had been made. The prisoner appeared personally in answer thereto. He was also assisted by an attorney. No objection was made to any of the proceedings on which the summons was founded, and the case was gone into on the merits before the stipendiary magistrate, who examined M. Humphreys in support of the application, who proved the payment of money as alleged, and also examined the prisoner in answer thereto, who swore he had never paid her any money. It was objected that, as there had been no proof on oath of money having been paid for the maintenance of the child within twelve months from its birth before the summons was issued, the magistrate had no jurisdiction to hear the case; but, upon a case reserved, it was held that the prisoner had waived the objection. The proceeding against the putative father is not a proceeding *in penam* to punish for a crime, but merely to impose a pecuniary obligation, and the summons is mere process to bring the defendant into court in a civil suit. According to strict regularity, before the summons issued there ought to have been evidence on oath of the payment of the money, although it is not expressly required by the statute to be on oath, as in the case where the complaint is made before the birth of the child. Further, it would have been proper that the summons should have been in the form given by the statute; but supposing that, if the prisoner had not appeared, the petty sessions could not have lawfully proceeded to hear evidence of the paternity; or that, if he had appeared, and objected to the regularity of the summons, the objection ought to have prevailed; yet when he actually appeared, and instead of objecting to the regularity of the summons, asked the Court to give judgment in his favour on the merits, and tendered evidence to absolve himself from liability, he waived any irregularity there might be in the process, and when he had thus submitted himself to the jurisdiction of the Court, the Court had jurisdiction to hear and decide the case. (*l*)

Upon an indictment for perjury, it appeared that the perjury had been committed upon the hearing of a second application for a bastardy order, a former application having been heard by the magis-

her parents' house to the justices' meeting of the division in which her parents resided. After the order she went into service without returning home. The jury found that she had no other home than D., and that she was residing at D., if in point of law she could under the circumstances be considered to be so. It was held that the justices had jurisdiction to make the order, as her residence was at D.

(*l*) *R. v. Berry*, Bell, C. C. 46. Martin, B., *dissentiente*. The application for the bastardy order was made under the 7 & 8 Vict. c. 101, and the 8 & 9 Vict. c. 110; *R. v. Fletcher*, L. R. 1 C. C. R. 320; 40 L. J. M. C. 123. See *R. v. Simmonds*, Bell, C. C. 168; 28 L. J. M. C. 183; *R. Wiltshire*, 12 Ad. & E. 793; *R. v. Smith*, 11 Cox, C. C. 10; *R. v. Chugg*, 11 Cox, C. C. 558.

trates and dismissed upon the merits. It was contended that the magistrates were *functi officio* after the first application had been dismissed on the merits, and had no jurisdiction to entertain the second application. But, upon a case reserved after conviction, the judges were unanimously of opinion that the magistrates had jurisdiction to hear the second application and administer an oath. The Court of Queen's Bench had decided that one inquiry on the merits did not make the matter a *res judicata*; but even if the previous dismissal were a defence, still the magistrates on the second application had jurisdiction to hear the application and administer an oath. (*m*)

An indictment alleged that T. Horne was duly licensed to keep a beer-house, and that an information had been laid against him for that he, being duly licensed to keep a beer-house, had it open unlawfully on the morning of Sunday, the 6th of February, 1853, and charged the defendant with falsely swearing that he had not been supplied with beer in the house on that morning. Horne's licence was for a year, commencing on the 11th of May, 1853, but Horne was keeping the beer-house on the 6th of February previously. It was objected that the averment that Horne was duly licensed on the 6th of February was not proved, and that if he was not so licensed, the justices had no jurisdiction to hear the information. But Crompton, J., held that the justices had jurisdiction generally over the subject of keeping houses for the sale of beer and other liquors open on Sunday; and that as, in order to establish an offence, it was not necessary to prove that the keeper of the house was licensed, what was sworn on the subject of Horne's keeping the house open brought the case within the jurisdiction of the justices, even if it turned out that he was not licensed at the time. (*n*)

By 4 Geo. 4, c. 34, s. 2, all complaints which shall arise between masters or mistresses and their apprentices, as to wages, &c., may be heard and determined before a justice of the peace. After an apprenticeship was over, the former apprentice summoned his late master under this Act for wages alleged to be unpaid, and on the hearing swore falsely. It was held that this was perjury, inasmuch as the magistrate had, at all events, jurisdiction to determine whether the relation of apprenticeship continued or not. (*o*)

The 6 & 7 Will. 4, c. 65, s. 9, renders it necessary that an information under the 1 Will. 4, c. 32, the Game Act, should be verified on the oath of a credible witness before any proceeding is taken upon it for summoning the party accused or compelling his appearance, and if this course has not been adopted, the justices have no jurisdiction to hear the case; and, consequently, a person giving false evidence on such an occasion is not guilty of perjury. (*p*)

The oath must be material to the question depending.¹—The oath

(*m*) *R. v. Cooke*, 2 Den. C. C. R. 462; 21 L. J. M. C. 136. See *R. v. Brisby*, 1 Den. C. C. 416.

(*n*) *R. v. Kirton*, 6 Cox, C. C. 393. Crompton, J., refused to reserve the point.

(*o*) *R. v. Sanders*, 1 L. R. C. C. R. 75. See *R. v. Bacon*, 11 Cox, C. C. 540, a case

where it was held that the magistrate had no jurisdiction, and consequently that the prisoner had not committed the offence of perjury.

(*p*) *R. v. Scotton*, 5 Q. B. 493. See *R. v. Western*, 10 Cox, C. C. 93.

AMERICAN NOTE.

¹ In some of the States of America it is not necessary under the statutes that the matter sworn should be material to the issue. Bishop, ii. ss. 1052, 1053.

must be material to the question depending: for if it be wholly foreign from the purpose, or altogether immaterial, and neither in any way pertinent to the matter in question, nor tending to aggravate or extenuate the damages, nor likely to induce the jury to give the readier credit to the substantial part of the evidence, it cannot amount to perjury, because it is wholly idle and insignificant; as, where a witness introduces his evidence, with an impertinent preamble of a story concerning previous facts, not at all relating to what is material, and is guilty of a falsity as to such facts. (g)

If it appear plainly that the scope of the question to a witness was to sift him as to his knowledge of the substance, by examining him strictly concerning the circumstances, and he gave a particular and distinct account of the circumstances which afterwards appears to be false; it seems he is guilty of perjury, inasmuch as nothing can be more apt to incline a jury to give credit to the substantial part of a man's evidence, than his appearing to have an exact and particular knowledge of all the circumstances relating to it. (r) And it is spoken of as a reasonable opinion, that a witness may be guilty of perjury in respect of a false oath concerning a mere circumstance, if such oath have a plain tendency to corroborate the more material part of the evidence; as if, in trespass for spoiling the plaintiff's close with the defendant's sheep, a witness swears that he saw such a number of the defendant's sheep in the close; and being asked how he knew them to be the defendant's, swears that he knew them by such a mark, which he knew to be the defendant's mark, whereas, in truth, the defendant never used any such mark. (s) And it appears to have been holden not to be necessary that it should be shown to what degree the point in which a man is perjured was material to the issue, and that it will be sufficient if the point were circumstantially material. (t) And still less is it necessary that the evidence be sufficient for the plaintiff to recover upon, since evidence may be very material, and yet not full enough to prove directly the point in question. (u) Where A. advanced money to B. on two distinct mortgages, upon one of which the security was insufficient, and B. assigned the equity of redemption in both to C., who assigned the insufficient estate to an insolvent, and filed a bill against A. to redeem the other, to which bill A. put in his answer, and therein denied having had notice of the assignment to the insolvent; it

(g) *R. v. Griepe*, 1 Lord Raym. 256. Bac. Ab. tit. *Perjury* (A). See 2 Roll. 41, 42, 369. Hetl. 97. 1 Hawk. P. C. c. 69, s. 8.

(r) See 1 Hawk. P. C. c. 69, s. 8. Upon an indictment for robbery committed on the 13th of April, between eight and ten o'clock at night, a witness for the prisoner swore, not only that the prisoner was at home at that time, but in answer to the judge said, that the prisoner had lived in the same house for the two years previous, and that during the whole of that time he had not been absent from the same house for more than three nights together. The last two statements were proved to be false, as the prisoner for a whole year of the period

spoken to had been in prison. Held, that the evidence so last given was material to the inquiry, and the proper subject of assignments of perjury, inasmuch as those latter statements tended to render more probable the previous statements made, that the prisoner was at home on the night of the 13th of April. *R. v. Tyson*, 37 L. J. M. C. 7; 11 Cox, C. C. 1. See *R. v. Naylor*, 11 Cox, C. C. 13; *R. v. Alsop*, 11 Cox, C. C. 264.

(s) Bac. Ab. tit. *Perjury* (A). 1 Hawk. P. C. c. 69, s. 8. See *R. v. Gardiner*, post.

(t) *R. v. Griepe*, 1 Ld. Raym. 256; *R. v. Muscot*, 10 Mod. 195.

(u) *R. v. Rhodes*, 2 Ld. Raym. 886.

was holden that the notice was a material fact upon which perjury might be assigned. (*v*)

An indictment for perjury committed before commissioners of taxes on an appeal of W. Hewatt against a surcharge for a greyhound used by him on the 24th of November, averred that it was a material question whether a certain receipt produced by the prisoner on the hearing of the appeal was given to him before the 12th of September then last past, and that the prisoner falsely swore that the receipt was given to him before the said 12th day of September. At the commissioners' meeting, evidence was given that Hewatt and the prisoner were coursing, on the 24th of November, with two greyhounds, one of which had been Hewatt's, who had no certificate. Hewatt, in support of his appeal against a surcharge for this dog, said that the dog had been sold to the prisoner long before, and called the prisoner as a witness. The prisoner swore that he bought the dog on the 6th of September, and produced a receipt for the purchase-money bearing that date. The surveyor asked him whether the receipt was given at the time of the sale, and he said it was not, but a few days after. On being pressed, he said it was given to him before the 12th of September. The surveyor pointed out to him that the receipt bore date the 18th of November, so that the prisoner must be mistaken; but the prisoner persisted, and swore positively that it was given him before the 12th of September. Officers from the stamps proved that the paper on which the receipt was written was stamped on the 18th of November, and could not have been issued from the stamp office before that day. It was objected that the materiality of the question as stated in the indictment had not been shown; that the material question was, whether the dog was the prisoner's or Hewatt's on the 24th of November, the day of the coursing. It had not been disproved that there had been a sale of the dog on the 6th of September; and if there was, the time of giving the receipt, or even the fact of any receipt having been given, was immaterial. The objection was overruled, and on a case reserved, Lord Abinger, C. B., said, 'The whole matter turned on the credit of the witness, and he tries to support his credit by false evidence. The receipt is to confirm his evidence, and he swears it was given before the 12th. If that were true, the proof would be decisive.' Williams, J., 'The time when this receipt was given is a step in the proof.' Lord Denman, C. J., 'Everything is material which affects the credit of the witness.' Lord Abinger, C. B., 'Every question in cross-examination which goes to the credit of the witness is material. If a witness were asked, in cross-examination, whether he was in such a place at such a time, and he denied it, that would be material if it went to his credit. In the present case, if they could not have contradicted the prisoner by the date of the stamp, the receipt confirming his evidence would have made out the case before the commissioners. (*w*)

The prisoner was indicted for perjury before a court of requests, in a proceeding, under the interpleader clause of the Act establish-

(*v*) *R. v. Pepys, Peake*, N. P. R. 138,
Lord Kenyon, C. J.

(*w*) *R. v. Overton*, C. & M. 655. 2 M. C.
C. R. 263, A. D. 1842.

ing the court, to ascertain whether a certain pig, which had been seized under an execution issued against him on the 26th of September, had been sold by him on the 5th of August to his brother. The prisoner had sworn that he had sold the pig to his brother on the 5th of August, and the allegation of perjury was, that the pig was not sold by the prisoner to his brother on the said 5th day of August. It was contended that whether the pig was sold or not on the 5th of August was not the material question; the material question was whether or not, at any time before the issuing of execution, there had been a sale of the pig by the prisoner to his brother. It was quite immaterial whether the sale took place on a particular day, if it took place at some time prior to the execution. Maule, J., 'I think that the ultimate question to be decided is one thing, and yet that a material question may be raised upon a matter collateral to that question. I do not at all think that I can confine the law of perjury by making that only perjury which, is material to the only question to be tried, otherwise persons might perjure themselves with impunity. It might be a material question in a case of murder what coloured coat a man had on: the colour of the pig, as I put it, might be most material; for suppose a person swore that this was a black pig, and another witness swore it was white, it would have been a material question whether the pig was black or white, although the ultimate question would have been whether it was sold at the time when it was alleged to have been sold.' (x)

On the hearing of an information against Robinson, under the 1 Will. 4, c. 32, s. 30, for committing a trespass in pursuit of game on a close in the occupation of T. Warren, a witness having proved that he saw Robinson in Warren's field, and saw him commit the offence there, the prisoner swore, on behalf of Robinson, that he went with Robinson into a lane adjoining the field, and that Robinson shot into the field, but did not enter it, and that he himself went into the field and fetched off what Robinson killed. It was contended that this evidence was not material; because Robinson was equally guilty of an offence within the 1 Will. 4, c. 32, s. 30, whether he went into the field and shot there, or whether he shot from the lane, and the prisoner in his company went in and brought away the game. But Williams, J., held that the evidence was material. (y)

An indictment alleged that a cause of divorce or separation was pending in the Court of Arches, which was promoted by E. Kelly against her husband J. Kelly, and that J. Worley was examined as a witness on behalf of E. Kelly, and that interrogatories were exhibited to Worley on behalf of J. Kelly, and that Worley falsely swore that he never passed by the assumed names of Abbott or Johnson, and it was proved that Worley was a witness on the part of the wife in the suit, and that interrogatories on behalf of the husband, by way of cross-examination, were exhibited to him, and

(x) *R. v. Altass*, 1 Cox, C. C. 17, A. D. 1843. A case once occurred at Gloucester where on an indictment for stealing a rabbit the question turned on whether a rabbit found in the prisoner's possession was a buck or doe rabbit, and numerous witnesses were called on each side, and the verdict was,

'We find it was a buck rabbit' — a case well illustrating Maule, J.'s remarks.

(y) *R. v. Scotton*, 5 Q. B. 493, A. D. 1844. The question was argued in the Q. B., but not decided, the case going off on another point. See *ante*, p. 307.

that one of the questions put to him, with the view of impeaching his credit, was, 'Have you not passed by the name of Abbott and also of Johnson?' He answered, 'I never passed by the assumed name of Abbott or Johnson.' He had, however, for several years gone by the name of Abbott, and lived with a woman who took that name, and two of his children by her were christened in that name. Lord Denman, C. J., 'I do not think that the evidence of materiality is sufficient. I do not mean to say that a false answer given, under such circumstances as those proved, might not support a charge of perjury; but I am of opinion that in this case enough has not been shown on the part of the prosecution to connect the false answer with the issue on which the evidence was given. It might have been material, but we cannot clearly see that it was so.' (z)

Where on a trial for rape the prosecutrix swore that she had never got one Williams to write a letter for her, which was shown to her, and on a trial for perjury in so swearing, it was proved that she had got Williams to write a letter to the person she had charged with the rape, saying, 'I will do all I can to clear you.' 'I should not have went to the police about the matter at all, if I had not been persuaded by' two persons whom she named, &c.; it was held that the evidence relating to the writing of this letter was clearly material. (a)

The prisoner was indicted for perjury committed by him on the hearing of a summons, which he had taken out against the prosecutor before the justices at petty sessions, for using language calculated to incite him to commit a breach of the peace. The language used by the prosecutor was in consequence of the prisoner, as the prosecutor alleged, having kicked and struck a horse, and several witnesses were called who proved this. The prisoner's attention was then called to what the witnesses had said, and he was asked on cross-examination whether it was true; he, however, denied that he had ever kicked or struck the horse, and the justices thereupon committed him for trial for perjury. Held, that no perjury could be assigned, as the statement by the prisoner that he had never kicked or struck the horse was merely collateral. (b)

Upon the trial of *Doe d. Richard v. Griffiths*, a copy of the will of William Joseph was tendered, and on objection to its admissibility, the prisoner, who was then attorney for the lessor of the plaintiff, swore that he had examined the copy produced with the original will, in the registry at Llandaff; and upon further objection that the original will was inoperative in respect of a chattel interest, and that, therefore, either the probate ought to be produced or the Act Book be proved, the prisoner further deposed that he had examined the memorandum at the foot of the copy of the will, with the entry in the Act Book at the same registry. Upon this evidence the judge offered to receive the document in evidence, but the plaintiff's counsel withdrew it. Upon the trial for perjury, it was proved that the defendant had

(z) *R. v. Worley*, 3 Cox, C. C. 535, A. D. 1849. As no part of the evidence, except the single question and answer, is stated, it is impossible to see what this decision amounts to.

(a) *R. v. Bennett*, 2 Den. C. C. 240, A. D. 1851. Talfourd, J., on the trial, and approved by the judges on a case reserved on other points.

(b) *R. v. Holden*, 12 Cox, C. C. 166.

not made either of the examinations which he had so deposed to, and he was found guilty of perjury; but Erle, J., reserved the question, whether the false oath was relevant and material to the issue then being tried, so as to amount to perjury; as to which the following were the facts:—On the trial of the ejectment, the lessor of the plaintiff claimed to be entitled to a term, which had been granted to William Joseph and Rees Morgan jointly; and his title was that Morgan had survived Joseph, and assigned the term to Catherine, the widow of Joseph, who married Saunders, and on her marriage made a settlement, under which the term vested in him. The will of Joseph was irrelevant to this title; but the time of his death was a material fact, in order to prove that Morgan survived him, and proof of the probate of the will of Joseph would thus have been relevant evidence towards establishing the plaintiff's title. The purpose of the plaintiff's counsel in tendering the evidence, was to clear a doubt respecting the interest of Joseph in the term, which was expected to be raised by the defendant, and after the document was withdrawn, the survivorship of Morgan to Joseph was clearly proved by other evidence for the plaintiff; but the purpose for which the document was offered was not stated on the trial of the ejectment. In the registry at Llandaff it was the practice to indorse the act of probate on the original will, and the book called 'The Act Book' contained a daily account of the matters of business completed in the registry, and the memorandum at the foot of the document in question was a copy of the entry in this book relating to the probate of the will of Joseph, and not a copy of the act of probate indorsed on the original will. It follows that the examination of the document tendered with the entry in the book called 'The Act Book' at Llandaff, did not render the document legally admissible as an examined copy of the act of probate. For the prisoner, it was contended before the judges, that the question was simply whether if a witness swears that he has examined a document, *not receivable in evidence*, with a certain book, that can be said to be material to the issue? The time of Joseph's death was in issue; how could the fact that the witness swore that he had examined a paper, not receivable in evidence, with a certain book, be material to the *issue* then being tried? It is not enough that the evidence has relation to the matter in issue; it must be material to the issue. It was contended, when the defendant was tried, that what he had sworn was material for the jury, who were to act on the evidence before them; and, secondly, that it was material for the judge, who was to say whether it was to be put to the jury or not. But it could not be material for the jury; for it was withdrawn from their consideration, and they could not legitimately act upon it; and here the judge was not a judge of fact. This evidence was not on any issue of fact which the judge had to try. It was merely evidence to be given to the jury through the judge. Lord Campbell, C. J., 'I am of opinion that the conviction was right. There was false swearing in a judicial proceeding. How can it be said not to have been material? It was necessary to prove that Joseph died before Morgan. Although the fact of Joseph's death had been proved by parol testimony, if evidence was given to show that probate had been granted of Joseph's will while Morgan was still living, it would have been material in corroboration.

With a view to have the copy of the will received in evidence, the defendant swore falsely that he had examined the paper produced with the original will at Llandaff, and the entry on it with the entry in the Act Book; and thereupon the judge said, I will admit it, and if it had been read, it would have gone to the jury with the rest of the evidence in the case. Afterwards the document is withdrawn, but that cannot purge the false swearing committed by the defendant. It has been said that if the judge were wrong in admitting the document in evidence, the defendant could not be convicted, making the offence of perjury depend upon whether a judge were right or wrong in his decision on a question of law, and upon the decision of some nice point in a bill of exceptions, which might ultimately go to the House of Lords. We are all of opinion, as the evidence was given in a judicial proceeding, with a view to the reception in evidence of a document, which was material, and as that evidence was false, that all the ingredients necessary to constitute the crime of perjury are present. (c)

Where a count stated that it was a material question whether a bond was obtained by the fraud of the prisoner, and that the prisoner falsely swore that he read over and explained it to the obligor; it was objected that the omission to read over the bond was no evidence of fraud, and therefore that the statement was not material; but Erle, J., overruled the objection, as the reading over the bond would be strong evidence to negative fraud. (d)

The prisoner was indicted for having falsely sworn before justices, on a charge against the prosecutor for stealing three books of account, that she saw him destroy another book of accounts, the prosecutor being also charged with embezzlement; and Watson, B., held that the evidence was not material. Its being calculated to influence the minds of the magistrates would not be sufficient. It would be merely bad conduct in one instance, inducing a probability of bad conduct in another. On the charge for embezzlement it would have been material evidence. (e)

An indictment alleged that a cause came on to be tried at the Assizes, and that the cause and all matters in difference between the parties were referred to an arbitrator, and assigned perjury before him as to the signature of a paper. The arbitrator said that it was impossible for him so to distinguish between the matters in the cause and the other matters in difference between the parties, as to say definitely to which head the questions put to and the answers given by the prisoner referred, and there was no other evidence on the point. Gurney, Q. C., 'In all these cases it is necessary to show that the matter alleged to be falsely sworn was material, that cannot be done in this case without proof that it was mate-

(c) *R. v. Phillpotts*, 2 Den. C. C. 302. 3 C. & K. 135, A. D. 1851. In the course of the argument, Maule, J., said, 'Here the defendant by means of a false oath endeavours to have a document received in evidence; it is, therefore, a false oath in a judicial proceeding; it is material to that judicial proceeding; and it is not necessary that it should have been relevant and

material to the issue being tried.' In *R. v. Gibbon*, *infra*, Pollock, C. B., said that there was a great deal of very good sense in Lord Campbell's judgment in this case.

(d) *R. v. Smith*, 1 F. & F. 98, A. D. 1858.

(e) *R. v. Southwood*, 1 F. & F. 356, A. D. 1858.

rial either to the action or to the other matters in difference. The evidence failing to show this distinctly, the defendant must be acquitted.' (f)

An indictment for perjury, committed before a coroner while holding an inquest on the body of J. Conolly, alleged that it was a material question whether the deceased, the prisoner, or another person had drunk any intoxicating liquor after they had left a police barrack and before they had arrived at a guard-room, and that the prisoner falsely swore that none of them had tasted any intoxicating liquor during that interval. This statement was clearly shown to be false, but there were no grounds for supposing that the deceased came to his death from anything except from the effects of having been exposed to the night air. It was objected that the matter so falsely sworn was not material, and Monahan, C. J., was inclined so to hold; but he left the question of materiality to the jury, and they convicted; and, upon a case reserved, it was held that the evidence was material. It was the duty of the coroner to inquire into all the circumstances attending, or which might have caused, the death of the person upon whom the inquiry was held. That being so, it at once became material to ascertain whether or not death had not been caused to some extent by the deceased having been tipping in a public-house, and therefore in a state to render it more probable that he should have lost his way. It was material for the coroner to ascertain, not only the actual cause of death, as murder, *felo de se*, or otherwise, but also all the circumstances attending it, and therefore it was a necessary part of his duty to ascertain the way in which the deceased spent the evening before his death. (g)

An indictment for perjury alleged that the prisoner falsely swore at a petty sessions that D. Rees was the father of her illegitimate child, and that her master, who was the uncle of D. Rees, had promised to raise her wages if she would swear the child to a man other than the said D. Rees, and if she would do so he would permit her to lie in at his house. Martin, B., expressed a strong opinion that this evidence as to the promises made to her by her master was not sufficiently material to the issue before the justices so as to amount to the crime of perjury; but he left the case to the jury. (h)

The prisoner was indicted for perjury alleged to have been committed by him on the hearing of an application of M. Humphreys, the mother of a bastard child, for an order in bastardy to be made upon the prisoner. Upon the hearing M. Humphreys swore that on the day after the birth of the child the prisoner paid her £1 7s. 6d., and that he paid her a weekly sum for several weeks after; in answer thereto

(f) *R. v. Ball*, 6 Cox, C. C. 360, A. D. 1854. Gurney, B., is far too good a criminal lawyer to have made such a decision as this, and I have the best authority for saying that he never did so decide. Probably the evidence failed to show that the evidence was material in any respect upon the hearing of the matters referred. It is obvious that the paper in this case might have been material both to the matter in issue in the

cause, and to the other matters referred, and yet according to this report the evidence would not have been material. C. S. G.

(g) *R. v. Courtney*, 7 Cox, C. C. 111, A. D. 1856.

(h) *R. v. Owen*, 6 Cox, C. C. 105, A. D. 1852. The report does not show how any such evidence was admitted before the justices. Acquittal.

the prisoner swore that he never paid M. Humphreys any money at all upon any account whatsoever, and on this statement perjury was assigned; it was objected that this assignment of perjury was upon a matter immaterial on the hearing; but, upon a case reserved, it was held that it was clearly material; for it was necessary to prove at the hearing the payment of the money; and further, the payment of the money for the maintenance of the child was corroborative evidence of the paternity. (i)

Brennan, being charged before justices of the peace with a robbery in a railway carriage, cross-examined the prosecutor after he had given his evidence in support of the charge, as to whether he had been in company with himself and the prisoner at Manchester on the previous day, and then called the prisoner, who swore that the prosecutor had accosted him, whilst in company with Brennan, and proposed that he should assist him to break into his uncle's house; and it was held that this evidence was in a matter immaterial to the inquiry before the justices. (j)

Justices have no right to inquire into the truth of a charge of libel preferred before them, or to hear any other justification. If publication is proved, they are bound to commit. Where, therefore, an indictment was preferred for perjury alleged to have been committed in the course of the cross-examination of a witness for the defendant on a charge of libel before magistrates, the object of which was to prove the truth of the libel, such cross-examination not being upon matter material to the issue, the Court directed an acquittal. (k)

The prisoner was indicted for falsely swearing on the hearing of an application in bastardy, that he had had connection with the mother of the child. The mother in support of the application had made a deposition before the magistrates, and she was then cross-examined as to whether she had not had connection with the prisoner in the September previous to the birth of the child, which was on the 29th of March, and she denied it. The prisoner was called on behalf of the alleged father, and swore that he had had connection with her as imputed by the question put to her. It was objected that the evidence given by the prisoner was not material to the issue raised on the application for the affiliation order, as the question put to the mother as to her having had connection with the prisoner merely went to affect her credit, and her answer to it ought to have been regarded as conclusive, and the evidence given by the prisoner was inadmissible. But, on a case reserved, it was held that the prisoner was liable to be convicted. 'It is now clearly established that a cross-examination going to a witness's credit is material, and that perjury may be assigned upon it.' (l) Here, therefore, the mother might have been indicted if she had sworn falsely on cross-examination upon this matter. 'Although it did not refer to the main issue, which was the paternity of the child, it had a bearing

(i) *R. v. Berry*, Bell, C. C. 46, A. D. 1859.

(j) *R. v. Murray*, 1 F. & F. 80, A. D. 1858. Martin, B., after consulting Byles, J. This case seems to be overruled by *R. v. Gibbon*, *infra*. On its being cited in that case, Martin, B., said, 'That case

should not be looked upon as any authority. It was only my impression of what was material formed hastily on circuit.'

(k) *R. v. Townsend*, 10 Cox, C. C. 356; *M. Smith*, J.

(l) *Per Crompton, J.*, *R. v. Gibbon*, *infra*.

upon what was indirectly in issue; namely, how far the complainant was deserving of credit.' (m) 'Then, as the question only affected her credit, as soon as she had answered it, all should have been bound by her answer. This is an established rule of our law. Notwithstanding that, the magistrates admitted the evidence of the prisoner, which legally was inadmissible. Then, although not legally admissible, yet, being admitted, it had a reference to what was indirectly in issue, — the credibility of the complainant. The evidence having been admitted, although wrongly, *R. v. Phillpotts* (n) is an authority directly in point that perjury may be assigned upon it. Although the evidence was open to objection, yet it does not lie in the witness's mouth to say that it was not a question on which he was bound to speak the truth. (o)

Upon an indictment for perjury in an answer to a bill filed against the defendant in chancery, stating that the defendant promised to pay Martin £1,000 as a marriage portion, when he was about to marry the defendant's niece: the defendant, by his answer, insisted that as there was no promise in writing, he was entitled to the benefit of the Statute of Frauds, but as to the fact, denied that he had ever made any such promise, on which denial perjury was assigned. Lord Kenyon, C. J., said, that 'he thought this was not such a material fact as would support the indictment. This promise was absolutely void, and, supposing it in fact to have taken place and acknowledged by the defendant, could not be enforced either at law or in equity; that Court had no power to decree a performance of it. It might be a false swearing, but did not amount to what the law denominated perjury.' (p)

So where upon an indictment for perjury, alleged to have been committed in an answer to a bill filed in chancery, it appeared that the bill was filed against the defendant and Robinson, in order

(m) Per Cockburn, C. J., *R. v. Gibbon*, *infra*.

(n) *Supra*.

(o) *R. v. Gibbon*, L. & C. 109, by eleven judges, Crompton, J., and Martin, B., doubting. It was stated in the argument that the child was a full-grown child. The cases where it has been held on a trial for rape that the woman may be proved to have had connection with other men, were distinguished by Williams, J., on the ground that 'the character of the prosecutrix in those cases may be so mixed up with the facts as to be material, not only to her credit, but to the cause.' By the counsel for the prosecution they were distinguished on the ground that voluntary intercourse with others was very material on the question whether she consented; and this distinction was not denied by any judge. The cases where in an action for seduction such evidence has been held admissible, were distinguished on the ground that such evidence affected the damages. But although Alder-

son, B., in *Verry v. Watkins*, 7 C. & P. 308, left such evidence to the jury in mitigation of damages, he first left the question to them whether the defendant was the father of the child, and my recollection of the case (in which I was counsel for the defendant) is that the evidence was given chiefly with a view to that question. And in *Grinnell v. Wells*, Gloucester Spr. and Sum. Ass. 1843, the mother on the first trial swore to connection with the defendant on one occasion only; and on the second trial, before Williams, J., evidence of an *alibi* was given, and also evidence that the mother had had connection with others at such a time that one of them might have been the father of the child; and this evidence was given only with a view to the paternity of the child. The new trial had been obtained on the affidavit (amongst others) of the defendant expressly negating any connection with the mother. C. S. G.¹

(p) *R. v. Benesech*, Peake, Add. C. 93.

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¹ See the American case of *S. v. Brown*, 79 N. C. 642, cited Bishop, vol. ii. ss. 1035, 1036.

to compel the specific performance of a contract for the purchase of a freehold estate, and it was not stated in the bill that the contract was in writing, but it was alleged that the defendants had frequently since the contract was entered into, admitted that the plaintiffs were interested in the purchase; and the defendants in their answer pleaded that the alleged agreement, not being in writing, was within the fourth section of the Statute of Frauds, and could not be enforced, and also denied the agreement as set forth in the bill, and denied that they ever admitted that the plaintiffs were interested in the purchase as stated: and upon these denials perjury was assigned. It was admitted that the agreement was not in writing, and that there was not any memorandum or declaration of trust respecting it. It was objected that the alleged perjury was not material or relevant to the matter in issue in chancery; the agreement not being in writing, the defendant relied on the Statute of Frauds as a good ground of defence. The denial therefore of an agreement which the Court had no power to enforce was immaterial and irrelevant to the investigation of the several matters in the bill. The counsel for the prosecution cited *Bartlett v. Pickersgill*, (q) where a person was convicted of perjury for the denial of a parol agreement for the purchase of an estate, which parol agreement a court of equity had refused to enforce. Abbott, C. J., 'It does not appear from the short statement of the case which has been cited, and which is not very distinctly reported, whether the Statute of Frauds was there pleaded and relied on. But in the present case the defendants have in their answer pleaded the statute, and insisted that this agreement not being in writing, and relating to the sale of land, is within the fourth section of that statute, and cannot be enforced. As a judge of a court of common law, it is competent for me to form my opinion upon the construction of this statute, although I cannot be presumed to know how a court of equity might deal with it. The statute, for the wisest reasons, declares that agreements of this description shall not be enforced unless they are reduced into writing. These defendants, therefore, having insisted upon the statute in their answer, the question is, whether under such circumstances the denial of an agreement, which by the statute is not binding upon the parties, is material; I am of opinion that it was utterly immaterial. It is necessary that the matter sworn to and said to be false should be material and relevant to the matter in issue: the matter here sworn is in my judgment immaterial and irrelevant, and the defendant must be acquitted.' (r)

But where an indictment stated that a bill was filed in chancery against the defendant, stating an agreement to purchase certain wheat, to be paid for by draft at three months, which agreement was not reduced into writing, and that afterwards a bought note was delivered to the defendant, which note did not contain fully the terms of the agreement; that the defendant brought an action and recovered a verdict; and that he was enabled to obtain such verdict by reason of his fraudulently concealing the true terms of the agreement, and the bill prayed that one of the terms of the contract might be declared

(q) 4 Burr. 2255. 4 East, 577, in
notis.

(r) R. v. Dunston, R. & M. N., P. R.
109.

to be that the purchase-money should be paid by a bill of exchange, payable three months after date; and the defendant by his answer denied the parol agreement stated in the bill, and the bill was dismissed, and the denial by the defendant was the subject of the indictment for perjury, — it was contended that the indictment could not be sustained. The only legitimate evidence of the contract was the bought and sold notes. The contract by parol was void by the Statute of Frauds, and a false answer to a bill for the discovery of such a contract would not subject a person to the indictment for perjury; and *R. v. Dunston* (s) was relied upon. Coleridge, J., 'In that case the bill in chancery was to enforce the performance of a parol contract, which could not be enforced by reason of the Statute of Frauds; and the case of *R. v. Benesech* (t) proceeded on the same ground. Though it is true that a party cannot vary the terms of a written contract by parol evidence, he may show by such evidence that he was induced to sign the written contract inadvertently and by fraud. In this case the object of setting up the parol terms of the contract is for the purpose of avoiding the contract on the ground of fraud.' 'I think that the principle, that parol evidence is inadmissible to contradict or vary the terms of a written contract, does not apply where the object of that evidence, as in this case, is to impeach the transaction on the ground of fraud. I think that the assignment of perjury on the denial in the answer of the parol terms, which the bill prayed to have established, is material and relevant; and I think therefore that the objection cannot be sustained.' (u)

Perjury may be committed on the trial of an indictment, which is afterwards held bad upon a writ of error. An indictment charged the defendant with having committed perjury on the trial of a previous indictment for perjury, upon which a person had been convicted and sentenced, but in which the judgment was reversed on a writ of error, on the ground that the assignment of perjury was insufficient; (v) and it was objected that the evidence of the defendant never could have been material, as the former indictment was held bad upon a writ of error; but the objection was overruled, on the ground that, whether a witness had committed wilful and corrupt perjury or not, could not depend on the validity in point of form of the indictment as to which he gave evidence. (w)

But it must be observed that any false oath is punishable as perjury which tends to mislead a court in any of their proceedings relating to a matter judicially before them, though it in no way

(s) *Supra*.

(t) Peake Add. C. 93.

(u) *R. v. Yates*, C. & M. 132.

(v) See *R. v. Burraston*, 4 Jurist. 697, see *post*.

(w) *R. v. Meek*, 9 C. & P. 513, Williams, J., *Mullett v. Hunt*, 1 Cr. & M. 752, was cited in support of the objection. See also *Davis v. Lovell*, 4 M. & W. 678. See 1

Hawk. P. C. c. 69, s. 4, cited, 'If judgment be arrested in a civil action for a defect in the declaration, it has never been said that that circumstance would prevent a witness, who had been guilty of false swearing at the previous trial, from being indicted for perjury;' per Pollock, C. B., *R. v. Cooke*, 2 Den. C. C. 462.¹

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¹ This appears to be so also in America. See *C. v. Tobin*, 108 Mass. 426.

affect the principal judgment which is to be given in the cause (*x*); as where a person who offers himself to be bail for another wilfully swears that he is a subsidy man and assessed at four pounds in the subsidy book, when he is not a subsidy man at all. (*y*) So also perjury may be committed in evidence given to the judge in order that he may decide whether a document is admissible. (*z*)

An indictment for perjury alleged that the defendant, as executrix of her husband, was plaintiff in a cause in the county court, and that she falsely swore that she had never been tried at the Central Criminal Court for any offence, and had never been in custody at the Thames police station; it was proved that she had been in custody at the station, and had been tried at the Central Criminal Court, and acquitted by the direction of the judge; the cause in the county court was an action for goods sold by the testator, and was tried by the judge without a jury; and the verdict was for the plaintiff; and the evidence in question was given by the plaintiff during her cross-examination; it was objected that the evidence given by the defendant was not material. It could not be material on the question whether the testator in his lifetime sold the goods for which the action was brought; and as the trial in the county court was before a judge, and not before a jury, it did not weigh as to the result of that trial whether she had been tried or not; and as giving a true answer that she had been acquitted by the direction of the judge would have equally cleared her character, it could not have been material that she denied having been taken into custody and tried on that charge. Lord Campbell, C. J., 'I think that there is evidence of materiality,' and (the counsel for the prisoner having addressed the jury) he left that question to the jury, and directed them to consider whether her evidence on the two points in question might not influence the mind of the judge of the county court in believing or disbelieving the other statements she made in giving her evidence. (*a*)

But where on an indictment for perjury before a coroner a question was raised as to the materiality of the matter sworn, and that question was left to the jury, who convicted; it was held, on a case reserved, that the matter was material: and all the judges except one, after fully considering the preceding case, expressed a very strong opinion that it was for the judge to determine whether the matter was material or not. (*b*)

(*x*) 1 Hawk. P. C. c. 69, s. 3. *R. v. Mullany*, 34 L. J. M. C. 111, L. & C. 593, where a defendant on trial of a plaint in a county court, wilfully, corruptly, and falsely, swore his name was Edward and not Bernard.

(*y*) Royson's case, Cro. Car. 146.

(*z*) *R. v. Phillpotts*, *ante*, p. 313.

(*a*) *R. v. Lavey*, 3 C. & K. 26 A. D. 1850. In every previous case materiality has been treated as a question of law, and it is submitted that it is clearly so; otherwise all the cases in which it has been held that an averment of materiality is unnecessary where the materiality appears on the face of the indictment, are erroneous. In *R. v. Gibbon*, L. & C. 109, Channell, B.,

said he never could understand *R. v. Lavey*, 'unless on the ground that there was a question whether the defendant in the County Court action meant to plead or admit the claim. That point having been ascertained, the question of materiality was no longer for the jury.'

(*b*) *R. v. Courtney*, 7 Cox, C. C. 111, A. D. 1856. Ball, J., doubted. It is to be observed that in this case all the judges held the evidence to be material; they did, therefore, treat the question as a matter of law. If they had held it to be a question for the jury, the question would have been whether the evidence warranted the verdict. See this case more fully stated, *ante*, p. 314.

An indictment alleged that on the hearing of an application for an order in bastardy, it became material to inquire whether the prisoner had ever kissed the prosecutrix or had familiarity with her; the prisoner, being examined in answer to the evidence given by the prosecutrix, swore that he never had any connection or familiarity with her, and never kissed her. It was objected that the evidence was not material, as it was far too wide in the form in which it was given. Wightman, J., consulted Erle, C. J., and declined to stop the case, and after pointing out the necessity for two witnesses to prove the falsehood of the prisoner's evidence, told the jury: 'Then the question arises whether the parts of his evidence which are assigned as perjury were material to the investigation. It seems to me that they were so, but that is for you. Were they material and wilfully false?' (c)

It should be observed, that a man may be as much perjured by an oath taken by him in his own cause, either in an answer in chancery, or in an answer to interrogatories concerning a contempt, or in an affidavit, &c., as by an oath taken by him as a witness in the cause of another person. (d) But the oath must be taken by a person sworn to depose the truth; and a false verdict does not come under the notion of perjury, because the jurors do not swear to depose the truth, but only to judge truly of the depositions of others. (e)

A further point of general application may be mentioned, namely, that it appears not to be important whether the false oath were credited or not, or whether the party in whose prejudice it was taken were in the event any ways damaged by it; for the prosecution is not grounded on the damage to the party, but on the abuse of public justice. (f)

In some cases, where a false oath has been taken, the party may be prosecuted by indictment at common law, though the offence may not amount to perjury. Thus it appears to have been holden, that any person making or knowingly using any false affidavit taken abroad (though a perjury could not be assigned on it here) in order to mislead our courts of justice, is punishable by indictment, as for misdemeanor; and Lord Ellenborough, C. J., said, 'that he had not the least doubt that any person making use of a false instrument in order to pervert the course of justice was guilty of an offence punishable by indictment.' (g)

Statutes relating to perjury. — We may now proceed to consider the 5 Eliz. c. 9, and other statutes which relate to the offence of perjury.

By the 5 Eliz. c. 9, (h) s. 3, 'all and every such person and persons which shall unlawfully and corruptly procure any witness or witnesses by letters, rewards, promises, or by any other sinister and unlawful labour or means whatsoever, to commit any wilful and cor-

(c) *R. v. Goddard*, 2 F. & F. 361, A. D. 1861. No authority was referred to in this case. Acquittal.

(d) 1 Hawk. P. C. c. 69, s. 5. Bac. Abr. tit. *Perjury* (A).

(e) *Id. ibid.*

(f) 1 Hawk. P. C. c. 69, s. 9. Bac. Abr. tit. *Perjury* (A). In *R. v. Nicholls*, Gloucester Sum. Ass. 1838, *cor. Patteson, J.*, the prisoner had on the trial of one Pitt for

larceny sworn that he had not given the stolen property to Pitt, but he was contradicted by other witnesses, and the jury disbelieved him, and acquitted Pitt, and he was convicted of perjury in so swearing, and transported for seven years. C. S. G.

(g) *Omealy v. Newell*, 8 East, 364.

(h) Made perpetual by the 29 Eliz. c. 5, s. 2, and 21 Jac. 1, c. 28, s. 8.

rupt perjury, in any matter or cause whatsoever now depending, or which hereafter shall depend in suit and variance, by any writ, action, bill, complaint, or information, in any wise touching or concerning any lands, tenements, or hereditaments, or any goods, chattels, debts, or damages, in any of the courts before mentioned, (i) or in any of the Queen's Majesty's courts of record, or in any leet, view of frank-pledge or law-day, ancient demesne court, hundred court, court baron, or in the court or courts of the stannary in the counties of Devon and Cornwall; or shall likewise unlawfully and corruptly procure or suborn any witness or witnesses, which shall be sworn to testify in *perpetuam rei memoriam*; that then every such offender or offenders shall for his, her, or their said offence, being thereof lawfully convicted or attainted, lose and forfeit the sum of forty pounds.'

Sec. 4. 'If it happen any such offender or offenders, so being convicted or attainted as aforesaid, not to have any goods or chattels, lands, or tenements, to the value of forty pounds, that then every such person so being convicted or attainted of any of the offences aforesaid, shall for his or their said offence suffer imprisonment by the space of one half-year, without bail or mainprize, and to stand upon the pillory (j) the space of one whole hour, in some market town next adjoining to the place where the offence was committed, in open market there, or in the market town itself where the offence was committed.'

Sec. 6. 'If any person or persons, either by the subornation, unlawful procurement, sinister persuasion, or means of any others, or by their own act, consent, or agreement, wilfully and corruptly commit any manner of wilful perjury, by his or their deposition in any of the courts before mentioned, or being examined *ad perpetuam rei memoriam*, that then every person or person so offending, and being thereof duly convicted or attainted by the laws of this realm, shall for his or their said offence lose and forfeit twenty pounds, and to have imprisonment by the space of six months without bail or mainprize.

Sec. 7. 'If it happen the said offender or offenders so offending not to have any goods or chattels to the value of twenty pounds, that then he or they to be set in the pillory (k) in some market-place within the shire, city, or borough, where the said offence shall be committed, by the sheriff or his ministers, if it shall fortune to be without any city or town corporate; and if it happen to be within any such city or town corporate, then by the said head officer or officers of such city or town corporate, or by his or their ministers, and there to have both his ears nailed.'

The statute further enacts that one moiety of the said forfeitures shall be to the King, and the other moiety to such person as shall

(i) Viz. (as in sec. 1) 'the King's Courts of Chancery, the Star Chamber, the White-hall, or elsewhere within any of the King's dominions of England or Wales, or the marches of the same, where any person or persons have or from thenceforth should have authority by virtue of the King's commission, patent, or writ, to hold plea of land, or to examine, hear, or determine any title of lands, or any matter of witnesses

concerning the title, right, or interest of any lands, tenements, or hereditaments.'

(j) The 1 Vic. c. 23, abolishes the punishment of pillory in all cases, but does not 'change, alter, or affect any punishment whatsoever which may now by law be inflicted in respect of any offence, except only the punishment of the pillory.

(k) See note, *supra*.

be grieved, hindered, or molested by reason of any of the offences before mentioned, that will sue for the same, &c.; and that as well the judge and judges of every such of the said courts where any such suit shall be, and whereupon any such perjury shall be committed, as also the justices of assize and gaol delivery, and justices of peace at their quarter sessions, both within the liberties and without, may inquire of, hear, and determine all offences against the said Act. (*l*) And it is provided that the said Act shall no way extend to any spiritual or ecclesiastical court, but that every such offender, as shall offend in term as aforesaid, shall be punished by such usual and ordinary laws as are used in the said courts. (*m*) And it is also provided that the said statute shall not restrain the authority of any judge having absolute power to punish perjury before the making thereof; but that every such judge may proceed in the punishment of all offences punishable before the making of the said statute, in such wise as they might have done and used to do to all purposes, so that they set not on the offender less punishment than is contained in the said Act. (*n*)

An important statute relating to the punishment of perjury is the 2 Geo. 2, c. 25, s. 2, which, in order the more effectually to deter persons from committing wilful and corrupt perjury, or subornation of perjury, enacts, 'that besides the punishment already to be inflicted by law for so great crimes, it shall and may be lawful for the Court or judge, before whom any person shall be convicted of wilful and corrupt perjury, or subornation of perjury, according to the laws now in being, to order such person to be sent to some house of correction within the same county for a time not exceeding seven years, there to be kept to hard labour (*o*) during all the said time, or otherwise to be transported to some of his Majesty's plantations beyond the seas, for a term not exceeding seven years, (*p*) as the Court shall think most proper; and thereupon judgment shall be given, that the person convicted shall be committed or transported accordingly, over and beside such punishment as shall be adjudged to be inflicted on such person, agreeable to the laws now in being; and if transportation be directed, the same shall be executed in such manner as is or shall be provided by law for the transportation of felons; and if any person so committed or transported shall voluntarily escape or break prison, or return from transportation before the expiration of the time for which he shall be ordered to be transported as aforesaid, such person, being thereof lawfully convicted, shall suffer death as a felon, without benefit of clergy, and shall be tried for such felony in the county where he so escaped, or where he shall be apprehended.'

An indictment for perjury contained two counts charging perjury to have been committed by the defendant on two different occasions,

(*l*) Secs. 8, 9. But see the 5 & 6 Vict. c. 38, *post*. Sec. 10 of 5 Eliz. c. 9, is repealed by the 26 & 27 Vict. c. 125.

(*m*) Sec. 11.

(*n*) Sec. 13.

(*o*) The 3 Geo. 4, c. 114, provides that any person convicted of perjury or subornation of perjury may be sentenced to

imprisonment with hard labour for any term not exceeding the term for which the Court may imprison for such offences, in addition to, or in lieu of, any other punishment.

(*p*) Now penal servitude for any term not exceeding seven and not less than three years.

— one in the progress of a trial, the other in an affidavit in chancery. Both acts of perjury had the same object in view. It was held that a punishment might be inflicted, in respect of each, of seven years' penal servitude, the second term to commence at the termination of the first, and that the offences were rightly included in the same indictment, and that a general verdict of guilty was good. It was also held that under 2 Geo. 2, c. 25, s. 2, there was no necessity to impose any punishment previous to that of penal servitude. (*g*)

Statutes relating to particular forms of perjury. — Besides these statutes, there are a great number relating to perjury committed in particular proceedings and transactions, and by particular persons, some of which it will be proper to notice in this place. Enactments of this description are to be met with in so many and such various statutes that it is not presumed but that many of them have not come within the editor's observation.

It should first be mentioned that the false affirmation, or declaration, of any of the people called *Quakers*, made instead of an oath, will subject the party to the penalties of perjury.

The 7 & 8 Will. 3, c. 34, except ss. 4 and 5, is repealed by 30 & 31 Vict. c. 59 (the Statute Law Revision Act, 1867). The 8 Geo. 1, c. 6, relates to the declaration of fidelity and abjuration oath to be made by Quakers; and by sec. 2 of that Act persons wilfully making false declarations under that act are liable to the same penalties, &c., as if they had been found guilty of perjury. Sec. 1 of this Act is in part repealed by 30 & 31 Vict. c. 59. The 22 Geo. 2, c. 46, s. 36, is repealed by the above Act, 30 & 31 Vict. c. 59. The 9 Geo. 4, c. 32, s. 1, is repealed by 36 & 37 Vict. c. 91 (the Statute Law Revision Act, 1873).

The 3 & 4 Will. 4, c. 49, s. 1, enacts that 'every person of the persuasion of the people called Quakers and every Moravian be permitted to make his or her solemn affirmation or declaration, instead of taking an oath, in all places and for all purposes whatsoever where an oath is or shall be required, either by the common law, or by any Act of Parliament already made, or hereafter to be made;' and provides that 'if any such person making such solemn affirmation (*r*) or declaration shall be lawfully convicted, wilfully, falsely, and corruptly to have affirmed or declared any matter or thing, which if the same had been (*s*) in the usual form would have amounted to wilful and corrupt perjury, he or she shall incur the same penalties and forfeitures as by the laws and statutes of this realm are enacted against persons convicted of wilful and corrupt perjury.'

The 3 & 4 Will. 4, c. 83, relating to affirmations by Separatists is repealed by 53 & 54 Vict. c. 33.

By the 1 & 2 Vict. c. 77, 'it shall be lawful for any person who shall have been a Quaker or Moravian to make solemn affirmation and declaration in lieu of taking an oath, as fully as it would be lawful for any such person to do if he still remained a member of either

(*g*) *Castro v. R.*, 6 Ap. Cas. 229.

(*r*) The form of affirmation given by this statute is, 'I, A. B., being one of the people called Quakers [or one of the persuasion of the people called Quakers, or of the united

brethren called Moravians, as the case may be], do solemnly, sincerely, and truly declare and affirm.'

(*s*) The word 'sworn' seems omitted here.

of such religious denominations of Christians,' and persons guilty of making false affirmations or declarations are liable to the same punishments as persons guilty of perjury, in the same manner as in the preceding statute. (u)

By the 1 & 2 Vict. c. 105, 'in all cases in which an oath may lawfully be and shall have been administered to any person either as a jurymen or a witness, or a deponent in any proceeding, civil or criminal, in any court of law or equity in the united kingdom, or on appointment to any office or employment, or on any occasion whatever, such person is bound by the oath administered: provided the same shall have been administered in such form and with such ceremonies as such person may declare to be binding; and every such person, in case of wilful false swearing, may be convicted of the crime of perjury in the same manner as if the oath had been administered in the form and with the ceremonies most commonly adopted.'

And now by the Oaths Act, 1888 (51 & 52 Vict. c. 46), every person who objects to be sworn and states as the ground of his objection either that he has no religious belief or that the taking of any oath is contrary to his religious belief, may make a solemn affirmation in the form thus prescribed, 'and if any person making such affirmation shall wilfully, falsely, and corruptly affirm any matter or thing which if deposed on oath would have amounted to wilful and corrupt perjury he shall be liable to prosecution, indictment, sentence, and punishment in all respects as if he had committed wilful and corrupt perjury.'

By 19 & 20 Vict. c. 119 (entitled 'An Act to Amend the Provisions of the Marriage and Registration Acts'), s. 2, every person who shall knowingly or wilfully make and sign or subscribe any false declaration, or who shall sign any false notice, for the purpose of procuring any marriage under the provisions of any of the recited Acts (6 & 7 Will. 4, c. 85; 1 Vict. c. 22; 3 & 4 Vict. c. 72), or this Act, shall suffer the penalties of perjury.

By sec. 18, any person who shall knowingly or wilfully make any false declaration or sign any false notice required by this Act for the purpose of procuring any marriage, and every person who shall forbid the granting by any superintendent registrar of a certificate for marriage by falsely representing himself or herself to be a person whose consent to such marriage is required by law, knowing such representation to be false, shall suffer the penalties of perjury. (v)

By 46 & 47 Vict. c. 51, s. 33 (7), 'If any candidate or election agent knowingly makes the declaration required by this section falsely, he shall be guilty of an offence, and on conviction thereof on indictment shall be liable to the punishment for wilful and corrupt perjury. Such offence shall also be deemed to be a corrupt practice within the meaning of this Act.'

By the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69)

(u) The form of affirmation given by this statute is, 'I, A. B., having been one of the people called Quakers [or one of the persuasion of the people called Quakers, or of the united brethren called Moravians, as the case may be], and entertaining conscientious objections to the taking of an oath, do solemnly, sincerely, and truly declare and

affirm.' This statute was passed in consequence of *R. v. Doran*, 2 Moo. C. C. R. 37. See *R. v. Mooney*, 5 Cox, C. C. 319.

(v) The 6 & 7 Will. 4, c. 85, s. 38, is repealed by 37 & 38 Vict. c. 35 (the Statute Law Revision Act, 1874). See 3 & 4 Vict. c. 72, s. 4.

s. 4, a child who does not understand the nature of an oath may give evidence without being sworn, but false evidence so given is to be treated as perjury (*w*)

The 5 & 6 Will. 4, c. 62, which was passed for the purpose of abolishing unnecessary oaths, by sec. 2 enacts, 'that in any case where, by any Act or Acts made or to be made relating to the revenues of customs or excise, the post-office, the office of stamps and taxes, the office of woods and forests, land revenues, works, and buildings, the war-office, the army pay-office, the office of the treasurer of the navy, the accountant-general of the navy, or the ordnance, his Majesty's treasury, Chelsea hospital, Greenwich hospital, the board of trade, or any of the offices of his Majesty's principal secretaries of state, the India board, the office for auditing the public accounts, the national debt office, or any office under the control, direction, or superintendence of the lords commissioners of his Majesty's treasury, or by any official regulation in any department, any oath, solemn affirmation, or affidavit might, but for the passing of this Act, be required to be taken or made by any person on the doing of any act, matter, or thing, or for the purpose of verifying any book, entry, or return, or for any other purpose whatsoever, it shall be lawful for the lords commissioners of his Majesty's treasury, or any three of them, if they shall so think fit, by writing under their hands and seals, to substitute a declaration to the same effect as the oath, solemn affirmation, or affidavit which might, but for the passing of this Act, be required to be taken or made; and the person who might, under the Act or Acts imposing the same, be required to take or make such oath, solemn affirmation, or affidavit, shall, in presence of the commissioners, collector, other officer, or person empowered by such Act or Acts to administer such oath, solemn affirmation, or affidavit, make and subscribe such declaration, and every such commissioner, collector, other officer, or person is hereby empowered and required to administer the same accordingly.'

Sec. 3. 'The declaration so substituted is to be published in the *Gazette*, and after twenty-one days from the date of the *Gazette* the provisions of this Act are to apply.'

Sec. 4. — 'After the expiration of the said twenty-one days it shall not be lawful for any commissioner, collector, officer, or other person to administer or cause to be administered, or receive or cause to be received, any oath, solemn affirmation, or affidavit, in the lieu of which such declaration as aforesaid shall have been directed by the lords commissioners of his Majesty's treasury to be substituted.'

Sec. 5. 'If any person shall make and subscribe any such declaration as hereinbefore mentioned in lieu of any oath, solemn affirmation, or affidavit, by any Act or Acts relating to the revenues of customs or excise, stamps and taxes, or post-office, required to be made on the doing of any act, matter, or thing, or for verifying any book, account, entry, or return, or for any purpose whatsoever, and shall wilfully make therein any false statements as to any material particular, the person making the same shall be deemed guilty of a misdemeanor.'

By sec. 6, the oath of allegiance is to be required in all cases as before the Act passed.

By sec. 7, oaths in courts of justice are to be taken in the same manner as if the Act had not passed.

Sec. 8. 'It shall be lawful for the universities of Oxford and Cambridge, and for all other bodies corporate and politic, and for all bodies now by law or statute, or by any valid usage, authorized to administer or receive any oath, solemn affirmation, or affidavit, to make statutes, bye-laws, or orders authorizing and directing the substitution of a declaration in lieu of any oath, solemn affirmation, or affidavit now required to be taken or made: provided always that such statutes, by-laws, or orders be otherwise duly made and passed according to the charter, laws, or regulations of the particular university, other body corporate and politic, or other body so authorized as aforesaid.'

Sec. 9. 'In future every person entering upon the office of churchwarden or sidesman, before beginning to discharge the duties thereof, shall, in lieu of such oath of office, make and subscribe, in the presence of the ordinary or other person before whom he would, but for the passing of this Act, be required to take such oath, a declaration that he will faithfully and diligently perform the duties of his office, and such ordinary or other person is hereby empowered and required to administer the same accordingly: provided always, that no churchwarden or sidesman shall in future be required to take any oath on quitting office, as has heretofore been practised.'

Sec. 10. 'In any case where, under any Act or Acts for making, maintaining, or regulating any highway, or any road, or any turnpike road, or for paving, lighting, watching, or improving any city, town, or place, or touching any trust relating thereto, any oath, solemn affirmation, or affidavit might, but for the passing of this Act, be required to be taken or made by any person whomsoever, no such oath, solemn affirmation, or affidavit, shall in future be required to be or be taken and made, but the person who might under the Act or Acts imposing the same be required to take or make such oath, solemn affirmation, or affidavit, shall in lieu thereof, in the presence of the trustee, commissioner, or other persons before whom he might under such Act or Acts be required to take or make the same, make and subscribe a declaration to the same effect as such oath, solemn affirmation, or affidavit and such trustee, commissioner, or other person, is hereby empowered and required to administer and receive the same.'

Sec. 11. 'Whenever any person or persons shall seek to obtain any patent under the Great Seal for any discovery or invention, such person or persons shall, in lieu of any oath, affirmation, or affidavit which heretofore has or might be required to be taken or made upon or before obtaining any such patent, make and subscribe, in the presence of the person before whom he might, but for the passing of this Act, be required to take or make such oath, affirmation, or affidavit, a declaration to the same effect as such oath, affirmation, or affidavit; and such declaration, when duly made and subscribed, shall be to all intents and purposes as valid and effectual as the oath, affirmation, or affidavit in lieu whereof it shall have been so made and subscribed.'

Sec. 12. 'Where by any Act or Acts at the time in force for regulating the business of pawnbrokers, any oath, affirmation, or affidavit might, but for the passing of this Act, be required to be taken or

made, the person who by or under such Act or Acts might be required to take or make such oath, affirmation, or affidavit, shall in lieu thereof make and subscribe a declaration to the same effect; and such declaration shall be made and subscribed at the same time, and on the same occasion, and in the presence of the same person or persons, as the oath, affirmation, or affidavit in lieu whereof it shall be made and subscribed would by the Act or Acts directing or requiring the same be directed or required to be taken or made; and all and every the enactments, provisions, and penalties contained in or imposed by any such Act or Acts, as to any oath, affirmation, or affidavit thereby directed or required to be taken or made, shall extend and apply to any declaration in lieu thereof, as well and in the same manner as if the same were herein expressly enacted with reference thereto.'

Sec. 13, reciting that 'a practice has prevailed of administering and receiving oaths and affidavits voluntarily taken and made in matters not the subject of any judicial inquiry, nor in anywise pending or at issue before the justice of the peace, or other person by whom such oaths or affidavits have been administered or received,' and that 'doubts have arisen whether or not such proceeding is illegal, for the more effectual suppression of such practice and removing such doubts,' enacts, 'that from and after the commencement of this Act, it shall not be lawful for any justice of the peace or other person to administer, or cause or allow to be administered, or to receive, or cause or allow to be received, any oath, affidavit, or solemn affirmation touching any matter or thing whereof such justice or other person hath not jurisdiction or cognizance by some statute in force at the time being (x): provided always, that nothing herein contained shall be construed to extend to any oath, affidavit, or solemn affirmation before any justice in any matter or thing touching the preservation of the peace, or the prosecution, trial, or punishment of offences, or touching any proceedings before either of the Houses of Parliament, or any committee thereof respectively, nor to any oath, affidavit, or affirmation which may be required by the laws of any foreign country to give validity to instruments in writing designed to be used in such foreign countries respectively.' (y)

Sec. 14. 'In any case in which it has been the usual practice of the Bank of England to receive affidavits on oath to prove the death of any proprietor of any stocks or funds transferable there, or to identify the person of any such proprietor, or to remove any other impediment to the transfer of any such stocks or funds, or relating to the loss, mutilation, or defacement of any bank-note or bank post bill, no such oath or affidavit shall in future be required to be taken or made, but in lieu thereof the person who might have been required to take or make such oath or affidavit shall make and subscribe a declaration to the same effect as such oath or affidavit.'

By sec. 15, declarations are substituted in lieu of the oaths required by the 5 Geo. 2, c. 7, 'An Act for the more easy recovery of debts in his Majesty's plantations and colonies in America,' and the 54 Geo. 3,

(x) See *R. v. Nott*, C. & M. 288.

(y) There are some cases where a justice may administer an oath out of his county, and the distinction seems to be between

voluntary and compulsory proceedings. See *Helier v. The Hundred of Benhurst*, Cro. Car. 211.

c. 15, "An Act for the more easy recovery of debts in his Majesty's colony of New South Wales."

Sec. 16. 'It shall and may be lawful to and for any attesting witness to the execution of any will, or codicil, deed, or instrument in writing, and to and for any other competent person, to verify and prove the signing, sealing, publication, or delivery of any such will, codicil, deed, or instrument in writing, by such declaration in writing made as aforesaid, and every such justice, notary, or other officer shall be and is hereby authorized and empowered to administer or receive such declaration.'

Sec. 17. 'In all suits now depending or hereafter to be brought in any court of law or equity by or in behalf of his Majesty, his heirs and successors, in any of his said Majesty's territories, plantations, colonies, possessions, or dependencies, for or relating to any debt or account, that his Majesty, his heirs and successors, shall and may prove his and their debts and accounts, and examine his or their witness or witnesses by declaration, in like manner as any subject or subjects is or are empowered or may do by this present Act.'

Sec. 18, reciting that 'it may be necessary and proper in many cases not herein specified, to require confirmation of written instruments or allegations, or proof of debts, or of the execution of deeds or other matters,' enacts that 'it shall and may be lawful for any justice of the peace, notary public, or other officer now by law authorized to administer an oath, to take and receive the declaration of any person voluntarily making the same before him in the form in the schedule to this Act annexed; and if any declaration so made shall be false or untrue in any material particular, the person wilfully making such false declaration shall be deemed guilty of a misdemeanor.' (2)

Sec. 21. 'In any case where a declaration is substituted for an oath under the authority of this Act, or by virtue of any power or authority hereby given, or is directed and authorized to be made and subscribed under the authority of this Act, or by virtue of any power hereby given, any person who shall wilfully and corruptly make and subscribe any such declaration, knowing the same to be untrue in any material particular, shall be deemed guilty of a misdemeanor.' (a)

With respect to the first of the statutes above set forth, namely, the 5 Eliz. c. 9, as it is but little resorted to at the present time, on account of prosecutions upon it being more difficult than at the common law, and as it did not alter the nature of the offence, but merely enlarged the punishment, (b) a brief statement of some of the principal points decided upon its construction will probably be deemed sufficient.

(2) See *ante*, p. 66, for the punishment, and see the cases on this section, *post*. By sec. 19, the same fees are payable on declarations as on the oaths in lieu of which they are made. By sec. 19, the declaration is to be in the form following:—'I, A. B., do solemnly and sincerely declare, that _____ and I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of an Act made and passed in the _____ year of the reign of his present Majesty, entitled an Act' [here insert the title of this Act].

(a) See *ante*, p. 66, for the punishment. The number of statutes which contain clauses making persons giving false evidence, making false affidavits, &c., either liable to the punishment of perjury or guilty of a misdemeanor, is so large that it is conceived they would occupy more space than the infrequency of the occasions on which it may be necessary to consult them, warrants devoting to their insertion; all of them, therefore, have not been inserted. C. S. G.

(b) *Buxton v. Gouch*, 3 Salk. 269.

In many instances an indictment will lie at common law, when it will not lie upon this statute. Thus where a witness for the King swears falsely, he cannot be indicted on the statute. (c)

It has been adjudged that a man cannot be guilty of perjury within this statute, in any case wherein he may not possibly be guilty of subornation of perjury within it; on the ground that it is reasonable to give the whole statute the same construction; and that it cannot well be intended that the makers of it meant to extend its purview farther as to perjury, which they appear to have considered as the less crime, than to subornation of perjury, which they seem to have esteemed the greater: and, therefore, since the clause concerning subornation of perjury, mentioning only matters depending by writ, bill, plaint, or information, concerning hereditaments, goods, debts, or damages, &c., does not extend to perjury on an indictment or criminal information, the clause concerning perjury, though penned in more general words, has been adjudged to come under the like restriction. (d) And it has also been resolved, that as the clause concerning subornation of perjury relates only to perjury by *witnesses*, that concerning perjury extends to no other perjury than that of a *witness*; and, therefore, not to perjury in an answer in chancery; or in swearing the peace against a man; or in a presentment by a homager in a court baron, or in a wager of law, or in swearing before commissioners of the King's title to lands. (e) And by the opinions of some, a false affidavit against a man, in a court of justice, is not within the statute. (f) But it is observed that if such affidavit be by a third person, and relate to a cause depending in suit, before the Court, and either of the parties in variance be grieved, hindered, or molested, in respect of such cause, by reason of the perjury, it may be strongly argued that it is within the purview of the statute. (g) It seems to be the better opinion that a false oath before the sheriff on a writ of inquiry of damages is within the statute. (h)

It has been collected from the clause giving an action to the party grieved, that no false oath is within the statute which does not give some person a just cause of complaint; and, therefore, that if the thing sworn be true, though it be not known by him that swears it to be so, the oath is not within the statute, because it gives no good ground of complaint to the other party, who would take advantage of another's want of sufficient evidence to make out the justice of the cause. (i) And upon the same ground no false oath can be within the statute, unless the party against whom it was sworn suffered some disadvantage by it: therefore, in every prosecution on the statute, it is necessary to set forth the record wherein the perjury is supposed to have been committed, and to prove at the trial that there is such a record, either by actually producing it, or by an attested copy; and it is necessary not only to set forth in the pleadings the point wherein the false oath

(c) *Id. ibid.*

(d) *Bac. Ab. tit. Perjury (B).* 1 *Hawk. P. C. c. 69, s. 19.*

(e) 1 *Hawk. P. C. c. 69, s. 20.* *Bac. Abr. tit. Perjury (B).*

(f) 2 *Roll. Abr. 77.* 1 *Roll. 79.* 3 *Keb. 345.*

(g) 1 *Hawk. P. C. c. 69, s. 21.*

(h) *Bac. Abr. tit. Perjury (B).* 1 *Hawk. P. C. c. 69, s. 21.*

(i) 1 *Hawk. P. C. c. 69, s. 22.* *Bac. Abr. tit. Perjury (B).* We have seen that this is otherwise at common law. *Ante, p. 294.*

was taken, but to show also how it conduced to the proof or disproof of the matter in question. (j) And if an action on the statute be brought by more than one, it is necessary to show how the perjury was prejudicial to each of the plaintiffs. (k) But it seems that a perjury, which tends only to aggravate or extenuate the damages, is as much within the statute as a perjury that goes directly to the point in issue; and that perjury committed in a cause wherein an erroneous judgment is given, is a good ground of a prosecution upon the statute till the judgment be reversed. (l)

Indictment. — It has been holden that every indictment or action upon 5 Eliz. c. 9, must exactly pursue the words of it; and, therefore, if it allege that the defendant deposed such a matter *falso et deceptivè*, or *falso et corruptè*, or *falso et voluntariè*, without saying *voluntariè et corruptè*, it is not good, though it conclude that *sic voluntarium et corruptum commisit perjurium contra formam statuti*, &c. Also it is said to be necessary expressly to show that the defendant was sworn; and that it is not sufficient to say that *tacto per se sacro evangelio deposuit*. But there is no need to show whether the party took the false oath through the subornation of another, or of his own act, though the words of the statute are, 'If persons by subornation, &c., or their own act, &c., shall commit wilful perjury;' for there being no medium between the branches of this distinction, they seem to be put in *ex abundanti*, and to express no more than the law would have implied, and, therefore, operate nothing. (m)

It seems that if perjury be committed that is within this statute, but the indictment concludes not *contra formam statuti*, yet it is a good indictment at common law, but not to bring the offender within the corporal punishment of the statute. (n)

By 14 & 15 Vict. c. 100, s. 19 'it shall and may be lawful for the judges or judge of any of the superior courts of common law or equity, or for any of Her Majesty's justices or commissioners of assize, nisi prius, oyer and terminer, or gaol delivery, or for any justices of the peace, recorder, or deputy recorder, chairman, or other judge holding any general or quarter sessions of the peace, or for any commissioner of bankruptcy or insolvency, or for any judge or deputy judge of any county court, or any court of record, or for any justices of the peace in special or petty sessions, or for any sheriff or his lawful deputy before whom any writ of inquiry or writ of trial from any of the superior courts shall be executed, in case it shall appear to him or them that any person has been guilty of wilful and corrupt perjury in any evidence given, or in any affidavit, deposition, examination, answer, or other proceeding made or taken before him or them, to direct such person to be prosecuted for such perjury, in case there shall appear to him or them a reasonable cause for such prosecution, and to commit such person so directed to be prosecuted until the next session of oyer

(j) Bac. Abr. tit. *Perjury* (B). 1 Hawk. P. C. c. 69, s. 23.

(k) *Id.* *ibid.*

(l) 1 Hawk. P. C. c. 69, s. 23. Bac. Abr. tit. *Perjury* (B). In 1 Hawk. P. C. c. 69, s. 4, there is a *qu.* whether perjury in a court, whose proceedings are after-

wards reversed by error, may not still be punished as perjury, notwithstanding such reversal? See *R. v. Meek*, *ante*, p. 318.

(m) 1 Hawk. P. C. c. 69, ss. 17, 18. Bac. Abr. tit. *Perjury* (B), and the authorities there cited.

(n) 2 Hale, 191, 192.

and terminer or gaol delivery for the county or other district within which such perjury was committed, unless such person shall enter into a recognizance, with one or more sufficient surety or sureties, conditioned for the appearance of such person at such next session of oyer and terminer or gaol delivery, and that he will then surrender and take his trial, and not depart the Court without leave, and to require any person he or they may think fit to enter into a recognizance, conditioned to prosecute or give evidence against such person so directed to be prosecuted as aforesaid, and to give to the party so bound to prosecute a certificate of the same being directed, which certificate shall be given without any fee or charge, and shall be deemed sufficient proof of such prosecution having been directed as aforesaid; and upon the production thereof the costs of such prosecution shall and are hereby required to be allowed by the Court before which any person shall be prosecuted or tried in pursuance of such direction as aforesaid, unless such last-mentioned Court shall specially otherwise direct; and when allowed by any such Court in Ireland such sum as shall be so allowed shall be ordered by the said Court to be paid to the prosecutor by the treasurer of the county in which such offence shall be alleged to have been committed, and the same shall be presented for, raised, and levied in the same manner as the expenses of prosecutions for felonies are now presented for, raised, and levied in Ireland: provided always, that no such direction or certificate shall be given in evidence upon any trial to be had against any person upon a prosecution so directed as aforesaid.'

Sec. 20. 'In every indictment for perjury, or for unlawfully, wilfully, falsely, fraudulently, deceitfully, maliciously, or corruptly taking, making, signing, or subscribing any oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing, it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what Court or before whom the oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing, was taken, made, signed, or subscribed, without setting forth the bill, answer, information, indictment, declaration, or any part of any proceeding, either in law or in equity, and without setting forth the commission or authority of the Court or person before whom such offence was committed.' (o)

An indictment for perjury alleged to have been committed on a trial before the Court of Quarter Sessions, averred in substance that a certain indictment for misdemeanor, &c., came on to be tried in due form of law, and was tried by a jury duly sworn, and the prisoner, as a witness on the trial, was duly sworn, and contained the other usual

(o) It was lamented by a learned judge, that the party prosecuting for perjury did not more frequently avail himself of the 23 Geo. 2, c. 11 (now repealed), made for the purpose of obviating difficulties in drawing the indictments. In the case in which this remark was made, the commission at the admiralty session had been unnecessarily set forth in the indictment; and it was admitted that where a prosecutor undertakes to set out in the indictment more of the proceedings than

he need under this statute, he must set them forth correctly; but it was holden that the commission at the admiralty session being set forth as directed to A., B., and C., and others not named, of which number A., B., and C., amongst others, *should always be one*, the Court must take it to mean that if either of the persons named of the quorum were present, it would be sufficient. *R. v. Dowlin*, 5 T. R. 311.

averments and conclusion. It did not state the nature of the misdemeanor, or aver that the Court of Quarter Sessions had authority to try the same or administer an oath on the trial. Held, that the substance of the offence charged against the defendant was sufficiently stated under this enactment, and that the indictment was good on motion in arrest of judgment. (*p*)

Sec. 21. 'In every indictment for subornation of perjury, or for corrupt bargaining or contracting with any person to commit wilful and corrupt perjury, or for inciting, causing, or procuring any person unlawfully, wilfully, falsely, fraudulently, deceitfully, maliciously, or corruptly to take, make, sign, or subscribe any oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing, it shall be sufficient, wherever such perjury or other offence aforesaid shall have been actually committed, to allege the offence of the person who actually committed such perjury or other offence in the manner hereinbefore mentioned, and then to allege that the defendant unlawfully, wilfully, and corruptly did cause and procure the said person the said offence, in manner and form aforesaid, to do and commit; and wherever such perjury or other offence aforesaid shall not have been actually committed, it shall be sufficient to set forth the substance of the offence charged upon the defendant, without setting forth or averring any of the matters or things hereinbefore rendered unnecessary to be set forth or averred in the case of wilful and corrupt perjury.'

Sec. 22. 'A certificate containing the substance and effect only (omitting the formal part) of the indictment and trial for any felony or misdemeanor, purporting to be signed by the clerk of the Court or other officer having the custody of the records of the Court where such indictment was tried, or by the deputy of such clerk or other officer (for which certificate a fee of six shillings and eightpence and no more shall be demanded or taken), shall upon the trial of any indictment for perjury or subornation of perjury be sufficient evidence of the trial of such indictment for felony or misdemeanor, without proof of the signature or official character of the person appearing to have signed the same.' (*q*)

It has been holden, on motion in arrest of judgment, that several persons cannot be joined in one indictment for perjury, the crime being in its nature several. (*r*) But this does not apply to subornation of perjury. (*s*)

Venue. — With respect to the *venue* in an indictment for perjury, it may be briefly observed that the parish or place, unless used as giving some specific local description, will not be material, and that it will be

(*p*) *R. v. Dunning*, 40 L. J. M. C. 58, *et per* Channell, B., 'This section is almost identical in terms with sec. 1 of 23 Geo. 2, c. 11, except that it omits the words "averring such Court or person or persons to have a competent authority to administer the same."'

(*q*) The production of the indictment itself is insufficient. *R. v. Coles*, 16 Cox, C. C. 165.

(*r*) *R. v. Philips*, 2 Str. 921.

(*s*) *R. v. Rhodes*, 2 Ld. Raym. 886. In *R. v. Goodfellow*, C. & M. 569. one defendant was indicted for perjury, and the other for suborning him to commit the perjury, and no objection taken to both being included in the same indictment; and it should seem none could have been successfully taken on that ground, as it is like the case of principal and accessory before the fact, included in the same indictment. C. S. G.

sufficient to show the offence committed anywhere within the county. The statement of venue in the margin is now sufficient. (t) In a case where perjury had been committed in the booth-hall within the limits of the city of Gloucester, which is a county of itself, on the trial of a cause before a jury of the county at large, it was holden that the indictment might be found and tried by juries of the county at large. (u) And where perjury had been committed on the trial of an indictment the Worcester quarter sessions, which were held in the Guildhall at Worcester, which is situate in the county of the city of Worcester, it was held that the indictment, which was found by the grand jury of the county of the city of Worcester, was good, as it was preferred in the county where the oath was actually taken. (v) A sufficient venue was holden to be laid on the act of taking the false oath in a case where perjury was assigned on an affidavit of an attorney of the Court made in answer to a summary application against him, and where it was objected that it was not stated where the Court was holden when the original application was made, or when the rule was made, calling upon the defendant to answer the charge, it being expressly averred that the defendant 'then and there before the said Court was duly sworn.' (w) In the instance of making an affidavit in the country, the party is not to be indicted where the affidavit may happen to be used, but in the county where the offence was completed, by making the false oath. (x)

Time. — The indictment need not state the time at which the offence was committed in any case where time is not of the essence of the offence. (y) Where it is not material, it need not be averred; and if averred, it may be rejected. (z) In a case where an indictment for perjury, charged to have been committed in the defendant's answer to a bill of discovery filed in the Court of Exchequer, alleged that the bill was filed on a day specified, it was holden that the day was not material, as it was not alleged as part of the record: and, therefore, that it was no variance, though the bill, when produced, appeared to be entitled generally of a preceding term. (a) Where the perjury was assigned in answer to a bill alleged to have been filed in a particular term, and a copy produced was of a bill amended in a subsequent term, by order of the Court, it was held to be no variance, the amended bill being part of the original bill. (b) So it has been held on an indictment for perjury committed on the trial of a cause at nisi prius to

(t) See the 14 & 15 Vict. c. 100, s. 23. See Harris's case, 2 Leach, 800; *R. v. Woodward*, R. & M. C. C. R. 323.

(u) *R. v. Gough*, Dougl. 791. In this case a charter had made Gloucester a county of itself, reserving only the trial of matters arising in the county at large within Gloucester as before. The judges intimated their opinions that the indictment might be in either county, but they were clear it might be in the county at large.

(v) *R. v. Jones*, 6 C. & P. 137, Tindal, C. J.

(w) *R. v. Crossley*, 7 T. R. 315.

(x) By Lord Kenyon, C. J. *Id. ibid.*

(y) 14 & 15 Vict. c. 100, s. 24. *R. v.*

Aylett, 1 T. R. 69. In *R. v. Kimpton*, 2 Cox, C. C. 296, Parke, B., doubted whether an averment of the materiality of a thing occurring on 'Monday, the 29th of June, in the year 1846,' was sufficient after verdict, as the proper course is either to state the year of our Lord, or the year of the monarch's reign; and he left the prisoner to his writ of error.

(z) *R. v. Aylett*, 1 T. R. 70, 71.

(a) *R. v. Hucks*, *cor.* Lord Ellenborough, C. J., 1 Stark. R. 521. And see *Rastall v. Stratton*, 1 H. B. 49. *Woodford v. Ashley*, 2 Campb. 193, and 1 Stark. Crim. Plead. 122.

(b) *R. v. Waller*, Mich. 6 Geo. 1, 3 Stark. Evid. 856.

be no variance that the *nisi prius* record states the trial to have been on a day different from that stated in the indictment, there being no express reference in the indictment to the record. (c)

Variances. — It is proper to make such a statement by way of inducement as will be sufficient to explain the assignment of perjury, and make it intelligible and consistent. And such statements in the indictment should be made with accuracy. An indictment for perjury stating a bill of Middlesex as 'issuing out of the office of the chief clerk assigned to inrol pleas in the Court,' &c., has been holden to be bad. (d) And if the indictment state that at the assizes, holden before justices assigned to take the said assizes, the oath was taken before A. B., one of the said justices, the said justice then and there having power, &c., it will be a fatal variance if the oath was administered when the judge was sitting under the commission of oyer and terminer and gaol delivery. (e)

An indictment for perjury alleged that at the assizes holden for the county of Stafford, on &c., at &c., before Sir J. P. &c., 'justices assigned to take the assizes in and for the said county,' one Corns was tried for a rape, and that the prisoner on that trial swore, &c. The record of the former trial stated it to have taken place 'at the assizes and general session of oyer and terminer.' It was objected that the indictment was bad, as an indictment for rape could not be tried under the commission of assize. Greaves, Q. C., doubted whether the indictment was necessarily bad; as the indictment for rape might have been removed by *certiorari*, and tried on the civil side; in which case the allegation that it was tried at the assizes might suffice. (f)

It was further objected that there was a variance, as the record produced showed that the trial had taken place in the crown court, and thereupon an amendment of the indictment was prayed. Greaves, Q. C., consulted Williams, J., and they agreed that there was a variance, but that there was no power to amend the indictment under the 9 Geo. 4, c. 15, as the allegation was the statement of a fact, viz. the Court before which the trial took place, and was not the 'recital or setting forth' of 'any matter in writing or print,' within that Act. (g)

An indictment alleged that a trial took place at a session of gaol delivery before Lord Campbell, chief justice of our lady the Queen, assigned to take pleas before the Queen herself, and Sir E. V. Williams,

(c) *R. v. Coppard*, Moo. & M. 118. 3 C. & P. 59, per Lord Tenterden, C. J., on the authority of *Purcell v. Macnamara*, 9 East, 156.

(d) *R. v. Scole, Peake*, N. P. R. 112, Lord Kenyon, C. J.

(e) *R. v. Lincoln*, MS. Bayley, J., and R. & R. 421.

(f) See the precedents, 2 Chitt. C. L. 368, 367 (a), of indictments for perjury on the trial of causes at the assizes, which are in the form of this indictment; though, according to 3 Bl. C. 60, the commission of assize is to take the verdict of a peculiar species of jury, called an assize. Blackstone also speaks of a commission of assize being issued each circuit; but no such commission is now issued, and the cases tried on the civil side are tried under the commission of

assize. And this is according to what Lord Holt said (*Bullock v. Parsons*, 2 Salk. 454), 'The authority of the judge of *nisi prius* is not by the *distringas*, but by the commission of assize; for it is the 13 Ed. 3, c. 30, which gives the trial by *nisi prius*, and by that statute the trial by *nisi prius* is given before justices of assize.' It is clear, therefore, that where perjury is committed either on a civil or criminal trial at *nisi prius* on circuit the trial ought to be alleged to have taken place before the justices assigned to take the assizes. C. S. G.

(g) *R. v. Fairburn*, Stafford Sum. Ass. 1850. MSS. C. S. G. The prisoner was acquitted, or the points would have been reserved. It seems clear that the amendment in such a case might now be made under the 14 & 15 Vict. c. 100, s. 1.

knight, one of the justices of our said lady the Queen of her Court of Common Pleas, assigned to deliver the said gaol of the prisoners therein. It was objected that the words 'assigned to deliver, &c.,' did not apply to Lord Campbell, but only to Williams, J.; but on its appearing that the record had 'and others their fellow-justices assigned to deliver,' &c., Talfourd, J., directed the indictment to be amended. (*h*)

Where an indictment for perjury alleged the former trial to have taken place 'at the assizes and general session of the delivery of the gaol,' it was objected that this was an impossible combination of civil and criminal jurisdiction, and Talfourd, J., ordered the word assizes to be struck out of the indictment. (*i*)

Where an indictment for perjury, committed in a written deposition before a magistrate, in which deposition a word necessary to the sense had been omitted, set out the *substance and effect* of the deposition, and supplied a word which the sense required, as though it was actually in the deposition, the variance was holden to be fatal. (*j*) And where a count in an indictment undertakes to set out continuously the substance and effect of what the defendant swore upon his examination, it must be proved that in *substance and effect* he swore the whole of what is set out, though several distinct assignments of perjury are made thereon. (*k*)

Where perjury is assigned upon several parts of an affidavit, and such parts are set out continuously, it is no variance if such parts are separated by other intervening matter, provided what intervenes does not vary the effect of what is set out. An indictment for perjury alleged to have been committed in an affidavit, set out various matters deposed to as if they had been continuous in the affidavit, but on the production of the affidavit, it appeared that the parts set out in the indictment were not continuous, but were separated by the introduction of other matter. It was contended that there was clearly a variance between the affidavit set out in the indictment and that given in evidence. The proper mode of stating it was, 'in one part whereof the defendant swore such and such things, and in another part whereof he swore certain other things.' In actions or indictments for libel such a variance would clearly be fatal. Abbott, C. J., 'In actions or indictments for libel the tenor must be set out; in indictments for perjury it is sufficient to state the substance and effect of the false oath; the variance pointed out is therefore immaterial.' (*l*) And the

(*h*) *R. v. Child*, 5 Cox, C. C. 197. Spr. Ass. 1851.

(*i*) *R. v. Child*, 5 Cox, C. C. 197. The copy of the record described the court as a general session of oyer and terminer and gaol delivery, and Talfourd, J., ordered the indictment to be amended accordingly.

(*j*) *R. v. Taylor*, 1 Campb. 404. Ellenborough, C. J. The deposition should have been set out literally, and the meaning explained by an *innuendo*. The indictment stated that the defendant went before a justice of the peace, and swore in substance to the effect following, that is to say, &c., and part of the deposition so set forth was that a person therein named assaulted the deponent

with an umbrella, and, *at the same time*, threatened to shoot her with a pistol; but when the deposition was produced it appeared that, after stating the assault with the umbrella, it proceeded thus, 'and at the *same* threatened to shoot,' &c., omitting the word *time*.

(*k*) *R. v. Leefe*, 2 Campb. 134. Lord Ellenborough, C. J., *post*. It appears, however, that in *R. v. Rhodes*, 2 Lord Raym. 886, it was holden, upon an indictment containing only one count, that although all the assignments of perjury but one were bad, judgment should not be arrested. And see *Compagnon v. Martin*, 2 Black. R. 790.

(*l*) *R. v. Callanan*, 6 B. & C. 102.

same has been held as to evidence given upon a trial. An indictment for perjury committed on the trial of an action for assault and battery, charged the defendant with having sworn that the plaintiff spit in the defendant's face before the defendant struck him, and that he, the defendant in the indictment, had not said certain words, and assigned perjury on both statements. The evidence given by the defendant on the former trial contained all the matter charged as perjury, but other matter intervened between the statement as to the spitting and that as to the words. It was objected that this was a variance, as the evidence charged as perjury in the indictment appeared to have been given continuously; but Abbott, C. J., held it was immaterial, as what intervened did not vary the effect of what was stated. (*m*)

In an indictment for perjury committed before a select committee of the House of Commons, it was averred that the election was held by virtue of a certain precept of the high sheriff, by him duly issued to the bailiff of the borough of New Malton; and it was holden that this was not matter of description, and that the production of a precept, which in fact issued to the bailiff of the borough of New Malton, though directed to the bailiff of the borough of Malton, was sufficient. But the indictment also stated that A. and B. were *returned* to serve as burgesses for the said borough of New Malton; and this was considered as a description of the indenture of return, in which the borough was described as the borough of Malton; and the variance was holden to be fatal. (*n*) But where an information for perjury committed before a select committee of the House of Commons, stated that the committee was chosen to try and determine the merits of an election, and that the committee were sworn 'to try the merits of the petition referred to them;' it was held that the committee was well described, although by the 10 Geo. 3, c. 16, s. 13, they were to be a committee 'to try and determine the merits of the return or election.' (*o*)

An indictment may be supported upon an answer in a court of equity, though the answer is not correctly entitled and the name of one of the parties be mistaken. Thus where an indictment alleged that Francis Cavendish Aberdeen and others exhibited their bill in the exchequer, &c., and, on the production of the bill, the complainants on the face of it purported to be *J. C. Aberdeen*, and others, it was holden that this was not a variance, and that it was competent to the prosecutor to prove, by other means than by the bill itself, the allegation that *Francis Cavendish Aberdeen* did, in fact, exhibit his bill. (*p*) And it was further holden not to be a variance, although after the allegation in question, and after setting out such parts of the bill as were necessary, these words were added, 'as appears by the said bill, &c., filed of record;' on the ground that these words referred to the last antecedent, and could not be considered as incorporated with the prefatory allegation that Francis Cavendish Aberdeen exhibited his bill. (*q*) And in an indictment for perjury committed in an answer to a bill in chancery, where the bill was stated to have been filed by A. against B. (the defendant in the indictment) and another, though in

(*m*) *R. v. Solomon*, R. & M. N. P. R. 252.

(*n*) *R. v. Leefe*, 2 Campb. 134.

(*o*) *R. v. Dunn*, 1 Dowl. & R. 10.

(*p*) *R. v. Roper*, 6 M. & S. 327. 1 Stark.

R. 518. Lord Ellenborough, C. J.

(*q*) *Id. ibid.*

fact it was filed against B., C., and D., the variance was holden not to be fatal; the perjury being assigned on a part of the answer which was material between A. and B. (r) So where an indictment for perjury in answer to a bill in chancery described the bill as exhibited against three persons only, viz., A., B., and C., and the bill when produced appeared to be against A., B., and D.; Abbott, C. J., held that this was not a fatal variance, and that the bill produced must be considered as the same described in the indictment. If the indictment had professed to set forth the title of the bill, such variance would have been fatal, but the bill was substantially described, and that was sufficient. (s) So if an indictment for perjury state that there was a suit depending in the Ecclesiastical Court between W. Peacock and R. Miles, and the proceedings in that Court state that the suit was between W. Peacock and R. Miles, *the elder*, this is no variance. (t)

Where an indictment alleged that an action was pending 'in the Whitechapel county court of Middlesex, holden at the court-house in Osborn-Street, Whitechapel, in the county of Middlesex, &c., before J. M., then and there being the judge of the said court;' and it was objected that the description ought to have been 'the county court of Middlesex holden at Whitechapel, in the county of M.,' in pursuance of the 9 & 10 Vict. c. 95; the Court of Exchequer Chamber held that it did sufficiently appear that the court was held in pursuance of that statute; for it was alleged to be a county court, and held before a single judge. (u)

It has been holden that, though there be two counts in the original proceeding, an averment that an *issue* came on to be tried is not a variance. (v) And where an indictment for perjury alleged that a certain issue in a plea of debt came on to be tried, and that upon the trial of the said issue so joined between the parties, certain questions became material, &c., but by the record it appeared that three issues had been joined on three pleas; it was objected that it was impossible to know to which of them the averment of materiality referred; but Erle, J., held that 'issue' was *nomen collectivum*, and overruled the objection. (w)

And a variance between the affidavit actually sworn, and in which the perjury was charged to have been committed, and the affidavit stated in the indictment, by leaving out the letter *s* in the word *understood*, was holden to be immaterial. (x) In a subsequent case, the defendant was tried on an indictment for perjury, committed in giving evidence as the prosecutor of an indictment against A., for an assault; and it appeared that the indictment for the assault charged that the prosecutor had received an injury, '*whereby his life was greatly despaired of*;' but that in the indictment for *perjury*, the indictment for the assault being introduced in these words, '*which indictment was presented in manner and form following*,

(r) *R. v. Benson*, 2 Campb. 508. Lord Ellenborough, C. J.

(s) *R. v. Powell*, R. & M. N. P. R. 101.

(t) *R. v. Bailey*, 7 C. & P. 264, Williams, J. See *R. v. Peace*, 2 B. & A. 579.

(u) *Lavey v. R.*, 2 Den. C. C. 504. See the indictment, 3 C. & K. 26.

(v) *Peake's N. P. C.* 37.

(w) *R. v. Smith*, 1 F. & F. 98.

(x) *Beech's case*, 1 Leach, 133. The inspection of a record is within the peculiar province of the Court; and, therefore, if a doubt arise as to any word upon a record, the Court and not the jury must resolve that doubt. By Lord Ellenborough, C. J., in *R. v. Hucks*, 1 Stark. R. 521.

that is to say, and then set forth at length, did not recite the above-mentioned passage correctly, but omitted the word '*despaired*;' upon which the counsel for the defendant admitted that it was not necessary to have recited the indictment for the assault; but he contended that the prosecutor, by the words '*in manner and form following, that is to say*,' had undertaken to recite it; and that, having so done, he was bound to set it forth *verbatim*. But the learned judge overruled the objection, and said that the word '*tenor*' had so strict and technical a meaning as to make a literal recital necessary; but that by the words '*in manner and form following, that is to say*,' nothing more was made requisite than a substantial recital; and that the variance therefore, in the present case, was only matter of *form*, and did not vitiate the indictment. (y)

An indictment for perjury alleged that the prisoner falsely swore to 'in substance and to the effect following,' and then set out *in totidem verbis* and in the first person a deposition of the prisoner in the English language, but it appeared that the prisoner was examined in Welsh through an interpreter, and that his examination was translated into English, taken down in writing, and signed by the prisoner; and this written deposition was set out in the indictment. It was submitted that the evidence ought to have been set out in Welsh with a translation in English. Williams, J., 'In perjury it is only necessary to prove "the substance and effect." The indictment charges that the prisoner deposed and swore in substance and to the effect there stated. It was not necessary in this indictment to have set forth the deposition *in totidem verbis*; still the substance and effect of what the prisoner swore in the Welsh language may be proved; and if that is in substance and to the effect the same as is stated in this indictment, that will be sufficient.' (z)

Where an indictment for perjury stated that on an inquiry before two justices of the peace on an information under an excise statute, it became a material question where a certain individual was at 4 A. M. on the 2d of July, and that the defendant swore she had been in his company from 2 in the same morning until 4, and on the trial for perjury the evidence was that she had said she had been in his company from 11 until 4.30; Parke, J., doubted whether the evidence supported the allegation, but on conference with Bolland, B., he inclined to think it did. (a)

If an indictment charge that the defendant swore in substance and effect in a deposition, and the deposition be made jointly by him and his wife, his statement following that of his wife, it will not be a variance. The indictment stated that upon a certain information upon oath, entitled 'the information,' &c., the defendant wilfully deposed in substance and to the effect following: 'the defendant (meaning C. D.) I am certain is one of the persons that assaulted and ill-treated my wife,' &c. The information began, 'The information and complaint of Jane, the wife of C. E. Grindall, and of the said C. E. Grindall, made on oath,' &c. 'And first, the said J. Grindall for herself saith that

(y) May's case, *cor.* Buller, J., 1799. The learned judge cited Beech's case, *ante*, note. See R. v. Spencer, R. & M. N. P. R. 97. 1 C. & P. 260.

(z) R. v. Thomas, 2 C. & K. 806.

(a) Anonymous, 1 Lew. 271.

the defendant is one of the persons who assisted W. J. S. and others in handcuffing and otherwise assaulting me on, &c' (Signed) 'J. Grindall.' 'And the said C. E. Grindall sworn says, "the defendant, I am sure, is one of the persons that assaulted and ill-treated my wife,"' &c. It was objected that there was a variance, as the indictment set forth the deposition as sworn by the defendant alone; but it was held that, as what the defendant swore was set out in substance, it was sufficient. (b)

Where an indictment alleged that the defendant committed perjury on the trial of one B., and that B. was convicted, and it appeared by the record when produced that the judgment against B. had been reversed upon error after the bill of indictment against the defendant had been found, it was held that this was no variance. (c)

Where an indictment for perjury alleged that an officer of excise went before two justices of the peace, and gave the said justices to understand and be informed that 'W. Stock, victualler, *being a brewer of beer or ale for sale,*' did neglect to make a declaration of the quantity of beer brewed; and the words in italics were not found in the information when produced; it was held that this was a fatal variance, as the meaning of the indictment was that 'Stock *being a brewer* neglected.' (d)

If an indictment use a word of equivocal meaning, the meaning in which it is used must be collected from the context of the sentence in which it occurs. An indictment for perjury alleged that a commission of bankruptcy was issued against the defendant, under which he was duly declared bankrupt, and that afterwards he preferred a petition to the chancellor, stating (amongst other things) that a commission had issued, that the petitioner, on the 1st of March, 1821, was declared bankrupt, and that at the several meetings *before the commission* the petitioner declared that the bill of exchange (on which the commission had issued) was not due, &c. But the allegation in the petition was that at the several meetings *before the commissioners* the petitioner declared that the bill was not due. It was contended that the words 'commission' and 'commissioners' were not convertible terms; that the word 'commission' denoted the authority under which the parties acted, and therefore the variance was fatal. Abbott, C. J., 'The objection is that there is a variance between the petition set forth in the indictment and that which is given in evidence at the trial. Now, in a proceeding of this kind it is not necessary to set out in the indictment *verbatim* the tenor of the petition; it is sufficient if it be set out truly in substance and effect. The petition, as set out in the indictment, purports that at the several meetings before the commission, the petitioner declared in the hearing of the said assignee that the bill of exchange given to G. Drowley for the debt was not due at the time when he struck the docket. Now the allegation in the petition, which was proved in evidence, was that at the several meetings before the commissioners the petitioner declared so and so, and the question is whether that is a fatal variance. The word "commission" is one of equivocal meaning; it is used either to denote a trust or authority

(b) R. v. Grindall, 2 C. & P. 563.
Abbott, C. J.

(c) R. v. Meek, 9 C. & P. 513. See R. v. Burraston, *post*, p. 356.

(d) R. v. Leech, 2 Man. & Ry. 119.

exercised, or the instrument by which the authority is exercised, or the persons by whom the trust or authority is exercised. And if it may denote the persons exercising the authority, we must collect from the context of the sentence in which the words "before the commission" occur, and of the other parts of the petition, whether it was used in that sense or not.' After stating the indictment the chief justice proceeded, 'Now, if the word commission as there used was intended to denote the commission itself, it would follow that the several meetings took place before any commission issued; but that is impossible, because in that case the petitioner could not have made his declaration in the hearing of the said assignee. Then, if that cannot be the meaning of the word commission, we must construe it in the other sense, which it is capable of bearing, namely, as denoting the persons to whom the authority was given; and if it be so construed, there was no variance between the petition set forth in the indictment and that which was given in evidence; the consequence is, that there must be judgment for the crown.' (e)

In an indictment for perjury the averment stated that the prisoner swore he saw W. 'about fifteen minutes after the hour of 11 o'clock in the forenoon,' whereas it was proved that he had sworn that he saw W. about a quarter past eleven on the day in question, without stating whether it was the forenoon or the afternoon. Day, J., held that the averment in the indictment was not proved, and directed an acquittal. (f)

The 9 Geo. 4, c. 15, s. 1, authorizes the Court to cause the record in an indictment for any misdemeanor, when any variance shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record, to be amended.

In a case where a complaint having been made *ore tenus* by a solicitor, before the chancellor in the Court of Chancery, of an arrest in returning home after the hearing of a cause, the indictment stated that, 'at and upon the hearing of the said complaint,' the defendant deposed, &c.; and this was holden to be a sufficient averment that the complaint was *heard*. (g) And it has been holden that an indictment for perjury, assigned on an affidavit sworn before the Court, need not state that the affidavit was filed of record, or exhibited to the Court, or in any manner used by the party. (h)

An indictment for perjury may state the trial to have taken place either before the judge, who in fact tried the case, or before the judges before whom it is considered in point of law to have taken place. Therefore an indictment for perjury, stating the trial to have been before two judges, but the oath to have been taken before one of them, is good. The indictment alleged the trial before both judges then in commission, and then alleged that the prisoner was sworn before one of the justices aforesaid; and, on a case reserved on the question whether the oath ought not to have been alleged to have been taken before

(e) R. v. Dudman, 4 B. & C. 850.

(f) R. v. Bird, 17 Cox, C. C. 387.

(g) R. v. Aylett, 1 T. R. 70.

(h) R. v. Crossley, 7 T. R. 815. Nor is it necessary to prove such facts. *Id. ibid.* And see the cases, *post*. But it is other-

wise when the proceeding is under the statute of Eliz. Stark. Crim. Plead. 121. And see 3 Stark. Evid. 857, citing R. v. Taylor, Skin. 403, where it was held that the bare making of the affidavit without producing or using it is not sufficient.

both justices, the judges were unanimously of opinion that the conviction was right. (e) So an indictment for perjury on the trial of a cause at the sittings after term, stating the trial to have been before the puisne judge, who in fact tried the cause, is good, although the *postea* states the trial to have been before the chief justice. An indictment for perjury, charged to have been committed on a trial at the sittings after term in London, alleged the trial to have taken place before Littledale, J.; and on producing the record it did not appear before whom the trial took place, but the *postea* stated it to have been before the lord chief justice; in point of fact, however, the trial took place before Littledale, J.; and it was objected that this was a variance; it was answered that there was no reference in the indictment to the record, and no *prout patet per recordum*: it was merely stated that the trial took place before Littledale, J., and that was proved. Lord Tenterden, C. J., 'On a trial at the assizes the *postea* states the trial to have taken place before both justices; it is considered in law before both, though in fact it is before one only, and I am not aware that the *postea* is ever made up here differently when a judge of the Court sits for the chief justice. I cannot stop the case upon such an objection; you may have leave to move upon this point in case it shall become necessary.' (f)

Where a trial was had in the old county court it was necessary to allege that the trial was had before the suitors, and to set out the names of the suitors; and therefore it was erroneous to allege that the trial took place before the sheriff and suitors. (k)

The indictment alleged that an issue was tried before the sheriff of the county of Durham, by virtue of a writ to him directed, and that upon the trial of that issue the prisoner was duly sworn before the said sheriff. By the writ of trial, return, and the record, the issue did appear to have been tried before the sheriff of Durham; but by the parol evidence it appeared that the issue was not tried before the sheriff or under-sheriff, and that neither of them was present, but that it was in fact tried before Mr. S., who was stated to be the deputy of the high-sheriff; but no appointment of Mr. S. was put in, nor was his office more particularly described. Wightman, J., was disposed to direct an acquittal, on the ground that the variance was fatal; but, upon being informed that it was the invariable practice when writs of trial were directed to the sheriff, to make up the record as if the trial had been before him, though in fact it was before some deputy, he thought it better to allow the trial to proceed, and the prisoner was convicted; and, upon a case reserved, the majority of the judges held that the conviction was right. (l)

So where an indictment for perjury alleged that upon the execution of a writ of trial directed to the sheriffs of the city of London, certain issues came on to be tried and were tried before the sheriffs of London, and that the defendant came before the said sheriffs, and before the said sheriffs was duly sworn, and it appeared that the trial took place before the secondary and not before the sheriffs, the Court of Queen's

(i) *R. v. Alford*, 1 Leach, 150. See this case, *post*, p. 343.

(j) *R. v. Coppard*, Moo. & M. 118. 3 C. & P. 59, Acquittal.

(k) *Jones v. Jones*, 5 M. & W. 523. See *R. v. Fellowes*, 1 C. & K. 115.

(l) *R. v. Dunn*, 2 M. C. C. R. 297. 1 C. & K. 730.

Bench held, on the authority of the preceding case, (*m*) that the trial was properly alleged to have taken place before the sheriffs. (*n*)

Where an indictment alleged a trial for felony to have taken place at a session of oyer and terminer and gaol delivery, before Lord Campbell and Williams, J., and the trial had in fact taken place before Greaves, Q. C., in the grand-jury room at Stafford during the assizes, and his name was not mentioned in the copy of the record which was produced; but the usual words 'and others their fellows, justices assigned, &c.' were therein, and it appeared that Greaves, Q. C., was a justice of the peace for Staffordshire. It was objected that there was nothing to show that Greaves, Q. C., had jurisdiction to try the case. Talfourd, J., said that if the trial had taken place in this Court before a person in the robes of a judge of assize, and acting as a judge of assize, he would not require any proof of his authority; but Mr. Greaves sat in the grand jury room, and being a magistrate for the county, might, it was just possible to suppose, have acted in that capacity. There was nothing on the face of the documents to show that he had any authority; he therefore thought the objection so formidable that he would, if necessary, reserve the point. (*o*)

An indictment alleged that a cause was depending, and that an application was made to Lord Denman, the Lord Chief Justice of Her Majesty's Court of Queen's Bench, and the other judges of the said Court, and the said judges granted a rule *nisi*, which rule, or an office copy thereof, was set out; and Parke, B., held that the indictment was bad, as the application could only be made to the Court, and it ought to have been so stated, and it did not appear by this indictment that the application was made to a tribunal having jurisdiction to grant it. (*p*)

If an indictment for perjury committed on a trial before the sessions alleges an adjournment to have been made by certain justices, and the record states it to have been made by other justices, this is a variance; but the defect may be cured by proving that in fact the adjournment was made by the justices named in the indictment. An indictment for perjury on the trial of an indictment for an assault alleged an adjournment to have been made by Const. and A. B., and others their fellows, justices, &c. The examined copy of the record of the conviction stated the adjournment to have been made by Const. and E. F., and others, their fellows, justices, &c. It was contended that this was a fatal variance; and Abbott, C. J., held that it was; but that the defect might be cured by other evidence, as by calling some person who could state that he was present and saw the justices named in the indictment present on the day in question. (*q*)

(*m*) *R. v. Dunn*.

(*n*) *R. v. Schlesinger*, 10 Q. B. 670.

(*o*) *R. v. Child*, 5 Cox, C. C. 197. But see *R. v. Dunn*, *supra*.

(*p*) *R. v. White*, 2 Cox, C. C. 232. It was suggested that the rule ended as usual 'By the Court;' which cured the defect. But Parke, B., held that that was not so; what was set out was the 'rule or an office copy thereof.'

(*q*) *R. v. Bellamy*, R. & M. N. P. R. 171. In order to remedy the defect, a wit-

ness from the office of the clerk of the peace produced a minute book, which contained an entry, not drawn up in any formal manner, of the names of the particular justices who were present at the day of adjournment mentioned in the indictment, and amongst whom were all the names mentioned in the indictment; these minutes were made by a clerk in the same office, of the name of Richards, whose duty it appeared to be to attend at the quarter sessions, for the purpose of making these entries at the time;

It is sufficient to state in the indictment that the defendant saw *duly* sworn. (r) In a case where it was averred that he was *sworn on the Gospels*, and he appeared to have been sworn according to the custom of his own country, without kissing the book, it was considered as a fatal variance; though it was holden that the averment was proved by its appearing that he was *previously* sworn in the ordinary mode. (s) An indictment for perjury in a cause tried at the assizes was holden good, although it alleged the oath to have been taken before one only of the judges in the commission, and the *nisi prius* record imported that the trial was before the two judges of assize. (t)

An indictment at common law, which charged that the defendant 'falsely, maliciously, wickedly, and corruptly swore,' &c., was holden sufficiently to imply that the offence was committed *wilfully*; (u) but it was considered at the same time that, in an indictment on the 5 Eliz. c. 9, the offence must be laid expressly to have been wilfully committed. (v)

The indictment should aver that the defendant '*wilfully and corruptly*' swore, and every count should expressly state that the defendant was sworn, and the fact of his having been sworn cannot be taken by intendment. The first count stated that the defendant on the trial of an indictment against J. H., intending to injure J. H., and to cause him to be wrongly convicted, appeared as a witness and was sworn, and 'then and there falsely and maliciously gave false testimony against J. H., by then and there deposing and giving evidence,' &c. The fifth count, the only one that differed materially from the first, alleged that by means of the false testimony in the first count mentioned, J. H. was found guilty; that a rule *nisi* for a new trial was granted; that the defendant, intending to hinder the said rule from being made absolute, came before a commissioner and was sworn, and being so sworn, wickedly, wilfully, and corruptly did

but Richards was not called as a witness, and there was no evidence to show whether he was present on the particular day further than the entry itself. In the same book on the opposite page to the entry already stated, was another, drawn up by the witness who produced the book; and this was in the form of a record, and was in fact a summary of all the names of the justices attending upon the quarter sessions upon each day during the sessions, but it did not distinguish who was present upon any particular day; amongst these names also were the justices mentioned in this indictment. But Abbott, C. J., held that this evidence was not sufficient to supply the defect; the minutes made by Richards were not a record, or in the nature of a record, and the entry on the opposite page was insufficient, as it did not give the names of the justices who were present on the particular day.

(r) *R. v. McCarthur, Peake's N. P. C. 155.* Lord Kenyon, C. J.

(s) *Id. ibid.*

(t) *R. v. Alford, 1 Leach, 150. MS. Bayley, J.; Eyre, B., doubted on the trial*

whether one commissioner of assize alone had competent authority to administer the oath, and conceived the indictment ought to have alleged the oath to have been taken before both the judges in the commission, but on a case reserved the judges were unanimous that the indictment was right. See this case, *ante*, p. 341. But as to a record in the Crown Court, see *R. v. Lincoln, ante*, p. 334. In *R. v. Deman, 2 Ld. Raym. 1221*, an exception was taken to an indictment, that it stated the trial at which the oath was taken to have been before the Lord Chief Baron and the associate, but stated the oath to have been before the Chief Baron, without the associate; and also, that the assignment of perjury differed from the oath, being before the Chief Baron and associate. But the objections were overruled; and the Court held that the associate need not be mentioned in every part of the indictment where the Chief Baron was mentioned.

(u) As to the offence being *wilful*, see *ante*, p. 293.

(v) *Cox's case, 1 Leach, 71.*

depose, swear, and make affidavit in writing, in substance that the evidence which he, J. S., had given on the said trial was true; whereas the evidence which the said J. S. had given on the said trial was not true, but was false in the particulars in the said first count of this inquisition assigned and set forth. The defendant having been convicted, a rule was obtained for arresting the judgment, and after argument, Abbott, C. J., delivered the judgment of the Court as follows: 'I am of opinion that this rule must be made absolute. As to the first class of counts, the objection is that they do not charge that the defendant swore wilfully or corruptly. Every definition of perjury is swearing wilfully and corruptly that which is false. Whether the word maliciously might supply the place of either wilfully or corruptly, it is not necessary to determine, for neither of those words is found in the counts in question, and *Cox's case*, (w) which has been referred to, proves at all events that such counts are insufficient. I now come to the consideration of the last count. It is in a form perfectly novel; it was intended to allege perjury in an affidavit made in this court. In the ordinary course of pleading, the first step would have been to charge that there had been a trial, and that the defendant was sworn as a witness; the second, that he swore such and such things; the third, that the matter was false, and so on. Here there is no distinct averment that the defendant was sworn as a witness, or of what he swore. But it is said that the fact of his having been sworn must be taken by intendment. Were we to do that, as we are desired to do, in support of this indictment, we should furnish a precedent for a very loose and insufficient mode of charging a very serious offence, which has always hitherto been required to be charged with great certainty and particularity. I think that these novel attempts in pleading are not to be encouraged, and that the judgment must be arrested.' (x)

Where an indictment for perjury alleged that the prisoner 'feloniously' swore to the matter on which the perjury was assigned instead of 'falsely,' it was held that the indictment was bad in substance, and that the words 'corruptly, knowingly, wilfully, and maliciously,' did not supply the defect: a man might swear 'corruptly' under some corrupt influence, and yet swear the truth; so with respect to the word 'knowingly;' and he might swear 'wilfully and maliciously' to gratify some malicious feeling, but yet it might not be 'falsely.' Nor did the conclusion that the prisoner 'in manner and form aforesaid did commit wilful and corrupt perjury' cure the defect; for the meaning of that was, that the prisoner committed the offence in the manner stated, and, that statement being defective, the indictment was bad. (y)

Variance in allegation of competency of court. — It must appear or (z) be alleged in the indictment that the person by whom the oath was administered had competent power to administer it. Thus upon

(w) *Supra*.

(x) *R. v. Stevens*, 5 B. & C. 246. The 5 Eliz. c. 9, s. 6, *ante*, p. 320, uses both the words, 'wilfully and corruptly,' and therefore it should seem that both these words

must be used in an indictment on that statute. C. S. G.

(y) *R. v. Oxley*, 3 C. & K. 317. Cresswell, J., after consulting Alderson, B.

(z) See *R. v. Dunning*, L. R. 1 C. C. R. 290.

an indictment for perjury before a justice in swearing that I. S. had sworn twelve oaths, where the charge as stated did not import that the oaths were sworn in the county for which the justice acted, Eyre, J., arrested the judgment; because, as the charge did not so import, the justice had no jurisdiction to administer the oath in question to the defendant. (a)

Where an indictment for perjury alleged that two judges had 'sufficient authority' to administer the oath, it was doubted whether it was sufficient, as the 23 Geo. 2, c. 11, s. 1, has only 'competent authority.' (b)

An indictment for perjury alleged that W. U. had done business as an attorney for the defendant and J. I., on the retainer of the defendant, and that afterwards, to wit, on the 7th of August, 1844, the said W. U. delivered a bill of costs to the defendant and J. I., and that no application was made to the court, in which the said business was done, by the defendant or J. I. within one month after the delivery of the bill, nor did the said court or any judge within one month next after the delivery of the said bill refer the said bill to taxation; and that after the expiration of one month, to wit, on the 25th of April, 1845, W. U. applied to one of the judges of the said court to refer the said bill to be taxed, and thereupon on the said 25th day of April the said judge issued a summons, requiring the defendant and J. I. to show cause why the said bill should not be referred to the master to be taxed; and that before showing cause the defendant went before a commissioner and made an affidavit denying the retainer of the said W. U. It was objected that 'month' in the indictment meant lunar month; and as the jurisdiction to tax the bill on the application of the attorney did not arise under the 6 & 7 Vict. c. 73, ss. 37 & 48, until after one calendar month after the delivery of the bill, the indictment did not show jurisdiction to issue the summons. But the Court of Exchequer Chamber held that the objection ought not to prevail; and Parke, B., in giving the judgment said, 'Although the word "month" would, in our opinion, if unexplained, signify lunar month, enough is stated to show the judge's jurisdiction; for, as the dates are material, they may be taken without the videlicet, and taken to be true. But I do not think the indictment would be bad even if it contained nothing to show that a calendar month had elapsed before the summons issued, for the judge had general jurisdiction, and must be taken to have had jurisdiction in the particular case unless the contrary appear. I think in such a case the jurisdiction would be intended; but it is not necessary to decide the point.' (c) The third and fourth counts of the same indictment omitted to allege that no application had been made to the court or a judge to tax the bill by the defendant or J. I., and it was urged that these counts were bad by reason of such omission, as by sec. 37 of the 6 & 7 Vict. c. 73, the

(a) *R. v. Wood*, Exeter, 1723. MS. Bayley, J.

(b) *R. v. Child*, 5 Cox, C. C. 197. Talford, J., declined to stop the case, but would have reserved the point had not the prisoner been acquitted. This enactment is now repealed, see *ante*, p. 330.

(c) *Ryalls v. R.* 11 Q. B. 178. The Court of Queen's Bench had held that as all the counts referred to the Act of Parliament, the word 'month' in the indictment must be construed according to the clause in the Act to mean calendar month.

jurisdiction of the courts to refer such a bill to taxation upon the application of the attorney depended on the fact that no application had been made within the month by the party chargeable; but the Court of Queen's Bench held that the judge had jurisdiction, after the expiration of the month which was alleged in the counts, to issue a summons at the instance of the attorney, calling on the party chargeable to show cause why the bill should not be taxed, although it might be true that if it had appeared on showing cause that a previous application within the month had been made by the party chargeable, the judge might not have had jurisdiction to make an order for taxation. Therefore the affidavit of the defendant, made after such summons, was made in the course of a judicial proceeding. (*d*)

Where a statute requires an act to be done by justices of the peace acting for a particular division in petty sessions, an indictment for perjury committed before two such justices must allege that they were acting for such division, but need not aver that they were assembled in petty sessions. (*e*)

Where an indictment for perjury stated that the prisoner, maliciously intending to subject W. Mortiboy to the punishments of felony and larceny, went before J. C. and H. H., two justices of the peace, and was sworn (J. C. and H. H. having competent power, &c.), and deposed in substance that on Wednesday last he (the prisoner) was in W. M.'s Peg Alley, and that he (the prisoner) put his hand into his watch fob, and took out a £5 note to make a bet with W. M., and put it into his breeches pocket. That W. M. collared him, and knocked him down, and put his knee on him, and then put his hand into his (the prisoner's) pocket, and took the said £5 note, &c. It was submitted that the indictment was bad, as it did not show that there was any proceeding pending before the magistrate, or that this was a deposition on any charge of felony. Coleridge, J., 'There might be cases of an affidavit where there was no charge, and no prosecution, and, indeed, no cause in hand. It might have been averred that the defendant made a charge, and that in support of that charge the deposition was made. If the defendant had merely come before the magistrates to swear this, without more, it would not be perjury. I think that the indictment is not sufficient.' (*f*)

(*d*) Ibid.

(*e*) *R. v. Rawlings*, 8 C. & P. 439, J. A. Park, and Patteson, JJ., after time taken to consider the points.

(*f*) *R. v. Pearson*, 8 C. & P. 119. When the objection was first made, Coleridge, J., said, 'This might have been the original information. Might it not be that this statement to the magistrates was the charge?' And it is conceived that this was the correct view of the case. In cases of felony and misdemeanor it is a very common practice for the party complaining to state the facts to the magistrate's clerk, who takes them down in the shape of an information; such information is then taken to the magistrate, and the complainant sworn to the truth of it: in such cases it is conceived the making the charge before the magistrate, and the making the deposition, is one and the same thing; it could not, therefore, be

averred and proved that the party made the charge, and *in support of it* made the deposition. See *Caudle v. Seymour*, 1 Q. B. 889, where some strong observations were made against the propriety of such a practice. It may, however, be questionable whether such a mode of taking the information would afford any ground of defence to the party who was sworn to its truth. It may be observed, also, that although it may admit of doubt whether this deposition disclosed a felony, yet as it clearly showed an assault, the magistrate had jurisdiction to administer an oath. In *R. v. Bradley*, (Stafford Spr. Ass. 1844, MSS. C. S. G.) Coleridge, J., said, that in the discussion of *R. v. Gardiner*, *infra*, considerable doubts were entertained among the judges whether *R. v. Pearson* was rightly decided. See *R. v. Crawley*, 12 Cox, C. C. 162; *R. v. Lewis*, 12 Cox, C. C. 163.

The first count stated that the prisoner, meaning to subject C. F. E. to the punishment provided for persons guilty of felony, &c., went and was sworn before a justice of the peace for the county having competent authority to administer the oath, and being so sworn then upon a certain information and examination, entitled 'County of Oxford, to wit: the information and examination of R. G. taken upon oath before me, &c.,' falsely, &c., did depose, &c. The whole of the information was then set out; it contained the following passage: 'I then went and got over Mrs. Calcut's wall into the close, and went and looked over the wall between her close and Mr. E.'s ox-pens. I then saw the donkey standing with its side towards and near to the manger of the second pen, with her head towards Mrs. Calcut's close. Mr. C. E. was standing behind her. I saw that he had the flap of his trowsers unbuttoned and hanging down. I saw the corner of the inside of it; he was rather on the move; he appeared to be on the donkey (meaning that he appeared to the said R. G. to be in the actual commission of that detestable crime, &c.). He remained in that position about five minutes, when the donkey kicked Mr. C. E.'s leg; upon which he moved aside, turning his back rather more towards me than it had been, and stooped down to rub his leg; he then lifted himself up again, and turned around with his face towards me. I then saw his private parts exposed: I saw him tuck up his shirt and button up his trowsers: the upper part of them as well as the flap had been unbuttoned.' This count contained no averment as to the materiality of any of the matters deposed to. It contained several assignments of perjury. Those on which the prisoner was found guilty were as follows: 'Whereas in fact the said C. F. E. then and there had not the flap of his trowsers unbuttoned or hanging down. And whereas the said C. F. E. had not then and there, or at any other time or place whilst standing behind the said donkey, or any other donkey, the flap of his trowsers unbuttoned, and hanging down, nor had the trowsers the said C. F. E. then wore any flap whatsoever. And whereas the said C. F. E. did not appear to the said R. G. to be, nor was he, then and there, or at any other time or at any other place, in the actual commission of that detestable crime, &c., with the female donkey aforesaid, or with any other animal, or in any other manner whatsoever. And whereas the said C. F. E. did not remain in that situation for about five minutes, nor did the said donkey kick the said C. F. E.'s leg, nor did,' &c., &c. Here followed a number of other averments, which were not proved for want of two witnesses. The third count was the same as the first, except that it stated the prisoner's intention to be, to subject C. F. E. to the punishment inflicted on persons guilty of misdemeanors, and the innuendo was, that C. F. E. was attempting to commit the offence. The seventh count stated, that the prisoner, intending to aggrieve C. F. E., 'came before Mr. Rawlinson, and was sworn (he having authority), and falsely, &c., did depose, swear, charge, and give the said justice to be informed that the said C. F. E. upon, &c., had a venereal affair with a certain animal called a donkey, and feloniously and against the order of nature did commit and perpetrate that detestable and abominable crime, &c., with the said donkey. And further (it being then and there material to the inquiry into the said charge and information to know the state of

the said C. F. E.'s dress at the time the alleged offence was so charged to have been committed as aforesaid) that he, the said R. G., then and there saw that the said C. F. E. then and there had the flap of his trowsers unbuttoned and hanging down, and that he, the said R. G., then and there saw the inside of the said flap; whereas the said R. G. did not then and there, or at any time, or at any place, see the said C. F. E. at any time in the act of having a venereal affair with a donkey, or with any other animal whatsoever, nor did the said C. F. E. then, or at any time, or at any place, or in any manner commit, nor was the said C. F. E. at any time, or at any place, or in any manner in the act of committing that detestable and abominable crime. And whereas the said R. G. did not then and there see the flap of his, the said C. F. E.'s, trowsers unbuttoned or hanging down, nor was the flap of the said C. F. E.'s trowsers then and there unbuttoned or hanging down, nor did the said R. G. then and there see the inside of the flap of the said trowsers.' The information signed by the prisoner was put in, and it was proved that he was duly sworn, and that the charge was dismissed. The two witnesses produced to the facts were C. F. E., a lad of fifteen, and his elder brother, J. H. E. They swore that they went together to the field, J. H. E. having a gun; that they spoke of going to Chipping Norton, and that C. F. E. went to see whether the donkey was able to go to Chipping Norton, and parted from his brother for that purpose; that he was absent three minutes; that the trowsers he had on, which were produced in court, had no flap. These were the only facts to which they both spoke. C. F. E. fully negatived what the prisoner had sworn to, in a manner quite satisfactory to the jury. J. H. E. also stated that he was about forty yards from the oxpens; that he had his back towards them; that if he had turned round he could have seen them and the wall, and must have seen if any one was looking over it, but he did not turn round. It was objected, first, that the first and third counts did not distinctly show any proceeding pending before the magistrate; that they ought to have averred directly that a charge was pending. *R. v. Pearson.* (g) But Patteson, J., thought that case distinguishable, because of the words 'upon an information and examination,' &c. (h) Second, that the flap of the trowsers being unbuttoned did not appear on the face of the counts to be material, and there was no averment of its materiality. The same objection applied to the precise time of five minutes. Third, that the assignment of perjury as to the main charge was too large, because it denied all animals and all times and places. Fourth, as to the first count, that the language used by the prisoner, as there set out, did not import that a felony was committed, but only an attempt. These objections were urged in arrest of judgment. Fifth, as to the seventh count, the first objection to the first and third counts was urged, Sixth, to the same count it was urged that, although in that count the state of C. F. E.'s dress was averred to be material, yet that by such averment was meant, not whether the flap of his trowsers was unbuttoned, but the trowsers generally. Seventh, that the seventh count alleged that the prisoner charged

(g) *Ando*, p. 346.

(h) The present indictment is in the same form as the one in 4 Wentw. 244, 2 Chitty's Crim. Law, 443.

the capital offence, whereas, by his information, he appeared to have charged only an attempt. The sixth and seventh objections were taken before the verdict, and did not apply in arrest of judgment, as was also the objection whether the evidence of J. H. E. went to any material fact sufficient to satisfy the rule as to two witnesses in cases of perjury. On all these questions, the learned judge requested the opinion of the judges, and all the judges present held the conviction good on the seventh count, and most of them appeared to think it good on all the others. (i)

Where an indictment stated that 'heretofore, to wit, on, &c., at, &c., before M. G. and T. H. H., two of the justices, &c., came one J. Osborne, and then and there exhibited to and before the said M. G. and T. H. H., so being such justices as aforesaid, a certain information upon oath, and then and there informed the said justices' that certain quantities of stolen silk were found in a certain house; it was held, that this allegation did not sufficiently show that the oath was taken before the said justices, as it was consistent with the allegation that the oath might have been taken before some other justices. (j)

Where a count, which charged perjury in an affidavit to hold to bail, made since the 1 & 2 Vict. c. 110, did not state that a writ of summons had been issued when the affidavit was sworn, it was held good; for the affidavit may be sworn before the issuing of the writ. (k)

Where an indictment for perjury committed under the Interpleader Act set out the issues joined in the Court of Exchequer between A. B. and C. D., the trial at Westminster, the verdict for the plaintiffs, the judgment, the writ of *feri facias* consequent thereon to the sheriff of Somersetshire, dated the 5th of June, 1841, the warrant, the seizure of the goods of C. D., and the notice on the part of the prisoner to the sheriff not to sell the goods so seized, but to deliver them up to him, the same being his property; and then charged that the prisoner came before a commissioner, and produced an affidavit in writing, and swore to the truth of the matter contained in it; and the affidavit was, that the prisoner having heard that C. D. had certain goods (those seized under the *feri facias* of the 5th of June), bought them and paid for them on the 1st of June. The sale and purchase were then negatived, and this was the perjury charged. It was submitted that, as there was no allegation that any application had been made under the Interpleader Act, it did not appear that the affidavit was made in a judicial proceeding; and Coleridge, J., held the objection fatal; as for anything that appeared, this was a voluntary oath, and not made in any judicial proceeding. (l)

Where an indictment for perjury alleged that a certain cause had been depending in the King's Bench, and that such proceedings were had, that a writ of inquiry was duly issued out of the said court, directed to the sheriffs of London to inquire, &c., and that the said sheriffs should make appear the inquisition which they should take thereof before the justices of our said Lord the King at Westminster, and then assigned perjury on the taking of the said inquisition

(i) R. v. Gardiner, 2 M. C. C. R. 95.
8 C. & P. 737.

(j) R. v. Goodfellow, MSS. C. S. G. and
C. & M. 569. Patteson, and Cresswell, JJ.

(k) King v. R. 14 Q. B. 31. 3 Cox, C. C.
561.

(l) R. v. Bishop, C. & M. 302.

before the secondary; the Court of King's Bench seem to have been of opinion that the indictment was bad, as it appeared that the perjury was committed *coram non judice*; for the writ of inquiry was issued out of the King's Bench, and made returnable in the Common Pleas, and therefore the secondary had no jurisdiction to administer the oath. (*m*)

An indictment for perjury committed in the preliminary proceedings before the commissioners of bankruptcy under 6 Geo. 4, c. 16, to ascertain whether the party should be adjudged bankrupt or not, it seems would be good, although it omitted to state that there was a good petitioning creditor's debt. (*n*)

In an indictment for perjury in an affidavit it is sufficient to state that the defendant was sworn before A. B. (A. B. having power to administer an oath) without stating the nature of A. B.'s authority. An indictment for perjury in an affidavit alleged that the defendant did take his corporal oath before F. J. Chell (he the said F. J. Chell then and there having sufficient and competent power and authority to administer the said oath to the defendant in that behalf) and that the defendant did before the said F. J. Chell, as such commissioner as aforesaid, depose, &c. It was contended, in arrest of judgment, that the indictment was bad, as it did not describe the official station of the person before whom the defendant was sworn. It was, indeed, stated that he made affidavit of certain matters before F. J. Chell, as such commissioner as aforesaid; but he had not been before mentioned as a commissioner, and therefore that averment could not cure the defect. The 23 Geo. 2, c. 11 (*o*) made it unnecessary to set out the commission of the person before whom the oath was taken, but that did not dispense with the necessity of showing the nature of his office. Abbott, C. J., 'Looking at the Act of Parliament, 23 Geo. 2, c. 11, (*o*) we find that all that is required to be set out in indictments for perjury is the substance of the offence charged, and by what court or before whom the oath was taken, averring such court or person to have competent authority to administer the same, without setting forth the commission or authority of the court or person before whom the perjury was committed. It is, therefore, to be considered whether the present indictment has set forth all that is required by the statute. It sets forth the substance of the matter sworn, the person before whom the oath was taken, and avers that he had authority to administer it. The indictment does, therefore, contain all that is required by the words of the statute; and taking into consideration the object of the Act, which was framed to remove the difficulties before felt by reason of the averments and matters which were usually set out in indictments for perjury, we ought not to require more than the words of the legislature have made necessary. When a case of this sort comes on for trial, the prosecutor must prove the situation of the person before whom the oath was taken, and the nature of his authority. I

(*m*) *Pippet v. Hearn*, 5 B. & A. 634. The question arose before the Judicature Acts in an action for a malicious prosecution for perjury, and the first count set out the indictment for perjury as stated in the text, and the court held that the count was good, for where a man maliciously prefers an in-

dictment for a crime he is liable to an action for it, although the indictment be defective.

(*n*) *R. v. Ewington*, C. & M. 319. See *R. v. Jones*, 4 B. & Ad. 345.

(*o*) This Act is now repealed, see *ante*, p. 330.

am, therefore, of opinion, that the indictment is sufficient if it contains the name of the person, if the defendant was sworn before a person, or of the court, if he was sworn before a court. There is not, then, any reason for granting this application.' (p)

This case was reconsidered in the following case:—The indictment stated that at the time of the taking of the false oath by J. O. hereinafter mentioned, R. L., F. D. P., and H. S. G. were commissioners acting in the execution of certain Acts of Parliament relating to the duties of assessed taxes in and for the district of the hundred of Knighton, in the county of W., and thereupon heretofore, to wit, on, &c., at &c., in the district and county aforesaid (at a meeting then and there held by the commissioners aforesaid for the purpose of hearing and determining appeals against the certificate or supplementary charges made by one J. L., crown surveyor in pursuance of the said Acts), a certain appeal of one W. H. of C., in the district and county aforesaid, in due form of law came on to be heard. The indictment then averred that the defendant on, &c., at, &c., appeared before the said commissioners as a witness for and on the behalf of the said W. H., on the hearing of the said appeal, and was then and there sworn, &c., before the said R. L., F. D. P., and H. S. G., so being such commissioners as aforesaid, that the evidence which he the defendant should give upon the hearing of the said appeal should be the truth and nothing but the truth (they the said commissioners then and there having authority to administer the said oath, &c.). The indictment then proceeded to aver the materiality, the giving the evidence, &c. The defendant having been convicted, a writ of error was brought, and one of the errors assigned was, that it did not appear that the said appeal was an appeal against such a certificate as in the said indictment mentioned, or that the same appeal was such an appeal as the said commissioners or any of them had power, authority, or jurisdiction to determine, and if they had no such power, &c., they had no jurisdiction to administer the said oath;

(p) *R. v. Callanan*, 6 B. & C. 102, 9 D. & R. 97. This case having been much relied upon in the following case, and the record examined, I have thought it right to insert the following statement of the first count, which I took from the record. The indictment stated that C. C., contriving and intending to injure one T. S., and in order to obtain a rule of the court of B. R., whereby it might be ordered by the said court that the said T. S. should show cause why a certain judgment signed on a warrant of attorney in a cause in the said court of Stevens against Callanan, and the execution issued thereon, should not be set aside, and the said warrant of attorney be delivered up to be cancelled, and why the proceeds of the said execution should not be restored to the said C. C., and why the said T. S. should not pay the costs of that application, and that in the meantime the said proceeds should remain in the hands of the sheriff of the county of Middlesex, came in his proper person, &c., on, &c., at, &c., before F. J. Chell, gentleman, and the said defendant then and there, to wit, on &c., at, &c., was

duly sworn, and did take his corporal oath upon the Holy Gospel of God before the said F. J. Chell (he the said F. J. Chell then and there having sufficient and competent power and authority to administer the said oath to the said C. C. in that behalf), and the said C. C. being so sworn as aforesaid, falsely, &c., did then and there before the said F. J. Chell, as such commissioner as aforesaid, depose, swear, and make affidavit in writing, amongst other things, in substance, &c. The indictment then set out the affidavit, which stated, amongst other things, that C. C. had applied to the said T. S. for a loan of 150*l.*, which T. S. had agreed to let C. C. have upon having a mortgage upon his, C. C.'s, house, and as a collateral security a warrant of attorney to accompany the said mortgage, that the mortgage and warrant of attorney were prepared for 250*l.*, although no more than 150*l.* was advanced, &c.: 'all which said several matters and things so deposed and sworn by the said C. C. as aforesaid were, and each of them was material for the obtaining and supporting the said rule.' C. S. G.

and the Court of Queen's Bench held that the indictment was bad upon this ground, and the judgment was reversed. (q)

Where an indictment alleged that 'a certain action of contract' was pending in a county court, and then alleged that the defendant was duly sworn before the judge of the said court, 'then and there having sufficient and competent authority to administer the said oath to her in that behalf,' it was objected that there was no averment that the said action of contract was one over which the county court had jurisdiction, and that no intendment could be made in favour of an inferior court that the action pending in it was one over which the court had jurisdiction; but the Court of Exchequer Chamber held that it did appear by necessary implication that the action was one over which the judge of the county court had jurisdiction; for unless he had, he could not have had power to administer the oath, so as to be valid and binding, which is the true meaning of the phrase. The alleged defect, therefore in the averment of the substance of the charge was supplied by necessary implication by the averment of the competency of authority in the judge to administer the oath. (r)

So where an indictment for perjury at a quarter sessions in Ireland alleged that a certain civil bill came on to be tried in due form of law before an assistant barrister, and alleged the oath to have been taken before the said assistant barrister, he having sufficient and competent authority to administer the said oath; it was objected that the indictment ought to have stated that the civil bill was for a cause of action within the jurisdiction of the court. But, on a case reserved, it was held, on the authority of the preceding case, that the indictment was good. (s)

An indictment for perjury alleged that a petition for protection from process was, under and in pursuance of the 5 & 6 Vict. c. 116, 7 & 8 Vict. c. 96, and 10 & 11 Vict. c. 102, filed and presented in the county court of Staffordshire at W. by the prisoner; and that the prisoner afterwards duly received an order for protection from process, and that afterwards, whilst the proceedings upon and in respect of the said insolvency were pending in the said county court, to wit, at the time of filing the said petition and schedule, the prisoner came before H. K., at the court at W., and within the jurisdiction aforesaid, for the purpose of making an affidavit and verifying on oath his said petition and schedule (H. K. being a commissioner to administer oaths in chancery, and duly empowered to act in the matter of the said insolvency, and to take the oath of the prisoner), and was duly sworn and took his oath that the affidavit he then made was true (H. K. having competent authority to administer the said oath). The indictment then alleged the materiality of certain matter, and that the prisoner falsely swore in the usual way. It was objected on error that the indictment

(q) *R. v. Overton*, 4 Q. B. 83. Many other errors were assigned, but not determined by the court.

(r) *R. v. Lavey*, 2 Den. C. C. 504. 17 Q. B. 496. See the indictment, 3 C. & K. 26. *R. v. Overton*, *supra*, was mainly relied on, in support of the objection, and the court observed, 'If it were necessary for us to say how we should decide the present case if

it were not distinguishable from that, we should require further time for consideration,' and that 'in that case the court considered that there was no averment that the oath was administered in the course of any judicial proceeding.'

(s) *R. v. Lawlor*, 6 Cox, C. C. 187. See *R. v. Dunning*, *ante*, p. 344.

did not show that there was jurisdiction to administer the oath, as it did not allege that the prisoner had resided within the jurisdiction of the court for six calendar months next preceding the filing of his petition, according to the 10 & 11 Vict. c. 102, s. 6. But it was held that the indictment was good. (*t*)

An indictment for perjury alleged to have been committed on the hearing of an appeal against a surcharge under the Game Acts before commissioners of assessed taxes, stated that a notice of appeal had been given to the assessors, and averred that the commissioners were 'duly authorized and empowered to hear and determine' the appeal. It was objected that the commissioners had no jurisdiction unless a notice of appeal had been given to the surveyor or commissioners; it was answered that the indictment alleged that the commissioners had authority, and that the want of notice might have been waived; but Patteson, J., held that the want of notice could not be waived; for the 43 Geo. 3, c. 29, enabled the commissioners to hear the appeal, 'unless such notice shall not have been given,' &c., 'when they shall dismiss the appeal.' Without such notice, therefore, the commissioners had no authority to hear the appeal, and it could not make the indictment good to show by evidence that the proper notice was given, when the indictment itself showed the notice to have been an improper one. (*u*)

Variances in allegation of materiality. — It is necessary that it should appear on the face of the indictment that the oath taken was *material* to the question depending. (*v*) But it is not necessary to set forth in the indictment so much of the proceedings of the former trial as will show the materiality of the question on which the perjury is assigned, and it will be sufficient to allege generally that the particular question became a material question. (*w*) Thus statements, that, at a court of admiralty sessions, J. K. was 'in due form of law tried upon a certain indictment then and there depending against him' for murder, and that 'at and upon the said trial it then and there became and was made a material question,' whether, &c., were holden to be sufficient averments that the perjury was committed upon the trial of J. K. for the murder, and that the question on which the perjury was assigned was material on that trial. (*x*) If the materiality of the question evidently appears upon the record, as where the falsehood affects the very circumstance of innocence or guilt, or where the perjury is assigned on documents from the recital of which it is evident that the perjury was important, the express allegation may it seems be omitted. (*y*) And where, upon an indictment for perjury on a trial for felony, it did not appear that the matter sworn was material, nor was it alleged that it was so, the judges held upon a case reserved, that if the original indictment had been set out, and it could plainly

(*t*) *Walker v. R.*, 8 E. & B. 439. Wightman, J., said, 'Suppose the petitioner, not so residing, had sworn in his petition that he did; would that be perjury?' It was admitted that it would. Lord Campbell, C. J., 'Then such a petition would give the court jurisdiction to inquire into the truth of the petition in that respect.'

(*u*) Anonymous, 1 Cox, C. C. 50.

(*v*) *R. v. Aylett*, 1 T. R. 69.

(*w*) *R. v. Dowlin*, 5 T. R. 311; *Lavey v. R.*, 2 Den. C. C. R. 504; 3 C. & K. 26.

(*x*) *Id. ibid.*

(*y*) 2 Chit. Crim. L. 307 *a*, citing *Trem. P. C.* 139, &c., and *R. v. Crossley*, 7 T. R. 815. *Ryalls v. R.*, 11 Q. B. 781. *R. v. Cutts*, 4 Cox, C. C. 435.

have been collected that the matter was material, it would have been sufficient without an averment of materiality, but that as this was not the case the indictment was bad. (z) So where upon an indictment for perjury committed in an answer in chancery, the perjury was assigned in defendant's denial in the answer of his having agreed, upon forming an insurance company of which he was director, &c., to advance 10,000*l.* for three years to answer any immediate calls, and there was no averment that this was material, nor did it appear for what purpose the bill was filed, nor what was the prayer, the judgment was arrested. (a)

It seems to be fully settled that either it must appear upon the indictment that the matter in respect of which the perjury is assigned was material, or it must be expressly alleged to have been so. An indictment for perjury alleged that on the trial of a certain issue the defendant was sworn as a witness, and that on such trial certain questions became material, that is to say, 'whether one J. Kenworthy had been arrested by one J. Lister; whether the said J. L. had on the occasion of the said alleged arrest touched the person of the said J. K.; and whether the said J. L. had on the occasion of the said alleged arrest put his arms round the said J. K. and embraced him.' The indictment then charged that the defendant swore falsely to the following effect: 'Lister (meaning the said J. L.) put his arms round him (meaning the said J. K.) and embraced him (meaning the said J. K., and meaning thereby that the said J. L. had *on the occasion to which the said evidence applied*, touched the person of the said J. K.).' It was further alleged that in answer to a question put to the defendant, 'whether the said J. L. did not put his arms round him (meaning the said J. K.) and embrace him,' the defendant falsely swore as follows: 'he (meaning the said J. L.) did' (meaning that the said J. L., did *on the occasion to which the said evidence applied* put his arms round and embrace the said J. K. and did touch the person of the said J. K.). The defendant having been convicted, a writ of error was brought, and the error specially assigned was that the materiality of the evidence alleged to have been false was not sufficiently averred in the indictment; and it was contended that in the evidence, on which the perjury was assigned, there appeared neither time, place, nor circumstance to connect the statement with the alleged arrest. The whole might have turned upon some former and entirely different transaction. And the innuendoes did not remove the difficulty; for there was no averment in them that it was on the occasion of the alleged arrest; it merely imported that the evidence was given concerning *an* occasion, which was not identified with that in question. Bayley, J., 'An indictment must be good without the help of argument or inference. In the case of perjury the indictment must show either by a statement of the proceedings or by other averments, that

(z) R. v. M'Keron, East. T. 1792, MS. Bayley, J. 5 T. R. 316. S. C.

(a) R. v. Bignold, Trin. T. 1824. MS. Bayley, J. The indictment was shown to Lord Gifford, M. R., and Mr. Bell, K. C., who both thought that upon the face of the indictment it could not be said whether the

question was material or not; and the materiality of all questions in a chancery suit depending upon the purpose for which the suit is instituted, the court held that the indictment could not be supported. MS. Bayley, J.

the question to which the offence related was material. That is not shown here in either way. The words on which perjury is assigned, if taken without the innuendoes, have no necessary reference to the occasion of an alleged arrest; nor is there anything in the indictment to connect them with it. It is contended that the inquiry, to which part of the evidence was an answer, would not have been relevant if applicable to any other matter and occasion than those now in question; but we know nothing of the merits of the case except from the indictment. The innuendoes rather introduce greater doubt than greater certainty, and lessen the force of the argument that only one occasion could have been contemplated. I am, therefore, of opinion that the indictment is defective, and the judgment ought to be reversed.' (b)

Where an indictment stated that a suit was pending in the Court of Chancery, and that a commission was issued to certain commissioners to examine witnesses upon interrogatories, and then set out the ninth interrogatory, and averred that 'upon the examination of the defendant upon the said interrogatories, it became, and was, material to ascertain the truth of the matters hereinafter alleged to have been sworn to and deposed by the defendant, upon his oath, in answer to the said ninth interrogatory;' it was objected that the averment of materiality was insufficient, there being no statement of the alleged perjury being material to the chancery suit, or to any question in that suit; and Coleridge, J., expressed some doubt whether the averment of materiality was sufficient, and would have reserved the point if it had become necessary. (c) And where an indictment for perjury, after alleging that an information was exhibited before two magistrates, and that the same information came on to be heard before M. G. and J. S., two justices, and that 'upon the hearing of the said information before the said M. G. and J. S., so being such justices as aforesaid, it became and was material to ascertain the truth of the matter hereinafter alleged to have been sworn to and stated by the said J. S. upon his oath;' it was held that this averment of materiality was insufficient. (d)

An indictment stated that, on the trial of an action of *Meek v. Knight*, 'it became and was a material question, whether a certain bill of exchange, bearing date, &c.' (here the bill was described) 'was accepted by the said J. Meek, for the accommodation of the said W. Knight, and without valuable consideration to the said J. Meek from the said W. Knight; and whether a certain paper writing or memorandum, then and there produced, by and in the handwriting of the defendant, J. Burraston, was really and truly executed by the said W. Knight, by affixing his mark thereto at the time of the making of the said bill of exchange. (The indictment then set out the

(b) *R. v. Nicholl*, 1 B. & Ad. 21. Little-dale, and Parke, JJ., concurred, and Parke, J., added, 'It is part of the definition of perjury that the false swearing is on some point material to the question in issue. In an indictment this may appear either from the matter of the suit, as shown on the record, or by direct averment.'

(c) *R. v. Hewins*, 9 C. & P. 786. The

defendant was acquitted. The form of the averment in this and the following case was taken from 2 Chitty's Cr. L. p. 307 a; where it is said that this 'concise statement would, it should seem, in all cases suffice.'

(d) *R. v. Goodfellow, Patteson, J.*, after consulting Cresswell, J., C. & M. 569. See the averment of materiality in *R. v. Callanan*, ante, p. note, 351, note (p).

memorandum.) And whether the said memorandum was read over by the said J. Burraston to the said W. Knight, at the time of making the said bill of exchange as aforesaid.' The indictment then alleged that the defendant swore that the said paper writing or memorandum was duly executed by the said W. Knight, by affixing his mark to the same, in the presence of the said J. Burraston, *on the day on which the same bears date and at the time of the making of the said bill of exchange*, and that the said memorandum was then and there read over by the said J. Burraston to the said W. Knight. 'Whereas, in truth and in fact, the said W. Knight did not execute the said paper writing or memorandum by affixing his mark thereto, in the presence of the said J. Burraston, *on the day on which the same bears date*, nor was the said memorandum read over by the said J. Burraston to the said W. Knight at the time of the making of the said bill of exchange, nor was the said memorandum produced or shown to the said W. Knight by the said J. Burraston, at the time of making the said bill of exchange.' Upon a writ of error, brought after a general verdict of guilty, the errors assigned were, that no perjury was assigned upon the question alleged to have been a material question upon the trial, and that no perjury was assigned upon any question alleged to have been a material question upon the trial; and the Court of Queen's Bench held that the indictment was bad. The assignment of perjury, that the bill was not executed on the day on which the same bears date, departed from the statement of the evidence, and the allegation of the materiality. And the assignment of perjury, that the paper was not executed at the time of the making of the bill, bore no relation to the allegations of the evidence of the defendant. The statement of the evidence of the defendant, as well as the allegation of the falsehood, were uncertain. The words 'then and there' might refer to the two dates, the date of the memorandum and the day of the making of the bill, and it might consist with the fact that it never was read over on both days, or the defendant might never have intended to say that it was. (e)

An indictment alleged that E. S. filed his bill in chancery against the prisoner, J. S. S., and J. S., whereby he prayed that a purchase by the prisoner might be declared fraudulent and void, and that he might be decreed to deliver up the contract to be cancelled, and then averred that *it then and there* became a material question whether the prisoner did advise the said J. S., E. S., and J. S. S., that certain real estate, including the premises described in the said bill, should be sold. It was held that the averment of materiality was insufficient. There might be very good reasons for setting aside the sale as fraudulent, quite independently of any advice given by the prisoner; and that being so, the question was whether there was a sufficient averment of materiality,

(e) *R. v. Burraston*, 4 Jurist, 697. The court expressed strong doubts whether it was possible to separate the three propositions, which were said to have formed one question; and Littledale, J., said that if it was one assignment of perjury, and part was bad, the whole was vitiated. It was also doubted whether where a matter was stated to be

a material question the prosecutor could abstain from stating any swearing as to such matter, or assigning any perjury upon it. But it became unnecessary for the court to decide either of these points, as the indictment was held bad on the grounds stated in the text.

and the words 'then and there' were not sufficient to supply the omission of the words 'in the said suit,' or words to the same effect. (*f*)

An indictment for perjury alleged that H. L. stood charged before T. Scott, a justice of the peace, with having on the 12th of August committed a trespass by entering in the daytime on certain land in pursuit of game, and that upon the hearing of the said charge, the prisoner appeared as a witness for the said H. L., and was duly sworn to speak the truth touching the said charge; and that the prisoner upon the hearing of the said charge, falsely swore that he did not see the said H. L., during the whole day of the 12th of August, and that 'at the time he the said prisoner swore as aforesaid it was material and necessary for the said T. Scott, so being such justice as aforesaid, to inquire of and be informed by the said prisoner whether he did see the said H. L. at all during the said 12th day of August,' and it was held that the indictment was bad; for 'it is not stated that it was a material and necessary question in the inquiry before the said T. Scott, to which the false and corrupt answer was given. It may have been, therefore, consistently with the averments in the indictment, material and important for T. Scott in some other matter, and not in the matter stated to be in issue before him, to have put this question and received this answer. Now as the offence of perjury consists in taking a false oath in a matter stated to be in judgment before a court or person having competent authority to decide it, and as this indictment does not clearly and distinctly charge that, it does not charge the offence of perjury.' (*g*)

An indictment for perjury committed on a trial for rape alleged that it was a material question whether the prisoner ever got one M. Williams to write a letter for her, and whether or not she saw the said M. Williams at the house of S. Lewis's father when the said letter was written; and that the prisoner falsely swore that she never got a Mr. M. Williams (he being then present in court during the said trial) to write a letter for her, and that she did not see the said Mr. M. Williams at the said house of the said father of the said S. Lewis. Whereas the prisoner did get the said M. Williams to write a letter for her, &c. At the trial for rape, the prisoner was asked whether she ever got Mr. M. Williams (who was pointed out to her in court) to write a letter for her. She replied, 'No, I did not.' The letter was shown to her and the question repeated, and she repeated her denial, and she also denied having ever seen M. Williams at S. Lewis's father's house. The falsity of what she so swore was clearly proved and the letter produced. It was objected, 1st, that the materiality of the matters assigned as perjury was not sufficiently alleged; 2nd, that the reference to the letter was too vague and general, and not properly pointed to the particular letter; 3rd, that the references to M. Williams and Lewis's father's house were not properly introduced by an averment; 4th, that the letter produced was not sufficiently identified with the statements on the record to support them. The objections were over-

(*f*) *R. v. Cutts*, 4 Cox, C. C. 485. Lord Campbell, C. J., said, 'An indictment for perjury must either show that the evidence alleged to be false was necessarily material to the issue, or there must be a positive

averment that it was material.' See also *R. v. Scott*, 13 Cox, C. C. 594.

(*g*) *R. v. Bartholomew*, 1 C. & K. 366. All the judges.

ruled, and, on a case reserved, it was urged that all the assignments of perjury were defective in not identifying the M. Williams spoken of in them with the M. Williams spoken of in the allegation of materiality; but it was held that the indictment was sufficient: it averred that it was a material question whether the prisoner got any M. Williams to write a letter. That averment comprehended every person of the name of M. Williams. The description therefore in this averment was larger than the description in the assignments of perjury, and comprehended the M. Williams there spoken of. As to the objection relating to the letter, it was contended that it could not possibly be material that the prisoner got Williams to write a letter. But it was held that, as there was an express averment that it was material, that let in evidence to prove that it was so, and when the evidence was looked at it was clear that the letter was material. (*h*)

An indictment for giving false evidence before a commissioner of bankruptcy alleged that upon the examination of the prisoner it was material to inquire what was the extent of the dealings of the prisoner with 'one Mr. Marshall, and how long he had known the said Mr. Marshall,' &c., and then alleged that the prisoner solemnly declared that 'Mr. Marshall is the landlord of No. 4, York-terrace,' &c. 'I have known Mr. Marshall two or three years,' &c. Whereas the said person so described was the same person as one S. Marshall Legge, and was the father of the prisoner, &c. It was objected, in arrest of judgment, that there was nothing to connect the allegation of materiality with the assignment of perjury, as there was no innuendo that Mr. Marshall meant S. Marshall Legge; and the judgment was arrested as the averment of materiality was insufficient to connect it with the other parts of the indictment. (*i*)

An indictment for perjury alleged that a cause came on to be tried before a county court judge, and that it became a material question on the trial whether J. H. Bridges had, in the presence of the prisoner, signed at the foot of a certain bill of account, purporting to be a bill of account between a certain firm called 'Bridges and Co.' and J. Webster, a receipt for the payment of the said bill, and that the prisoner falsely swore that J. H. Bridges did in her presence sign the said receipt; and it was proved that on the trial the prisoner produced an invoice of goods, at the foot of which was a receipt, which purported to bear the signature of Bridges, and the prisoner swore that he in her presence wrote and signed that receipt. Bridges had on other occasions signed receipts in the presence of the prisoner at the foot of invoices. It was objected that the indictment did not sufficiently specify the account and receipt to which the evidence on which the perjury was assigned related; but, on a case reserved, it was held that the indictment was sufficient, as it was only necessary to refer to the receipt as introductory to making out the materiality of the perjury. (*j*)

Where an indictment for perjury alleged that the defendant swore that he had not written certain words in the presence of one Dipple,

(*h*) *R. v. Bennett*, 2 Den. C. C. 240; 3 C. & K. 124; 5 Cox, C. C. 207. It is trusted that the text represents substantially the grounds of the decision on the two points; but all three reports are very unsatisfactory.

No express notice was taken of the other points.

(*i*) *R. v. Legge*, 6 Cox, C. C. 220. The Recorder, after consulting Parke, B.

(*j*) *R. v. Webster*, Bell, C. C. 154.

and alleged that it was a material question whether the defendant had so written such words in the presence of Dipple; the Court of Queen's Bench held that the indictment was sufficient; for the question whether the words were written in the presence of Dipple might have been material; and it was impossible to assume the contrary against the record. (*k*)

An indictment for perjury on the taking of an inquisition before a coroner alleged that it 'was, upon the taking of the said inquisition, a material question whether,' &c., and it was urged that this statement did not sufficiently show that the question was material to the inquiry; but Parke, B., held that the statement sufficiently imported that the question was material to the subject-matter of the inquisition. (*l*)

An indictment for perjury alleged that it was a material question whether, before the execution of a bond, it was agreed between certain persons that the prisoner should lend W. Winder 1500*l.* before the title to certain premises was investigated by the prisoner, and before any mortgage thereof was executed to secure repayment thereof, and that they should execute the bond to secure the prisoner the repayment of the said sum and interest in case the title should turn out to be defective, or the mortgage should not be duly executed; but if the title turned out to be good, *and* the mortgage was executed, they were not to be liable on the bond; and then alleged that the prisoner falsely swore that nothing was said by him or in his hearing about the bond being a temporary security, or a security until the mortgage was prepared, '*or any thing of the kind.*' It was objected that, according to the agreement as stated, the bond would be binding until the title turned out to be good, which would not necessarily be when the mortgage was executed, so that the bond would not necessarily be a temporary security. But Erle, J., held that the exact terms of the alleged agreement were not material; for the prisoner swore that there was no agreement '*of the kind.*' (*m*)

The indictment must show on the face of it that the matter *was* material; it is not sufficient if it only shows that it *might* or might not have been material. An indictment for perjury alleged that, on the trial of an indictment for an assault, with intent to commit a rape, and for a common assault, upon one Ann Bird, the said Ann Bird swore that she was the wife of one J. Bird, and had been married to him at such a time and such a place, whereas she was not the wife of the said J. Bird, and had never been married to him; and the indictment contained an allegation of materiality, which was insensible in consequence of an error in copying it from the draft; it was, nevertheless, contended that it sufficiently appeared on the face of the indictment, that the evidence on which the perjury was assigned was material on two grounds. First, that on any indictment for an assault, with intent to commit a rape, it was most material, not only as affecting the credit of the witness, but as going to the very gist of the charge itself, whether the party assaulted had falsely sworn that she was a married woman. Secondly, that by swearing that she was the wife of J. Bird, the prosecutrix supported the allegation that

(*k*) R. v. Schlesinger, 10 Q. B. 670.
(*l*) R. v. Kimpton, 2 Cox, C. C. 296.

(*m*) R. v. Smith, 1 F. & F. 98.

the assault was upon 'Ann Bird,' which would have failed if she had admitted that she was not married to J. Bird. But Cresswell, J., held that it did not sufficiently appear that the evidence was material; it might or might not be material, and that was not sufficient. (n)

Where an indictment for perjury stated that a cause was set down for trial, and appointed for a particular day, and that the defendant in that cause, before that day, made an affidavit before a judge, in which he stated that he had a good defence to the action, which he would be able to prove at the trial, and that some of the bills on which it was brought were void for usury, and then assigned perjury on these allegations; it was objected that the indictment was clearly bad: the only manner in which such an affidavit could be in a judicial proceeding, or the matters contained in it become material, would be upon an application to postpone the trial of the cause; but the indictment did not show that any such application was made or intended. Lord Tenterden, C. J., however, thought that the occasion, on which the affidavit was intended to be used, might be sufficiently collected from the indictment, and refused to stop the trial, as the defendant, if there was any weight in the objection, might have the benefit of it after he was convicted. (o)

An indictment alleged that an action came on to be tried in a county court, in which the plaintiff claimed to recover a sum for the expenses of a journey, and another sum for wages, and it was thereupon proved on the part of the plaintiff, that the defendant had made certain statements, which were set out, and by which the debt to the plaintiff was sought to be proved; and afterwards averred that the defendant swore that he had not made any of the said statements; whereas he had made them; but there was no averment of materiality. Byles, J., held that such an averment was not necessary; but that it would suffice if the materiality could be gathered from the whole indictment, and if the assignments of perjury showed upon the face of the indictment that they were material to the issue. And here it appeared, on the face of the indictment, that the statements alleged to be falsely made were material to the issue. (p)

(n) *R. v. Ann Bird*, Gloucester Spr. Ass. 1842. The indictment for the assault simply stated the assault to be upon Ann Bird, without any further description. The learned judge expressed an opinion that the indictment was insufficient before the case went to the jury, but he left it to them, and after they had found the prisoner guilty, arrested the judgment, in order that the prosecutor might bring a writ of error if he thought fit. No writ of error was brought, the prosecutor being unable to incur the expense of such a proceeding. It sometimes happens that upon an objection taken to an indictment before verdict, the judge who tries the case, if he considers the objection valid, directs an acquittal; but the course adopted by the learned judge in this case is certainly the better course, as, if the decision be incorrect where the judgment is arrested, it may be reversed upon error; whereas if the prisoner is acquitted, and the decision is incorrect, there is no means of correcting the error, and as the verdict of the jury has been taken,

it may be very questionable whether if a fresh indictment were preferred a plea of *autrefois acquit* might not be successfully pleaded. See per Lord Tenterden, C. J., *R. v. Fowle*, 4 C. & P. 592, *post*. In *R. v. Purchase*, C. & M. 617, tried at the same assizes, Patteson, J., after consulting Cresswell, J., refused to allow any objection to be taken to an indictment for embezzlement, except upon demurrer or in arrest of judgment, and it seems most in accordance with the regular course of proceeding that such a course should be adopted in all cases. C. S. G.

(o) *R. v. Abraham*, 1 M. & Rob. 7. The defendant was convicted, but did not appear to receive judgment when called upon, and no motion in arrest of judgment was made.

(p) *R. v. Harvey*, 8 Cox, C. C. 99. It was urged that the omission of an averment of materiality was a mere formal defect, and amendable under the 14 & 15 Vict. c. 100, s. 25; but Byles, J., was clearly of opinion that it was matter of substance. It was also

Variances in allegation of falsity.—It is also necessary that the indictment should expressly contradict the matter falsely sworn to by the defendant. And the general averment that the defendant falsely swore, &c., upon the whole matter, will not be sufficient: the indictment must proceed by particular averments (or, as they are technically termed, by *assignments of perjury*), to negative that which is false. It may be necessary to set forth the whole matter to which the defendant swore, in order to make the rest intelligible, though some of the circumstances had a real existence: but the word ‘falsely’ does not import that the whole is false; and when the proper averments come to be made, it is not necessary to negative the whole, but only such parts as the prosecutor can falsify, admitting the truth of the rest. (*q*) It is suggested that in negating the defendant’s oath where he has sworn only to his *belief*, (*r*) it will be proper to aver that ‘*he well knew*’ the contrary of what he swore. (*s*) It seems that an assignment of perjury may, in some instances, be more full than the statement of the defendant, which it is intended to contradict. Thus, where the fact in the affidavit, in which the defendant was charged to have perjured himself, was, that he never did, at any time during his transactions with the commissioners of the victualling-office charge more than the usual sum of sixpence per quarter beyond the price he actually paid for any malt or grain purchased by him for the said commissioners as their corn-factor; and the assignment in the indictment, to falsify this, alleged that the defendant did charge more than sixpence per quarter *for and in respect of* such malt and grain so purchased; it was objected that the words *in respect of* might include lighterage, freight, and many collateral and incidental expenses attending the corn and grain jointly with the charge for the corn or grain, and, that bearing such sense, the defendant was not guilty of perjury; but the objection was overruled. (*t*)

An indictment alleged that it was material, on the hearing of an information before justices of the peace, to prove that cards were played in the bar of a public-house between the hours of six o’clock and eight o’clock on a certain evening, and that the prisoner falsely swore that he was in the bar of the said house from between the hours of six o’clock and seven o’clock until nine o’clock in the said evening, and that he did not play at any game at all, and that no cards or game of cards at all were or was during all the said last mentioned time or between the hours aforesaid played therein; whereas the prisoner did between the hours of six o’clock and eight o’clock in the said evening play at a certain game of cards. Rolfe, B., held that the indictment was bad. The prisoner might have played at five minutes past six, and yet not have played from between six and seven until nine; the words ‘from between six and seven’ might be any time short of seven, five minutes or five seconds to that hour. The indictment could not be read as averring that the prisoner swore that he did not play at any time during that evening, but merely that he did not play at a

urged that sec. 20 of that Act (*ante*, p. 381), rendered the averment unnecessary; but Byles, J., was clearly of opinion that it did not, as it was not one of the things named in that section.

(*q*) *R. v. Perrott*, 2 M. & S. 385, 390.

(*r*) *Ante*, p. 294.

(*s*) 2 Chit. Crim. L. 312.

(*t*) *R. v. Atkinson*, Dom. Proc. 1785. Bac. Abr. tit. *Perjury* (C). See *R. v. Gardiner*, *ante*, p. 349.

particular period of that evening, namely, from some period before seven until nine. That might be perfectly true, and yet he might have played between six and seven, and so may have played, as is assigned in the indictment, between six and eight. (*u*)

Where an indictment for perjury committed in an information before magistrates, alleged that the prisoner was sworn on an information taken on the 11th of March, 1844, and deposed that on 'the morning of Thursday last, the 7th day of March (he meaning the 7th day of March in the year 1804),' he met G. C.; whereas the prisoner did not on the morning of Thursday, the 7th day of March, 1844, meet G. C.; it was held that 1804 could not be rejected as surplusage, and that the indictment was bad. (*v*)

The averments introduced to negative the matter sworn ought to be so distinct and definite as to inform the defendant of the particular and precise charges which are intended to be proved against him. An indictment for perjury committed in the Insolvent Debtors' Court alleged, that the defendant swore in substance that his schedule contained a full, true, and perfect account of all debts owing to him at the time of presenting his petition; whereas the said schedule did not contain a full, true, and perfect account of all debts owing to him at that time; and Lord Tenterden, C. J., after consulting the other judges of the Court of King's Bench, held that the indictment was insufficient, as it was quite impossible that the defendant could know, from allegations so vague and indistinct, what was to be proved against him; the allegations conveyed no information whatever of the particular charges against which the defendant ought to be prepared to defend himself. (*w*)

The indictment charged the prisoner with the offence of making a false declaration before a justice, that he had lost a pawnbroker's ticket, 'whereas in truth and in fact he had not lost the said ticket, but had sold, lent, or deposited it, as a security to one S. C., &c.' Held, that the allegations 'but had sold, lent, or deposited it, &c.' did not render the indictment ambiguous or uncertain, but was pure surplusage, which might be rejected, and need not be proved. (*x*)

Assigning perjury on contradictory depositions. — It has been decided that perjury cannot be legally charged and assigned by showing that the defendant did on two different occasions make certain depositions contradictory to each other, with an averment that each of them was made knowingly and deliberately, but without averring or showing in which of the two depositions the falsehood consisted. The information stated that the defendant, before a committee of the House of Commons, being duly sworn, deliberately and knowingly, and of his own act and consent, did say, swear, and give in evidence, &c.; setting out the evidence so given. And then the count averred that the said defendant, at the bar of the House of Lords, being duly sworn, deliberately and knowingly, and of his own act and consent,

(*u*) *R. v. Whitehouse*, 3 Cox, C. C. 86.

(*v*) *R. v. Garvey*, 1 Cox, C. C. 111.
Brady, C. B. This case is very badly reported, and it is very doubtful whether the wrong year was not given as the date of swearing the information.

(*w*) *R. v. Hepper*, R. & M. N. P. R. 210.

See *R. v. Mudie*, 1 M. & Rob. 128. *R. v. London*, 12 Cox, C. C. 50.

(*x*) *R. v. Parker*, 39 L. J. M. C. 60.
 L. R. 1 C. C. R. 225.

did say, swear, and give in evidence, &c.: setting out in like manner the latter evidence, which was directly contrary to that given before the House of Commons; and concluded (after averments as to the identity of the persons and places referred to in the evidence on both occasions), and so the jurors aforesaid do say that the said Edward Harris did commit wilful and corrupt perjury. And this was holden to be bad on motion in arrest of judgment. (y)

Averment by innuendo. — If there be any doubt on the words of the oath, which can be made more clear and precise by a reference to some former matter, it may be supplied by an *innuendo*; the use of which is, by reference to preceding matter, to explain and fix its meaning more precisely. (z) We have seen that, in a case of perjury committed in an affidavit, it was holden that a word which had been omitted by accident in the original document was improperly stated in the indictment, as though it had been in the original document, and that such word ought to have been inserted and explained by an innuendo. (a) In a case where an objection was taken to an indictment, that it added, by way of innuendo to the defendant's oath, 'his house situate in the Haymarket in St. Martin in the Fields,' without stating by any averment, recital, or introductory matter, that he had a house in the Haymarket, or (even admitting him to have such a house) that *his oath was of and concerning the said house*, so situated, the objection was overruled, on the ground that the innuendo was only a more particular description of the same house which had been previously mentioned. (b) And, in the same case, the oath of the defendant being that he was arrested upon the steps of his own door, an innuendo that it was the outer door was holden good. (c) Where an innuendo is improperly introduced, and any use is made of it in the indictment, it cannot be rejected as surplusage, and it will be bad after verdict. (d) But if the innuendo, and the matter introduced by it, are altogether impertinent and immaterial, and can have no effect in enlarging the sense, it seems that they may be rejected as superfluous. (e)

The proper office of an innuendo is to fix and point the meaning of something that has been previously averred. The indictment stated the presenting of a petition to the House of Commons concerning the election of F. H. F. Berkeley, and set out the petition, which stated the said F. H. F. Berkeley before and at the election was guilty of bribery, and that certain agents of the said F. H. F. Berkeley, being trustees of divers public charities, and by virtue of such office entitled to dispose of the funds of such charities, before and at the said election were guilty of various corrupt acts, &c., in order to procure the return of the said F. H. F. Berkeley. The indictment then averred that one T. Carlisle was a trustee of divers of the said public charities,

(y) *R. v. Harris*, 5 B. & A. 926. It should have been averred and shown in which of the two depositions the falsehood consisted.

(z) *R. v. Aylett*, 1 T. R. 70. *R. v. Taylor*, 1 Campb. 404. See *R. v. Griep*, 1 Lord Raym. 256. 2 Salk. 513. And see as to the use of an innuendo, 1 Saund. 243,

note, (4). 1 Chit. on Plead. 406. 1 Stark. Crim. Plead. 118, *et seq.*

(a) *R. v. Taylor*, 1 Campb. 404. *Ante*, p. 335.

(b) *R. v. Aylett*, 1 T. R. 70.

(c) *Id. ibid.*

(d) *R. v. Griep*, 1 Ld. Raym. 260.

(e) *Roberts v. Camden*, 9 East, 93. 2 Chit. Crim. L. 311.

and 'that shortly before the said election (to wit), on, &c., the said T. Carlisle, the said F. H. F. Berkeley, and other persons, went to the house of one W. Virrier for the purpose of soliciting the said W. Virrier to vote for the said F. H. F. Berkeley at the said election.' The indictment then stated that certain members of the House of Commons were chosen to try and determine the merits of the said election, and that the said persons so chosen met to try and determine the matter of the said petition. The indictment then averred that S. Virrier appeared 'as a witness before the said select committee touching the matter of the said petition,' and that the said S. Virrier was duly sworn, &c. 'And it then and there became and was a material question, whether at the time aforesaid, when the said T. Carlisle, the said F. H. F. Berkeley, and the said other persons, so went to the house of the said W. Virrier, the said T. Carlisle said that he would give the said W. Virrier 6*l.* out of the funds of one of the aforesaid charities at Christmas, whereof the said T. Carlisle was trustee as aforesaid, or that he would give him 6*l.* at Christmas.'^(f) And that the said S. Virrier falsely, &c., did depose, &c., to the select committee aforesaid, 'touching the matters and merits of the said election, and the matter of the said petition, in substance and to the effect following, viz., that *before the said election* a canvassing party came to her husband's house, and Mr. Berkeley (meaning the said F. H. F. B.), and Mr. Carlisle (meaning the said T. C.), came into the house of the said W. Virrier, and Mr. Carlisle asked her if she knew who her husband was going to vote for at the ensuing election; that she said she believed he was going to vote one and one, and that Mr. Carlisle then said that he would act like a sensible man, and "I will give him the 6*l.* at Christmas" (thereby meaning that at the said time when the said F. H. F. Berkeley, and the said T. Carlisle, and the said other persons so went as aforesaid to the house of the said W. Virrier, for the purpose of soliciting him to vote for the said F. H. F. Berkeley, the said T. Carlisle said he would give the said W. Virrier 6*l.* at Christmas, out of the funds of one of the aforesaid public charities, whereof the said T. Carlisle was trustee as aforesaid).'^(g) 'Whereas in truth and in fact the said T. Carlisle did not at the said time when the said F. H. F. Berkeley, the said T. Carlisle, and other persons went to the said house of the said W. Virrier to solicit him to vote as aforesaid, or during the time when, on that occasion, they were in or at the said house, say to the said S. Virrier that the said T. Carlisle would give to the said W. Virrier the 6*l.* at Christmas, or any sum of money from or out of any of the said public charities, or any sum of money whatsoever at Christmas or at any other time.'^(h) The defendant having been found guilty, it was moved, in arrest of judgment, that it did not appear either from the evidence said to have been given by the defendant, or from any other part of the indictment, except the innuendo, that the occasion on which the speaking of the words was said to have been material, was the same occasion with reference to which

^(f) The indictment here stated other questions to be material in a similar manner.

^(g) The indictment here set out more of the evidence. See the case, *post*, p. 370.

^(h) The indictment here set out other assignments of perjury to the other parts of the evidence, which was set out in the indictment.

the evidence was given; that the averment of materiality might relate to one occasion, and the evidence to another occasion of the same kind; and that the innuendo would not aid, because an innuendo can only explain, and cannot supply the place of a substantial averment. The indictment also alleged that the defendant swore 'touching the matters and merits of the said election, and the matter of the said petition,' but that did not show that her evidence related to the material time before mentioned. Nor did her evidence, as set out, identify the occasion without the innuendo. The innuendo, therefore, did more than explain; it supplied that which made the evidence material. Lord Denman, C. J., after full argument and time taken to consider, delivered the judgment of the Court as follows: 'Upon this indictment a motion has been made to arrest the judgment upon two objections. 1st, that the allegation of the oath having been taken "touching the matter of the said election, and the matter of the said petition," did not sufficiently point to the matter whereupon the defendant was alleged to have given evidence; and, secondly, that there was nothing to fix the alleged gift and promise of money to the said visit on the 6th of July. We think, however, that neither objection is sustainable. As to the first, it does sufficiently appear that a competent trial was had, that a material question arose as to the existence of certain facts, to which the defendant deposed, and was therein guilty of perjury. Now although it is certainly true that the averment stating the oath to have been "touching and concerning the matters and merits of the said election, and the matter of the said petition," does not directly refer to what are alleged to be the material questions which arose, yet, where it does sufficiently appear, both by averment and otherwise, that the oath was upon a material point, the allegation "touching and concerning," &c., is wholly superfluous and unnecessary, and the indictment would have been sufficient if it had omitted that part altogether, and had merely stated that the defendant deposed and swore "as follows," &c. The second objection is, that the evidence, upon which the perjury is alleged to have been committed, is not referred with sufficient distinctness to the said canvassing visit, and that the innuendo, by which it is attempted so to apply it, introduces new matter, and is therefore bad. We, however, think otherwise; for an introductory averment expressly states that there was, in fact, such canvassing visit, and the innuendo directly refers thereto. It is plain, therefore, that this case comes within the rule laid down by De Grey, C. J., in *R. v. Horne*, (i) which has always been recognized as the true one; and that the innuendo does only point and fix the meaning of something previously averred, which is the proper office of an innuendo, and that it does in no respect enlarge it. We think, therefore, that there is no ground for arresting the judgment.' (j)

Conclusion of the indictment. — An indictment for perjury at common law need not conclude 'against the form of the statute.' The defendant was indicted for perjury in giving false evidence before the revising barrister as to the occupation of a tenement in the borough of Bridgnorth, and the indictment did not conclude against the form of the statute. It was objected that as this was a crime created by the

(i) 2 Cowp. 672.

(j) *R. v. Virrier*, 12 Ad. & E. 317.

2 Will. 4, c. 45, s. 52, the indictment ought so to have concluded. It was answered that the revising barrister held a court, which was made so by sec. 50 of the same Act. That any false swearing in a court was perjury at common law, and therefore the indictment was good. Lord Abinger, C. B., thought the only question was, whether the statute, by sec. 50, constituted a court; for if it did, the offence of false swearing in it was perjury at common law, and his opinion was that it did constitute a court, and therefore the indictment was sufficient. (*k*) And so it has been held that an indictment for perjury committed by a plaintiff as a witness in his own behalf in a suit in a county court need not conclude 'against the form of the statute.' (*l*)

Where all the counts of an indictment for perjury concluded, 'and so the jurors aforesaid upon their oath aforesaid *did* say that the defendant on, &c., at, &c., before, &c., did commit wilful and corrupt perjury,' it was objected, on error, that this conclusion was erroneous in using the words 'did say' instead of 'do say;' but the Court of Queen's Bench held that the whole averment might be struck out, as the perjury was sufficiently alleged by the preceding part of each count; and as 'perjury' was not a word of art, like 'murder,' the concluding part of the count was immaterial. (*m*)

In general the Court will oblige the defendant to plead or demur to a defective indictment for perjury. (*n*) And they are very cautious in granting a certiorari to remove it. (*o*)

But where an indictment for perjury is clearly bad upon the face of it, a judge at *nisi prius* may refuse to try such indictment. An indictment for perjury charged that one A. B. had been convicted of certain offences, and that A. B. afterwards obtained a rule to show cause why a new trial should not be granted, and that the defendant, in order to prevent the said rule from being made absolute, made the affidavit whereon the perjury was assigned, but there was no averment that the matters falsely sworn were material, nor could it be collected from the indictment that they were so; and Garrow, B., having consulted Abbott, C. J., who concurred with him in opinion that the indictment was clearly bad, held that it was the duty of the judge not to proceed to try the case. (*p*) So where in an indictment for perjury the allegations negating the matter sworn, were so vague and indistinct as to convey no information of the particular charges against the defendant; Abbott, C. J., after consulting the other judges of the Court of King's Bench, ordered the case to be struck out of the list. (*q*) So where an indictment for perjury at common law was found at the Quarter Ses-

(*k*) *R. v. Thornhill*, Salop Sum. Ass. 1838, reported on another point, 8 C. & P. 575. In *R. v. De Beauvoir* 7, C. & P. 17, the indictment seems not to have concluded 'against the form,' &c. See the note at the end of the case.

(*l*) *R. v. Morgan*, 6 Cox, C. C. 107. Martin, B. See *ante*, p. 36.

(*m*) *Ryalls v. R.*, 11 A. & E. 781; *R. v. Hodgkiss*, 39 L. J. M. C. 14: and see now the 14 & 15 Vict. c. 100, s. 24.

(*n*) 2 Hawk. P. C. c. 25, s. 146; *R. v. Souter*, 2 Stark. R. 423; *R. v. Burnby*, 5 Q. B. 348.

(*o*) 2 Hawk. P. C. c. 27, s. 28.

(*p*) *R. v. Tremearne*, R. & M. N. P. R. 147. In *R. v. Deacon*, R. & M. N. P. R. 27, Abbott, C. J., refused to try an indictment for a forcible entry, which was bad for want of alleging that the entry was *manu forti*, although the counsel for the defendant insisted that the case should proceed in order that the defendants might have the benefit of an acquittal by a jury, as they intended to institute proceedings for a malicious prosecution.

(*q*) *R. v. Hepper*, R. & M. N. P. R. 210.

sions, and removed by certiorari into the Court of King's Bench, and sent down to be tried at *nisi prius*; Gaselee, J., refused to try it, as it was quite clear that the sessions had no jurisdiction over perjury at common law, and the indictment was, therefore, void. (r) But a judge will not allow counsel to argue at length at *nisi prius* the invalidity of an indictment, for the purpose of inducing the Court to refuse to try it, as that is not the time or place to discuss such disputed questions. (s)

As to amending an indictment at the trial when there is a variance between the statements in it and the evidence, see *ante*, p. 53.

The defendant was indicted in Middlesex for perjury committed in an affidavit; which indictment, after setting out so much of the affidavit as contained the false oath, concluded with a *prout patet* by the affidavit filed in the Court of King's Bench, at Westminster, &c., and on this he was acquitted; after which he was indicted again in Middlesex, for the same perjury, with this difference only, that the second indictment set out the *jurat* of the affidavit, in which it was stated to have been sworn in London; which was traversed by an averment that, in fact, the defendant was so sworn in Middlesex, and not in London; and the Court of King's Bench held that he was entitled to plead *autrefois acquit*, as the *jurat* was not conclusive as to the *place* of swearing; and the same evidence as to the real place of swearing the affidavit might have been given under the first as under the second indictment; and therefore, the defendant had been once before put in jeopardy for the same offence. (t)

Trial. — With respect to the trial of perjury it may be observed, that the courts of Quarter Sessions have no jurisdiction over the offence at common law, and though they had jurisdiction over it under the 5 Eliz. c. 9, yet that jurisdiction is taken away by the 5 & 6 Vict. c. 38, s. 1, which enacts, that 'neither the justices of the peace acting in and for any county, riding, division, or liberty, nor the recorder of any borough, shall, at any session of the peace, or at any adjournment thereof, try any person or persons for (*inter alia*) perjury or subornation of perjury;' or 'making or suborning any other person to make a false oath, affirmation, or declaration punishable as perjury, or as a misdemeanor. (u)

By the 22 & 23 Vict. c. 17 (amended by 30 & 31 Vict. c. 35), no indictment for perjury or subornation of perjury can be found by any grand jury, unless the case has been taken before a justice, &c., as therein mentioned. (v)

It may be observed that it is the practice of the Central Criminal Court not to try an indictment for perjury arising out of a civil suit while that suit is in any way undetermined, except in cases in which

(r) *R. v. Haynes*, R. & M. N. P. R. 298. See *R. v. Rigby*, 8 C. & P. 770.

(s) *R. v. Abraham*, 1 M. & Rob. 7, *ante*, p. In this case the defendant's counsel pointed out the objections in order to induce the Court to stop the trial, and Lord Tenterden, C. J., said that 'it might be convenient sometimes for counsel to suggest a point on which an indictment is clearly bad, to save the time of the Court.' In *R.*

v. Hepper and *R. v. Tremearne* the objections to the indictment were pointed out by the Court. See *ante*, p. 366.

(t) *R. v. Emden*, 9 East, 437. As to pleading *autrefois acquit*, see *ante*, p. 38.

(u) *R. v. Bainton*, 2 Str. 1088. *R. v. Westiness*, *id. ibid.* 1 Chit. Crim. L. 301. *R. v. Haynes*, R. & M. N. P. R. 298.

(v) See the Acts, *ante*, p. 2.

the Court, where the suit is pending, postpones the decision of it in order that the criminal charge may first be disposed of. (*w*)

Where two justices refuse to hear a charge of perjury alleged to have been committed in a suit in the Ecclesiastical Court, on the ground that that suit was still pending, the Court of Queen's Bench refused to grant a mandamus to compel them to hear the charge, and the Court seem to have thought that the course the justices had taken was the most likely to answer the ends of justice. (*x*)

Where a person made an affidavit in the Court of Common Pleas, and afterwards, being summoned to appear in Court, came there, and confessed it to be false, the Court recorded his confession, and ordered that he should be taken into custody, and put in the pillory. (*y*) In answer to the objections of the defendant's counsel to this proceeding, it was argued that it was fully justified under the 5 Eliz. c. 9, and that even if the Court could not punish the defendant by virtue of that statute, he might be punished at common law, on the ground that any Court might punish such a criminal for an offence committed in *facie curiæ*. (*z*)

Number of witnesses necessary for conviction.¹—The evidence of one witness is not sufficient to convict the defendant on an indictment for perjury; as in such case there would be only one oath against another. (*a*) But this rule must not be understood as establishing that *two witnesses* are necessary to disprove the fact sworn to by the defendant; for if any material circumstance be proved by other witnesses, in confirmation of the witness who gives the direct testimony of perjury, it may turn the scale, and warrant a conviction. (*b*)

Upon an indictment for perjury, Coleridge, J., is reported to have said, 'One witness in perjury is not sufficient, unless supported by circumstantial evidence of the strongest kind; indeed, Lord Tenterden, C. J., was of opinion that two witnesses were *necessary* to a conviction.' (*c*) In a later case, where the evidence of one witness went in support of all the assignments of perjury, and to confirm him another witness was examined as to a conversation between himself and the defendant, and some entries in the defendant's books were given in evidence; it was submitted that there was no evidence to go to the jury; that the rule is that a case of perjury cannot be submitted to the jury on the evidence of a single witness; and as to the evidence of confirmation, it was not enough that there should be *some* evidence in confirmation, as

(*w*) R. v. Ashburn, and R. v. Simmons, 8 C. & P. 50.

(*x*) R. v. Ingham, 14 Q. B. 396.

(*y*) R. v. Thorogood, 8 Mod. 179.

(*z*) Id. *ibid.*; and Bushell's case, Vaugh. 152, was cited.

(*a*) R. v. Muscot, 10 Mod. 193. 4 Black. Com. 358. Peake on Evid. 10. 1 Phil. on Evid. 151, 7th edit.

(*b*) R. v. Lee, Mich. 6 Geo. 3 MS. Bayley, J., 1 Phil. Evid. 152, 7th edit.; R. v. Shaw, L. & C. 579; 34 L. J. M. C. 169.

(*c*) Champney's case, 2 Lew. 258, and the same point is said to have been ruled by the same learned judge in R. v. Wigley, *ibid.* note. And Mr. Starkie observes, 'And *semble* that the contradiction must be given by *two direct witnesses*, and that the negative supported by one witness and by circumstantial evidence, would not be sufficient. It has been so held (*ut audiui*) by Lord Tenterden, C. J.' 3 Stark. Evid. 860, note (*g*).

AMERICAN NOTE.

¹ See Woodbeck v. Keller, 6 Cow. 118; S. v. Hayward, 1 N. & M. 546; C. v. Parker, 3 Cush. 212; S. v. Raymond, 20 Iowa, 532; Hendricks v. S., 26 Ind. 493; U. S. v. Hall, 44 Fed. Rep. 864; S. v. Peters, 107 N. C. 876; S. v. Heed, 57 Mo. 252.

in an ordinary case at *nisi prius*, where some evidence is necessary to prevent a nonsuit; but it must be such evidence as, in the opinion of the judge, is really confirmatory in some important respect, and equivalent to the positive testimony of a second witness. Coleridge, J., 'I think that the case must go the jury, but I also think without the slightest chance of a verdict for the crown. The rule that the testimony of a single witness is not sufficient to sustain an indictment for perjury, is not a mere technical rule, but a rule founded on substantial justice; and evidence confirmatory of that one witness in some slight particulars only, is not sufficient to warrant a conviction.' (d)

An indictment for perjury committed on the trial of a civil bill alleged that the prisoner, Thomas Towey, falsely swore that 'the note produced is not my handwriting, or any part of it, and the name "Thomas Towey" as a witness is not in my handwriting.' The note purported to bear the marks of Patrick and James Towey as makers of the note, and had on it, 'Witness present, Thomas Towey.' The payee of the note could not read, but he identified the note, and swore that he saw Thomas Towey write on the paper, and saw Patrick and James put their marks on it. Another witness proved that he had subpoenaed Thomas Towey to appear at the sessions as a witness, and that the prisoner then said that there was no occasion to test (subpœna) him; that he would go to prove the note; and that at a meeting between the parties to try to settle the civil bill, on the payee of the note saying he had James Towey's note, and would take the law on it unless he signed a new one, Thomas said that he had been tested (subpœnaed) to come there, but that there was no occasion to test him; that he would prove the note. But the note was not produced at this meeting; and, upon a case reserved, it was held that this evidence was a sufficient corroboration of the evidence of the payee. The prisoner was the only witness to the note, and he could only prove it in his character as a witness, and, therefore, when he said he could prove it, it came to sufficient evidence that he was the witness to the note. (e)

An indictment for perjury alleged that in the month of June, 1851, the prosecutor had distrained upon the prisoner for certain arrears of rent, and that the prisoner on a trial at *nisi prius* falsely swore that there was only one quarter's rent due at the time of the said distress. On the trial for perjury the prosecutor positively swore to the fact of there being five quarters' rent due at the time of the said distress; and produced his books by which he refreshed his memory; and for the purpose of corroborating his statement and showing by the oaths of two witnesses the falsity of the matter sworn to, the son of the prosecutor deposed to a conversation with the prisoner in August, 1850, in which the prisoner admitted that three or four quarters of the said rent were then due. The jury convicted; but, upon a case reserved, the judges were unanimously of opinion that this was not sufficient corroboration. There was nothing in the evidence of the

(d) *R. v. Yates*, C. & M. 132. See *R. v. Parker*, *post*, p. 375.

(e) *R. v. Towey*, 8 Cox, C. C. 328. The payee was cross-examined to show that there was another paper written by the prisoner,

which the payee could not distinguish from the note; but Hayes, J., observed that the jury had found that the prisoner spoke of 'the note.'

son relevant to the issue. There was a year's interval between the transaction he spoke of and the time when the distress was made, and the money might have been paid intermediately. The oath of the son was quite as consistent with the oath of the prisoner as with that of the prosecutor. In perjury there must be something to make the one believed rather than the other, and there was no such evidence in this case. (f)

In one case where there were three assignments of perjury upon evidence relating to one and the same transaction, at one and the same time and place, it seems to have been considered that the jury ought not to convict on one of the assignments, although there were several witnesses who corroborated the witness who spoke to such assignment on the facts contained in the other assignments. The indictment stated that the defendant swore that Mr. B. and Mr. C. came to her husband's house, that Mr. C. said, 'I will give him the 6*l.* at Christmas,' and Mr. B. shook hands with her, and put something into her hand, and told her to give it to her husband, and that it was a sovereign wrapped up in some paper; and Mr. C. told her he should not forget it was in his power to give her husband the 6*l.* at Christmas. The assignments of perjury were, 1st, that Mr. C. did not say that he would give the 6*l.* at Christmas; 2ndly, that Mr. B. did not put a sovereign into the hand of the defendant; and 3rdly, that Mr. C. did not tell the defendant that he should not forget it was in his power to give her husband the 6*l.* at Christmas. Evidence was given in support of all the assignments of perjury. Lord Denman, C. J., in summing up, said that as to the second assignment the proof lay almost entirely in the evidence of one witness, and, therefore, he did not see how the jury could convict of the perjury imputed; but that on the others there was a distinct contradiction of the defendant's testimony by Mr. C., who was supposed to have offered the 6*l.*, and several other witnesses; and he left it to the jury to say whether there was not a strong body of evidence clearly supporting Mr. C.'s denial. (g)

But where upon an indictment for perjury, alleged to have been committed in making a charge of an unnatural offence, in which the defendant had deposed that he saw the prosecutor committing the offence, and saw the flap of his trowsers unbuttoned, and that he was

(f) *R. v. Boulter*, 2 Den. C. C. 396. In Best's Pr. Ev. 440 it is observed, 'We apprehend that the old rule and reason of the matter are not satisfied unless the evidence of each witness has an existence and probative force of its own, independent of the other; so that, supposing the charge to be one of those in which the law allows condemnation on the oath of a single witness, the evidence of either would form a case proper to be left to a jury, or would at least raise a strong suspicion of the guilt of the defendant. See *R. v. Shaw*, 34 L. J. M. C. 169.

(g) *R. v. Virrier*, 12 Ad. & E. 317. The Chief Justice considered the most convenient mode of summing up the case to be to treat the second assignment as the first, and

the first and third as one, and did so leave the case to the jury, who found a verdict of 'not guilty on the first assignment of perjury for want of sufficient evidence, and guilty on the second,' but said nothing on the third, and the verdict was entered accordingly. The Chief Justice did not at the time make any note of his summing up, but did so afterwards; and having a distinct remembrance of it, and no doubt of the jury's intention, he (on summons) allowed the *postea* to be amended by entering a verdict of 'guilty' on the first and third assignments, and 'not guilty' on the second; but the Court afterwards held that the amendment ought not to have been made, there being no note or memorandum of the judge or other document to amend by.

there five minutes; and to disprove this the prosecutor swore that he did not commit the offence, and that his trowsers had no flap on; and to confirm him his brother proved that at the time in question the prosecutor was only absent three minutes, and that the trowsers he had on, which were produced in court, had no flap; Patteson, J., held that the corroborative evidence was quite sufficient to go to the jury; and upon a case reserved, the judges held the conviction right. (*h*) So where perjury was alleged to have been committed by the defendant, who was an attorney, in an affidavit made by him to oppose a motion to refer the defendant's bill of costs to taxation, and to prove the perjury one witness was called, and in lieu of a second witness, it was proposed to put in the defendant's bill of costs delivered by him to the prosecutor; it was suggested that this was not sufficient, as the bill had not been delivered by the defendant on oath. Lord Denman, C. J., 'I have quite made up my mind that the bill delivered by the defendant is sufficient evidence, or that even a letter, written by the defendant, contradicting his statement on oath, would be sufficient to make it unnecessary to have a second witness.' (*i*)

Where a prisoner was indicted for falsely swearing that he had paid J. Bland a certain sum of money on a particular occasion, and Bland swore that he received the money in packages, and afterwards counted it, and found it 7*l.* short; and the only corroboration of his statement was by another person, who also counted it, but had not been present when the money was received; it was held that this was no corroboration at all. (*j*)

An indictment alleged that the prisoner falsely swore at a petty sessions that D. Rees was the father of her illegitimate child. A witness other than D. Rees proved that the prisoner had said that D. Rees 'had never touched her clothes' at a time when she generally denied being in the family way; and Martin, B., thought that though, under some circumstances, such a statement might have been a sufficient corroboration of the evidence of D. Rees, yet this negation was so far a part of the general denial that the jury could not safely convict upon it alone. (*k*)

A count alleged that the prisoner falsely swore that she had shown to one Cuthbert certain invoices bearing certain dates. Cuthbert swore that the prisoner had not shown him the invoices she had sworn to, but that she had shown others; and he produced a memorandum, he had made privately at the time, of the dates of the invoices, which showed that they were not the same as those sworn to by the prisoner; Cockburn, C. J., held the private memorandum a sufficient corroboration. (*l*)

(*h*) *R. v. Gardiner*, 2 Moo. C. C. R. 95. See a fuller statement of this case, *ante*, p. 347.

(*i*) *R. v. Mayhew*, 6 C. & P. 315.

(*j*) *R. v. Braithwaite*, 1 F. & F. 688, 8 Cox, C. C. 444. *Watson, B., and Hill, J.* In the latter report it is stated that 'the prosecutor took it without counting it, and carried it to a Mrs. Watson's, and counted it over.' In the former, 'The prosecutor took it without counting it, and carried it to an adjacent lane, where he counted a part of it,

and found it wrong; he then gave it to a Mrs. Watson, and asked her to count it over.' Mrs. Watson was the witness called to corroborate Bland.

(*k*) *R. v. Owen*, 6 Cox, C. C. 105.

(*l*) *R. v. Webster*, 1 F. & F. 515. If this case is correctly reported, it deserves reconsideration. The memorandum was not itself admissible, and could only be used to refresh the memory of the witness; so that the whole statement rested on his single oath; and, even if the memorandum had

Contradictions by defendant. — In a case where the defendant had been convicted of perjury, charged in the indictment to have been committed in an examination before the House of Lords, and the only evidence was a contradictory examination of the defendant before a committee of the House of Commons, application was made for a new trial, on the ground that in perjury two witnesses were necessary, whereas in that case only one witness had been adduced to prove the *corpus delicti*, namely, the witness who deposed to the contradictory evidence given by the defendant before the committee of the House of Commons; and, further, it was insisted that mere proof of a contradictory statement by the defendant on another occasion was not sufficient, without other circumstances showing a corrupt motive, and negating the probability of any mistake. But the Court held that the evidence was sufficient, *the contradiction being by the party himself*, and that the jury might infer the motive from the circumstances; and the rule was refused. (m) And the same principle appears to have been acted upon in a former case. The defendant had first made his information upon oath before a justice of the peace, that three women were concerned in a riot at his mill (which was dismantled by a mob on account of the price of corn), and afterwards, at the sessions, when the rioters were indicted, he was examined concerning those women, and (having been tampered with in their favour) he then swore they were not in the riot. There was no other evidence on the trial of the defendant for this perjury, to prove that the women were in the riot (which was the perjury assigned), but the defendant's own original information on oath, which was produced and read, and by which he had sworn that they were in the riot. And the judge thought this evidence sufficient, and the defendant was convicted and transported. (n) And with respect to this evidence, it has been observed, that when the same person has by opposite oaths asserted and denied the same fact, the one seems sufficient to disprove the other; and with respect to the defendant (who cannot contradict what he himself has sworn) is a clear and decisive proof, and will warrant the jury in convicting him on either, for whichever is given in evidence to disprove the other, it can hardly be in the defendant's mouth to deny the truth of that evidence, as it came from himself. (o)

But where the defendant was indicted for perjury, alleged to have been committed on the trial of an indictment for larceny, and it appeared that the defendant had sworn to several material facts before the committing magistrate, but when he was called on the trial, denied the whole of what he had stated before the magistrate; and

been admissible, it would only have been the written statement of the witness and not on oath; and the time when it was made and the veracity of its statements must have rested on his single oath. See *R. v. Lara*, 6 T. R. 565, in support of this reasoning. In *R. v. Boulter*, *supra*, p. 370, it was not even suggested that the prosecutor's books could be used to corroborate his evidence.

(m) *R. v. Knill*, 5 B. & A. 929, note (a).

In *R. v. Hook*, *infra*, Pollock, C. B., doubted whether any conviction would now be permitted in such a case as *R. v. Knill*.

(n) *Anon. cor. Yates, J.*, Lancaster Sum. Ass. 1764. And afterwards, Lord Mansfield, C. J., and Wilmot, J., and Aston, J., to whom Yates stated the reasons of his judgment, concurred in his opinion. Notes to *R. v. Harris*, 5 B. & A. 939, MS. Bayley, J.

(o) From the Precedent-book of Chamber, J., cited 5 B. & A. *ibid*.

R. v. Knill and *Anon.* (p) were cited to show that the contradiction by the oath before the magistrate would alone be sufficient evidence to convict the defendant; but Gurney, B., held, that it was not sufficient to prove that the defendant had, on two different occasions, given directly contradictory evidence, although he might have wilfully done so; but that the jury must be satisfied affirmatively that what he swore at the trial was false, and that would not be sufficiently shown to be false by the mere fact that the defendant had sworn the contrary at another time; it might be that his evidence at the trial was true, and his deposition before the magistrate false. There must be such confirmatory evidence of the defendant's deposition before the magistrate, as proved that the evidence given by the defendant at the trial was false. (q)

So where a prisoner was indicted for perjury in evidence given before a grand jury, and her deposition on the hearing of the charge before the committing magistrate was put in to show that the statement before the grand jury was false; Tindal, C. J., held, that further evidence must be given; for if the two contradictory statements on oath alone were proved, *non constat* which was the true one. (r)

(p) *Supra*, notes (m) and (n).

(q) *R. v. Wheatland*, 8 C. & P. 238.

Although at first sight this decision may seem at variance with those cited, perhaps it may not in fact be so. In *R. v. Knill*, the Court held that 'the jury might infer the motive from the circumstances,' none of which are stated in the short minute of the case; some of them might have been such as to show that the one statement was false, or the other statement true. In the Anonymous case the defendant had been *tampered* with after his first examination, and the evidence of the tampering with the defendant might be such as to lead to the conclusion that his evidence on the trial was false. But supposing those cases to go the length of establishing the proposition, that the defendant's own evidence upon oath is sufficient to contradict the evidence on which the perjury is assigned, it is conceived they cannot be supported. The prosecutor may charge the perjury either on the one statement or on the other, and whichever he selects it is clear that the defendant could not avail himself of a plea of *autrefois acquit*, or *convict* in case he were subsequently indicted for the other, and therefore he might be twice put in jeopardy, and perhaps twice convicted for the same offence. The judgment in *R. v. Harris*, 5 B. & Ald. 926, is conclusive to show that this is a good objection. Again, such evidence leaves it wholly uncertain which of the two statements is true; now it is a clear rule of criminal law that if the evidence on the part of the prosecution leaves it wholly uncertain whether the *crime charged* has been committed or not, the defendant must be acquitted; and as to the observation that 'it can hardly be in the defendant's mouth to deny the truth of the evidence that came from himself,' it must be remembered that there are two statements upon oath, and if

he is to be concluded from denying one to be true, the same reason would conclude him from denying the other, and it would surely be very unreasonable to hold that he is concluded to deny the truth of whichever the prosecutor may think fit to select. It is conceived, also, that an indictment charging each of the statements to be false in separate counts could not succeed. The charges being directly contradictory the one to the other, it may be doubted whether the grand jury would be warranted in finding such an indictment; or, if found, whether it would not be bad on the face of it; and as the defendant could only make a defence to one charge by proving himself guilty of the other, the judge would probably insist upon the prosecutor electing on which charge he would proceed. But supposing these difficulties to be surmounted, it is not easy to see how it would be possible for the jury to find a verdict without any evidence to show which statement was false. If they found a general verdict they would at one and the same time find each of the statements to be both true and false, unless indeed they were satisfied that the defendant had, upon both occasions, wilfully sworn to matters about which he had no knowledge at all. *Ante*, pp. 294, 361. C. S. G.

(r) *R. v. Hughes*, 1 C. & K. 519. The false statement before the grand jury was that certain tablecloths were the property of the prisoner's son, and she had sworn before the magistrates that they were her husband's; and evidence of the state of the family was given to prove that the latter statement must be true; but Tindal, C. J., thought that there was so much doubt whether the prisoner might not have sworn under a misapprehension, that he directed an acquittal.

And where the prisoner was indicted for perjury, and it appeared that she had made two statements on oath, one of which was directly at variance with the other; Holroyd, J., is reported to have said, 'Although you may believe that on one or other occasion she swore that which was not true, it is not a necessary consequence that she committed perjury; for there are cases in which a person might very honestly and conscientiously swear to a particular fact, from the best of his recollection and belief, and from other circumstances at a subsequent time, be convinced that he was wrong, and swear to the reverse, without meaning to swear falsely either time. Again, if a person swears one thing at one time, and another at another, you cannot convict where it is not possible to tell which was the true and which was the false.' (s)

The prisoner, a policeman, laid an information against a publican for keeping open his house after lawful hours on the fast day, and on the hearing of the information swore that he knew nothing of the matter, except what he had been told by another person, and that '*he did not see any person leave the publican's house after eleven*' on the night in question. Perjury was assigned on this last allegation. It was proved by the clerk of the magistrates that the prisoner on laying the information said, he had caught the publican; he had last night seen four men leave his house after eleven; one of them he could swear to; it was Williamson; he knew him by his coat. Another witness proved that the prisoner, on another occasion, made the same statement to him. A third witness, Williamson, proved that, on a third occasion, the prisoner repeated the statement with the variation, 'One I can swear to; it was your brother.' It was proved that Williamson and others had left the house on that night after eleven. The prisoner on the hearing of the information acknowledged that he had offered to smash the case for 30s. He told another witness he should make the publican give him money to settle it; another witness heard him offer the publican to settle it for 1l., saying he was risking perjury; and another witness proved that the prisoner owned he had received 10s. to smash the case, and was to have 10s. more. It was objected that there was no sufficient evidence, as these were only the statements of the prisoner not on oath against that on oath. But, on a case reserved, it was held that the conviction was right. In addition to the statements of the prisoner, there were strong confirmatory circumstances. The prisoner's offering to smash the case for one pound, his admitting that he had received 10s. and was to receive 10s. more, and his talking of making the publican pay to settle it, are strong evidence to show that what he stated upon his oath was false, and that his statements not upon oath were true. (t)

(s) Mary Jackson's case, 1 Lew. 270.

(t) R. v. Hook, D. & B. 606. Wightman, J., said, 'It is not necessary that there should be two independent witnesses to contradict the particular fact, if there be two pieces of evidence in direct contradiction. Here one piece of evidence is that the prisoner himself is proved to have made statements directly contrary to his statement on oath; that alone would not do; but in addition to that you have the oaths of other

witnesses, which go to show that that which he stated when not upon oath was true; and therefore you have two pieces of evidence. I ought rather to put it that, instead of two witnesses being necessary to prove each fact, you must have the evidence of two persons giving evidence in contradiction to what has been sworn to by the prisoner; as, one witness who could prove, as in this case, that on other occasions the prisoner had stated that which was diametrically opposed to that

In the following case, it was doubted whether the rule, which requires two witnesses was satisfied by several witnesses, each supporting a separate assignment of perjury, but no two speaking to the same assignment. Upon the trial of an indictment for perjury, alleged to have been committed by an insolvent debtor in falsely swearing to the correctness of his schedule, the defendant's account-book, given by him to the Insolvent Debtors Court, was put in, and several persons, whose names were specified in the indictment as debtors, and omitted in the schedule, appeared in the book as debtors to the defendant, and 'paid' was marked to their accounts in the defendant's writing. These persons were called, and stated that they did not pay until after the petition and schedule. It was objected that this was not sufficient evidence, inasmuch as it was only oath against oath, the defendant having sworn that the debts were paid; a single witness, with respect to each particular debt, swore that it was not paid at the particular time of the schedule. Lord Tenterden, C. J., 'I feel the force of the objection. It is a very important point whether the defendant's book, and the oath on one side, be not met by the oath of the witnesses on the other side. It would be very difficult to give any other evidence. I will not stop the case. If the defendant is convicted, you can move for a new trial.' (u)

But it has since been held, that the rule which requires two witnesses, or one witness and some sufficient corroboration, applies to every assignment of perjury in an indictment. Where, therefore, an indictment contains several assignments of perjury, it is not sufficient to disprove each of them by one witness; but in order to convict on any one assignment, there must be either two witnesses, or one witness and corroborative evidence, to negative the truth of the matter contained in such assignment. The prisoner was indicted for perjury alleged to have been committed in an affidavit to obtain a criminal information, in which he had sworn that he had paid all his debts, except two, as to which there was an explanation, and there were several assignments of perjury averring that he had not paid certain persons who were named (besides the two excepted ones), and such persons proved that they had not been paid, but only spoke to their respective debts not having been paid; Tindal, C. J., held that this was not sufficient, and that as to each debt there should be the testimony of two witnesses, or of one witness, and such confirmatory evidence as was equivalent to the testimony of a second witness. (v)

which he has sworn, and the other witness to give evidence of that which is directly opposite. You have therefore two contradictions: you have the contradiction of the prisoner himself, as deposed to on oath by one witness, and you have the contradiction of another independent witness, who speaks to the falsehood of the fact; you, therefore, have two independent contradictions on oath.' It is to be observed that, as it was proved that in fact the men did leave the public-house, as stated by the prisoner when he laid the information, the only question really was whether he saw them leave it.

(u) *R. v. Mudie*, 1 M. & Rob. 128. The defendant was acquitted on another ground; see the same case, *post*, p. 398.

(v) *R. v. Parker*, Stafford Sum. Ass. 1842. MSS. C. S. G. and C. & M. 639. Where an assignment of perjury was in the vague terms that defendant falsely swore that he had not treated a certain person to brandy, &c., on a certain day, instead of in the definite terms, that he had not treated him at a particular public-house, on a certain day, it was held, that proof of treating at two public-houses by two distinct witnesses, was sufficient to support a conviction, be-

The rule that the testimony of a single witness is insufficient to warrant a conviction on a charge of perjury, is an arbitrary rule, founded upon the general apprehension that it would be unsafe to convict in a case where there is merely the oath of one man to be weighed against the oath of another; (*w*) and it should be observed that this rule does not extend to all the facts, which are necessary to be proved on the trial of an indictment for perjury; but only to the proof of the falsity of the matter upon which the perjury is assigned. Thus, the holding of the court, the proceedings in it, the administering the oath, and even the evidence given by the defendant, may all be proved by one witness. (*x*)

The prisoner was indicted for having falsely sworn that one Prosser never was out of his sight between the hours of 7 A. M. and 10 A. M. on a certain day, and two witnesses proved that they saw Prosser at 8.30 A. M. on that day near Lane's Fallow, but could not tell whether the prisoner was in sight of Prosser or not, as the fences were high. Another witness proved that at 9 A. M. the same morning he saw the prisoner alone and on foot at a place more than six miles from Lane's Fallow. It was objected that the assignment of perjury was not proved by two witnesses. Patteson, J., 'It is necessary to have two witnesses to prove an assignment of perjury; but there need not be two witnesses to prove every fact necessary to make out an assignment of perjury. If the false swearing be that two persons were together at a certain time, and the assignment of perjury that they were not together at that time, evidence by one witness that at the time named the one was at London, and by another witness that the other was at York, would be a sufficient proof of the assignment of perjury.' (*y*)

Where a statement made by a prisoner is in the nature of an admission that a previous statement on oath is false, it is to be dealt with as a confession, and not as falling within the cases which have just been noticed. (*z*)

Where on an indictment for perjury committed, on a trial before a Queen's counsel at the assizes, his notes of the evidence, proved to be in his handwriting, were tendered in evidence; Talfourd, J., held that they were inadmissible. (*a*)

Competency of Witnesses. — The incompetency of witnesses on the ground of interest is removed by the 6 & 7 Vict. c. 85, 14 & 15 Vict. c. 99, and 16 & 17 Vict. c. 83, and therefore the decisions on that subject are omitted. See these statutes, noticed Vol. III. *Evidence*. Husbands and wives are still incompetent as witnesses for or against each other in many criminal cases, and it is probable that perjury might be assigned on the evidence of a witness who was so incompetent.¹

cause any witness of a treating at a separate time and place on the same day, was sufficient corroboration of the witness who spoke only to one act of treating. *R. v. Hare*, 13 Cox, C. C. 174. Denman, J.

(*w*) 3 Stark. Evid. 859.

(*x*) See 2 Hawk. P. C. c. 46, s. 10.

(*y*) *R. v. Roberts*, 2 C. & K. 607.

(*z*) See *R. v. Hook*, D. & B. 606, per Byles, J.

(*a*) *R. v. Child*, 5 Cox, C. C. 197, and statements made by a judge in giving judgment in an action are not admissible in evidence on a prosecution for perjury against a witness in the action. *R. v. Britton*, 17 Cox, C. C. 627.

AMERICAN NOTE.

¹ It is perjury in America for a person to swear falsely in a matter duly pending, though such person is incompetent as a witness. *Chamberlain v. P.*, 23 N. Y. 85; 80

Am. D. 255; *S. v. Molier*, 1 Dev. 263; *Montgomery v. S.*, 10 Ohio, 220; *P. v. Brown*, 54 Mich. 15; *P. v. Courtney*, 31 Hun, 199, 94 N. Y. 490.

Where a bill of indictment was preferred against the defendant for perjury, alleged to have been committed on a trial at the Quarter Sessions, and it was proposed to examine one of the grand jury, who had acted as chairman of the Quarter Sessions at the trial at which the alleged perjury was committed, but that gentleman expressed a desire not to be examined as a witness, and the grand jury wished to know whether they ought to examine him or not; Patteson, J., held that they ought not to examine him. He was the president of a Court of Record, and it would be dangerous to allow such an examination, as the judges of England might be called upon to state what occurred before them in court. (b)

In a case of perjury where the statements of the prisoner had not been taken down and were proved from memory, some observations being made as to the judge of the county court who had tried the case not being called to prove his notes, though he was willing to appear; Byles, J., said that the judges of the superior courts ought not, of course, to be called upon to produce their notes. If he were subpoenaed for such a purpose he should certainly refuse to appear. But the same objection was not applicable to the judges of inferior courts; he saw no reason why they should not be called, especially where, as in this case, the judge was willing to appear. (c)

It has been holden, that if a count in an indictment for perjury undertake to set out continuously the *substance and effect* of what the defendant swore when examined as a witness, it is necessary in support of this count, to prove that *in substance and effect* he swore the whole of that which is thus set out as his evidence, although the count contains several distinct assignments of perjury. It was urged in support of the prosecution that *reddendo singula singulis*, the defendant was charged with swearing separately in answer to all the questions that were mentioned. But Lord Ellenborough, C. J., said, 'Suppose you had undertaken to set out the *tenor* of what the defendant swore, and it should appear by the evidence that he had not sworn a material part of that which was set out, would not this have been fatal? Having taken upon you to state the *substance and effect* of what he swore, you are not bound down to precise words; but must you not prove that he swore in substance and effect the whole that you have stated? You aver that part of the defendant's evidence concerning the assurance given by Lord Headley to be material, and you have not proved

(b) *R. v. Gazard*, 8 C. & P. 595. In *R. v. Jones*, 6 C. & P. 137, on an indictment for perjury the chairman of the Worcestershire Quarter Sessions proved what a witness swore on a trial before him at the Quarter Sessions. In *R. v. Gazard*, the chairman was required as a witness for the same purpose, and, not being examined, the bill was ignored. Mr. Starkie, after citing this case, adds a *quære*, without stating any reason for so doing. 3 Stark. Evid. 861. It may, however, have struck him that no sufficient reason could be assigned for the decision. It would, no doubt, be extremely inconvenient if the judges were called upon to give evidence as to what occurred before them in court, but the inconvenience in the case of

chairmen of Quarter Sessions is comparatively slight, especially as they are usually present at the Assizes, and the evidence must be given in the county where they are chairmen. Assuming, however, that the inconveniences in their case were considerable, it seems worthy of further consideration how far that can prevent their liability to be called as witnesses. The general rule undoubtedly is, that every person is liable to be compelled to give evidence in a criminal case, and it may be dangerous to introduce exceptions which may prevent persons from giving evidence either for the crown or for the defendant. C. S. G.

(c) *R. v. Harvey*, 8 Cox, C. C. 99.

that he swore to any such assurance. Did you ever know the rule *reddendo singula singulis* applied to a misrecital? Is there any authority to show that under *secundum substantiam* you are not bound to prove the *substance* of what you state, as under *secundum tenorem* you are bound to prove the *tenor*? To hold otherwise would be to introduce a most dangerous latitude into criminal proceedings. I am decidedly of opinion that you have failed in the proof of a substantial allegation. It is essential to the security of innocence that words set out in the record should be either literally or substantially proved. A person giving his assurance generally, and giving his assurance for the performance of a particular stipulation, are allowed to be entirely different. If a man swears falsely to several material questions, these may be included in distinct counts.' (d)

It appears to have been ruled, that upon an indictment for perjury committed at the trial of a cause, the prosecutor must prove *the whole* of the defendant's testimony, (e) unless the perjury be assigned upon a point which first arose upon the defendant's cross-examination, in which case proof of the whole cross-examination has been ruled to be sufficient. (f) And the ground upon which proof of the *whole* of the examination or cross-examination was ruled to be necessary in these cases appears to have been, that possibly the defendant might have corrected in some part of such examinations any mistake he had made in other parts. But it is observed that this doctrine of compelling the prosecutor to prove more than a *prima facie* case is an anomaly in the criminal law; that in general the party indicting is not bound to anticipate matters of defence, which it lies on the prisoner to bring forward; and

(d) *R. v. Leese*, 2 Campb. 134. The learned reporter says, 'I find no decision or dictum in the books as to the evidence of the words sworn which is necessary to support an indictment for perjury. For the general principles upon this subject, *vide* 2 Hawk. P. C. c. 46, ss. 34, 35, 36. *Compagnon v. Martin*, 2 Bl. Rep. 790.' The count upon which the question in this case turned, alleged that a committee was appointed and met to try the merits of a petition complaining of an undue election, that certain questions were material, and that the defendant swore 'touching the said material questions, and the merits of the said petition,' in substance and effect as follows, — that he, by the directions of J. L., waited upon Lord H. and proposed to the said Lord H. that the said J. L. would decline upon the expenses being paid him, including the previous expenses of the day before; that Lord H. agreed that the said expenses should be paid, including the expenses that had been incurred at different inns in the town; that J. L.'s voters were to be applied to in consequence of that arrangement for the purpose of voting for the said Lord H., and that the defendant enumerated the expenses; that the defendant upon his return to the committee of the said J. L. communicated to them what had so passed between the said Lord H. and him; and that the said committee dispersed to carry the said agreement into effect; and

that the said J. L. asked the defendant if the expenses were secured; and that the defendant told the said J. L. his lordship had given his assurance *that it should be so*. The assignments of perjury negatived each of these statements, and it was proved that everything alleged was sworn, except the last words 'that it should be so.' The decision in this case seems questionable. As it is clearly settled that a defendant may be convicted of any one distinct assignment of perjury, though acquitted of all the rest; see *post*, p. 395; there seems no reason why proof of having sworn the matter negatived by one assignment should not be sufficient. In the case of obtaining goods by false pretences, it is clearly settled that proof of any one false pretence, and that the goods were obtained by that pretence, is sufficient, see Vol. II.; and that is a stronger case, because there the indictment in effect avers that all the pretences operated towards the obtaining the goods. In perjury each assignment of perjury is separate and distinct, and the court will give judgment upon one, although all the others are bad in point of law. *R. v. Rhodes*, 2 Lord Raym. 886. C. S. G.

(e) *R. v. Jones, Peake*, N. P. C. 37, Lord Kenyon, C. J.

(f) *R. v. Dowlin, Peake*, N. P. C. 170, Lord Kenyon, C. J.

that it does not seem that, in this case, the party indicted would sustain hardship in being compelled to show that he had corrected the part of his evidence assigned. (*g*) And it is said by another learned writer, that at most the rule seems to amount to this, that all the evidence given by the defendant, in reference to the particular fact on which perjury is assigned, ought to be proved. (*h*) And the rule hardly seems to be necessary for the protection of the defendant, as it will be open to him to cross-examine the witness by whom his statements upon oath are proved, whether he did not in some other parts of his evidence correct or explain those statements upon which the prosecution is founded, and unless the witness can positively deny any such correction or explanation, or if he admits that they may have occurred, the proof will probably be deemed insufficient for a conviction. And it will of course be open to the defendant to prove that any corrections or explanations were given by him in other parts of his evidence. (*i*) And it has since been held, upon a case reserved, that on an indictment for perjury committed on the trial of a cause, it is sufficient to go to the jury, if a witness states from recollection the evidence that the defendant gave, though he did not take it down in writing, and cannot say with certainty that it was all the evidence the defendant gave, if he can say with certainty that it was all he gave on that point, and that he said nothing to qualify it. (*j*)

Where a prisoner is indicted for perjury in evidence given on the trial of a cause, it is only necessary for the prosecution to prove so much of that evidence as is relevant to the matter in issue on the trial for perjury; but if the prosecution prove the whole of his evidence, and it refers to any deed or other document, which is so mixed up with it that it is necessary to be read in order to make the evidence intelligible, the prisoner is entitled to have it put in and read for that purpose; but he is not entitled to require it to be regularly proved by calling the attesting witness or the like. (*k*)

Proof of authority to administer the oath. — It is sufficient, to support the averment that the party administering the oath had competent authority for that purpose, to show in the first instance that he acted as a person having such authority. Thus, upon an indictment for perjury before a surrogate in the Ecclesiastical Court, it was ruled, that the fact of the person who administered the oath having acted as a surrogate was sufficient *prima facie* evidence of his having been duly appointed, and having authority to administer it. And Lord

(*g*) 2 Chit. Crim. L. 312, referring to 1 Sid. 418, *Rex v. Carr*.

(*h*) 3 Stark. Evid. 358. And the author further observes, that the rule even to this effect appears to be a doubtful one; for when it has once been proved that particular facts, positively and deliberately sworn to by the defendant in any part of his evidence, were falsely sworn to, it seems in principle to be incumbent on him to prove, if he can, that in other parts of his testimony he explained or qualified that which he had so sworn.

(*i*) *R. v. Carr*, 1 Sid. 418.

(*j*) *B. v. Rowley*, R. & M. C. C. R. 111, and *R. & M. N. P. R.* 229, where Little-dale, J., is reported to have said, 'I take the

true rule to be this, that all the evidence referable to the fact on which the perjury is assigned must be proved.' In *R. v. Munton*, 3 C. & P. 498, three witnesses stated what the defendant had said on the trial of an indictment for an assault, and the defendant was convicted, although none of the witnesses took down the evidence as it was given, and none of them professed to state the whole of the evidence given. And this course has been followed in subsequent cases. *R. v. Meek*, reported, 9 C. & P. 513, as to another point. *R. v. Ann Bird*, Gloucester Spr. Ass. 1842, Creaswell, J.

(*k*) *R. v. Smith*, 1 F. & F. 98, Erle, J.

Ellenborough, C. J., said, 'I think the fact of Dr. Parson having acted as surrogate is sufficient *prima facie* evidence that he was duly appointed and had competent authority to administer the oath. I cannot for this purpose make any distinction between the Ecclesiastical Courts and other jurisdictions. It is a general presumption of law, that a person acting in a public capacity is duly authorized so to do.' (l) But it was holden, in the same case, that upon its appearing that the surrogate was appointed contrary to the canon (which requires that no judicial act shall be speeded by any ecclesiastical judge, unless in the presence of the registrar or his deputy, or other persons by law allowed in that behalf), his appointment was a nullity and the averment that he had authority to administer the oath was negatived. (m) So where perjury was assigned upon an affidavit sworn before Chell, a commissioner, &c., and it was proved that Chell acted as a special commissioner for taking the affidavits of parties in prison, or unable from sickness to attend before a judge; Patteson, J., held that this was sufficient evidence that Chell was a commissioner, and that it was not necessary to prove the commission under which the affidavit was taken, upon the general principle that a person acting as a public officer must be taken to have authority as such, and that a commissioner for taking affidavits came within that principle. (n) So where an affidavit was alleged to have been sworn before R. G. Whatley, a commissioner, 'then and there being duly authorized and empowered to take affidavits in the said county of G. in or concerning any cause depending in Her Majesty's Court of Exchequer,' and it was proved that Whatley had acted as a commissioner for taking affidavits in the Court of Exchequer for ten years; but had never seen his commission. He had however, directed it to be applied for ten years before through his agent, and had been told by him that it had been granted; it was held that Whatley's acting as a commissioner was *prima facie* evidence that he was so. (o)

Where in order to prove an allegation in an indictment for perjury that a county court was duly constituted under the 9 & 10 Vict. c. 95, a Gazette was put in, but it turned out to be a wrong one; Maule, J., held that proof that the judge acted in the capacity of a judge of the court in pursuance of and under the County Courts Act, would suffice. (p)

It has been held that an indictment for perjury in an affidavit sworn in the Insolvent Debtors Court by an insolvent, respecting the state of his property and expenditure, for the purpose of obtaining an extended time to petition under the 7 Geo. 4, c. 57, s. 10, cannot be

(l) R. v. Verelst, 3 Campb. 492. R. v. Cresswell, 2 Chit. Cr. L. 312. S. P. per Lord Ellenborough, C. J.

(m) R. v. Verelst, *supra*.

(n) R. v. Howard, 1 M. & Rob. 187.

(o) R. v. Newton, 1 C. & K. 469. Atch-erley, Serjt., after consulting Tindal, C. J.

The defendant had requested Whatley to act as commissioner in taking this particular affidavit.

(p) R. v. Ward, 3 Cox, C. C. 279. The same has been held with regard to a deputy county court judge. R. v. Roberts, 14 Cox, C. C. 101.¹

AMERICAN NOTE.

¹ The same doctrine appears to prevail in America. Straight v. S., 39 Ohio St. 496, but in New York a contrary view has been

expressed by some judges. Lambert v. P., 76 New York, 220, 231; U. S. v. Curtis, 107 U. S. 671.

supported, without proving that the court by its practice required such an affidavit: and it was also held that such proof was not given by an officer of the court producing printed rules, purporting to be rules of the court, which he had obtained from the clerk of the rules, and was in the habit of delivering out as the rules of the court, but which were not otherwise shown to be sanctioned by the court; the officer professing to have no knowledge of the practice except from such printed rules. (*q*)

The oath must be proved as alleged.¹ — The taking the oath must be proved as it is alleged. Therefore, if it be averred that the defendant was sworn upon the Holy Gospels, &c., and it turned out that he was sworn in some other manner, according to some particular custom, and not upon the Gospels, the variance will be fatal. (*r*) But where the allegation in an indictment was, that on the trial of an action the prisoner 'was duly sworn, and took his corporal oath on the Holy Gospel of God,' and the proof was that the witness was sworn and examined; and it was objected that the particular mode of swearing must be proved, as the evidence given would apply to the oath of a Jew, or person of any other religion than the Christian; Littledale, J., held the evidence sufficient, as the ordinary mode of swearing was the one specified. (*s*) The indictment stated that the prisoner was sworn to speak 'the truth, the whole truth and nothing but the truth,' and it was proved that the oath taken was in the form, 'you shall true answer make.' Watson, B., held this to be no variance. (*t*)

The recital of the place where the oath is administered in the jurat has always been considered as a sufficient proof that the oath was administered at the place named. (*u*) Where, therefore, perjury was assigned on an answer in chancery, and the defendant's signature to the answer, and that of the Master in Chancery to the jurat, were proved, and that Southampton Buildings, which the jurat recited as the place where the oath was administered, was in the county of Middlesex; Lord Tenterden, C. J., held that this was sufficient proof that the oath was administered in Middlesex. (*v*) So where on an indictment for perjury committed in an affidavit, the original affidavit was produced; and it was proved to be signed 'John Turner,' in the

(*q*) *R. v. Koops*, 6 Ad. & E. 198, 1 N. & P. 823. It was also contended for the defendant that the Insolvent Court had no power to make the rule, and that the offence was at any rate not perjury; but no opinion was expressed upon these points.

(*r*) 3 Stark. Evid. 857. *R. v. M'Arthur*, Peake's case, 155.

(*s*) *R. v. Rowley*, R. & M. N. P. R. 299.

(*t*) *R. v. Southwood*, 1 F. & F. 356.²

(*u*) Per Lord Tenterden, C. J. *R. v. Spencer*, R. & M. N. P. R. 97. 1 C. & P. 260.

(*v*) *R. v. Spencer*, *supra*.

AMERICAN NOTES.

¹ If a witness in taking the oath by accident kisses a book not the Gospels, neither he nor the Court being aware of the mistake, perjury may be assigned on the false evidence of the witness. *P. v. Cook*, 4 Seld. 67, 59 Am. D. 451. Kissing the book or lifting up the hand are directory only, and not essential. *C. v. Smith*, 11 Allen, 243; *R. v. Haly*, 1 Crawf. & Dix, C. C. 199, but see *O'Reilly v. P.*, 86 N. Y. 154, 40 Am. R.

525; *S. v. Mace*, 86 N. C. 668; *U. S. v. Baer*, 18 Blatch. 493.

² The mere form is immaterial. *S. v. Dayton*, 53 Am. D. 270; *S. v. Owen*, 72 N. C. 604; *Edwards v. S.*, 49 Ala. 334; *Faith v. S.*, 32 Tex. 373; *Johnson v. S.*, 76 Ga. 790. But the substance must be followed. *Maher v. S.*, 3 Minn. 444; *S. v. Trask*, 42 Vt. 152.

handwriting of the prisoner, and the jurat was 'Sworn in open court at Westminster Hall, the 10th day of June, 1846, By the court,' and it was proved that the words 'By the court' were in the handwriting of one of the masters of the court, by whom the jurats of affidavits are signed when the affidavits are sworn in court; it was objected that it should be shown that the master was in court when the prisoner was sworn before him. Erle, J., 'We have proof of the handwriting of the party sworn, and of the officer, who is authorized to administer the oath; and when an officer thus authorized writes under a proper jurat the words "By the court," I think that that is sufficient evidence that the affidavit was sworn before him, and properly sworn in court.' (w) But a variance as to the place of taking the oath will not be material, if it be proved to have been taken in the county where the defendant is indicted. (x) And upon an indictment in Middlesex, it may be shown that the oath was in fact taken in Middlesex, although the jurat state it to have been sworn in London. (y)

On a trial in Michaelmas term, 52 Geo. 3, of an indictment against a bankrupt for perjury before the commissioners in passing his last examination under the bankrupt laws then in force, Lord Ellenborough said, 'I am strongly inclined to think that you ought to give strict evidence of the bankruptcy. Unless the defendant really was a bankrupt, the examination was unauthorized. It goes to the authority of the commissioners to administer the oath. Their authority takes its root, not in the commission, but in the bankruptcy. While the commission subsists its validity may be assumed for certain civil purposes; but when a criminal case occurs, unless the party was a bankrupt all falls to the ground. However I will save the point.' (z)

The indictment stated that A. P. carried on the business of a builder, and that he was indebted to W. B. in the sum of 100*l.* and upwards; that he committed an act of bankruptcy; that a fiat issued against him, on the petition of W. B.; that the commissioners adjudicated A. P. to be a bankrupt; that in the prosecution of the fiat it became material to inquire into the estate and effects of A. P.; and that at a meeting of the commissioners the defendant appeared before them as a witness, and was sworn, &c. It appeared that the debt due to W. B. was much less than 100*l.*, but that there were two other creditors, to each of whom A. P. owed more than 100*l.*; therefore, under the 6 Geo. 4, c. 16 (the Bankrupt Act then in force), s. 18, the Lord Chancellor might, on application, have directed the substitution of a good petitioning creditor's debt for that of W. B., but that in fact this had not been done. It was objected that the defendant was entitled to be acquitted, as the averment that W. B. was a creditor to the amount of 100*l.* was not only not proved, but was disproved. The counsel for the crown cited *R. v. Raphael*, (a) where Abbott, J., held, that on an indictment against a third person, examined before commissioners of bankrupt, their declaration that a party was a bankrupt is sufficient. The defendant having been convicted, the judges, upon a case reserved, held the conviction wrong. (b)

(w) *R. v. Turner*, 2 C. & K. 732.

(x) *R. v. Taylor*, Skin. 403.

(y) *R. v. Emden*, 2 East, 437. 3 Stark. Evid. 858.

(z) *R. v. Punshon*, 8 Campb. 96. See *R. v. Bullock*, 1 Taunt. 71.

(a) *Manning's Ind.* 232.

(b) *R. v. Ewington*, 2 M. C. C. R. 223.

On an indictment for perjury, in an answer in chancery, sworn before the passing of the Judicature Acts, the bill must be proved in the usual way; the proof of the defendant's signature, and that of the master before whom the answer purports to be sworn, is evidence of the defendant's having sworn to the truth of the contents, without calling the person who wrote the jurat; or further, proving the identity of the defendant as being the very same person who had signed the answer. (c) But unless there be such proof of the defendant's signature, or some other sufficient proof to identify him as the person by whom the oath was taken, no return of commissioners or of a master in chancery will be sufficient. (d) In a case upon the 31 Geo. 2, c. 10, s. 24 (for taking a *false oath* to obtain administration to a seaman's effects, in order to receive his wages), it was holden necessary to prove, directly and positively, that it was the prisoner who took the oath. (e)

An indictment for perjury alleged that the prisoner, 'being a trader within the meaning of the statutes in force relating to bankrupts, but owing debts amounting in the whole to less than 300*l.*, and having resided for six calendar months next immediately preceding the time of filing his petition within, &c.,' did present his petition to the Insolvent Court in Portugal Street; and the only evidence given in support of these allegations was the prisoner's petition filed in that court, which alleged the very same matters as facts upon the truth of which, with others, the prisoner rested his application to the insolvent court; and, on a case reserved, it was held that, as against the prisoner, the statements in the petition, uncontradicted by any conflicting testimony, were abundant evidence to prove those allegations in the indictment. (f)

An indictment for perjury alleged that W. Turner made his will, and appointed J. H. Turner, W. B. Wood, and W. T. Abud the executors thereof, and to prove this averment the probate of the will was tendered; it was objected that, as the will applied both to lands and personalty, the original will must be produced and proved. Erle, J., 'A will may in law have two operations, — the one, as to realty, respecting which the ecclesiastical courts have no jurisdiction; the other, as to personalty and executors, in which the ecclesiastical courts have sole jurisdiction, and therefore, with respect to the latter, the evidence of the attesting witness is not necessary here. If all the matters in this indictment relate to personalty and executors, the probate is the proper proof; but if there is any question here raised as to whether the testator devised lands, the original will must be produced, and one of the attesting witnesses called. But if it is only to be shown that the deceased made a will, and left certain persons

C. & M. 319. In the course of the argument before the judges, Lord Abinger, C. B., said, 'You cannot dispute the authority of the commissioners to take the preliminary proceedings under the fiat, to ascertain whether the party should be adjudged bankrupt or not. They were authorized to do that by the fiat of the Lord Chancellor; but you say that if there was no good petitioning creditor's debt, the commissioners had no authority to inquire and examine witnesses as to

the bankrupt's property.' See Vol. II., Bankrupts.

(c) *R. v. Benson*, 2 Campb. 508. *R. v. Morris*, 2 Burr. 1189. 1 Leach, 50. The reason why the Court of Chancery made a general order that all defendants should *sign* their answers was with a view to the more easy proof of perjury in answers. 2 Burr. 1189. See *R. v. Turner*, 2 C. & K. 732.

(d) *Id. ibid.*

(e) *Brady's case*, 1 Leach, 327.

(f) *R. v. Westley*, Bell, C. C. 193.

executors of it, I shall hold the production of the probate to be the proper proof.' (*g*)

On an indictment for perjury in a deposition sworn by the prisoner as a proof of a debt against a bankrupt, it appeared that the proof was placed according to the practice on a file of the proceedings, where it remained for several months, and the prisoner having demanded an inspection of the file, it was handed to him by the usher, and shortly afterwards returned to the usher, who restored it to the customary place of deposit without examination. It was afterwards discovered that the proof had disappeared, and all searches for it had proved ineffectual; and an office copy under the seal of the court was tendered in evidence. It was objected, on the authority of Taylor on Evidence, (*h*) that a copy could not be received in evidence in a case of perjury; but Hill, J., held that, on proof that the original had been lost or destroyed, secondary evidence was admissible. (*i*)

In order to show the materiality of the deposition or evidence of the defendant, it is essential, where perjury is assigned in an answer to a bill of equity, filed before the passing of the Judicature Act, to produce and prove the bill, (*j*) or if the assignment is on an affidavit, to produce and prove the previous proceedings, such as the rule *nisi* of the court, in answer to which the affidavit in question has been made. (*k*)

If the assignment be on evidence on the trial of a cause, in addition to the production of the record (*l*) the previous evidence and state of the cause should be proved, or at least so much of it as shows that the matter sworn was material. So also such prefatory circumstances and innuendos as are averred upon the face of the indictment for the same purpose must be proved. (*m*)

It is reported to have been held upon the trial of an information for perjury, alleged to have been committed on the trial of an ejectment, that in order to prove the perjury a witness might prove what a witness, who was since dead, swore on the trial of the ejectment. (*n*) It has been observed that this ruling seems to be utterly inconsistent with the principles now established. (*o*)

Some counts in an indictment for perjury committed in an affidavit to oppose a summons to set aside a judgment obtained by the prisoner alleged that the prisoner 'caused to be entered up final judgment in the said action;' and a clerk from the judgment office produced from that office a book in which judgments are entered up, and stated that interlocutory judgment was signed in the action, and that final judgment was afterwards entered up; it was objected that the roll or an examined copy of it ought to have been produced. It was answered

(*g*) R. v. Turner, 2 C. & K. 732.

(*h*) S. 1379, p. 1232, third edit.

(*i*) R. v. Milnes, 2 F. & F. 10.

(*j*) 3 Stark. Evid. 859, citing R. v. Alford, 1 Leach, 150.

(*k*) 3 Stark. Evid. 859.

(*l*) R. v. Iles, Hard. 118. Bull. N. P. 243. 2 Hawk. P. C. c. 46, s. 57, 3 Stark. Evid. 855.

(*m*) 3 Stark. Evid. 859.

(*n*) R. v. Buckworth, T. Raym. 170, per

Twisden, J., and Morton, J., against Keeling, C. J., who said it was not to be allowed, because between other parties.

(*o*) 3 Stark. Evid. 861, where the case is erroneously cited as Taylor v. Brown. The report does not show for what precise purpose the evidence was adduced; if for the purpose of proving what passed on the former trial in order to show that the matter was material, *qu.* whether it was not admissible. C. S. G.

that the 'entering up' of final judgment always takes place before there is any roll carried in, and is the making of the entry in the book produced; (*p*) and Lord Denman, C. J., held the proof sufficient. (*q*)

Where, in order to prove an allegation in an indictment for perjury that a cause came on to be tried, the *nisi prius* record was produced, and it appeared that no *postea* had been indorsed upon it, but there was a minute, in the handwriting of the officer, indorsed upon the jury panel which was affixed to it, in these words, 'Verdict for plaintiff, damages 1s.' Lord Tenterden, C. J., after consulting the other judges of the Court of King's Bench, held that the officer's minute was sufficient evidence that the trial took place. (*r*)

Where an indictment for perjury alleged that certain issues came on to be tried and were tried before the sheriffs of London upon the execution of a writ of trial, and the *postea* being produced, the verdict appeared to have been taken on one of two issues, without any statement as to the event of the other, the Court of Queen's Bench held that the allegation was proved by the record and *postea* taken together. It appeared that the jury was summoned and sworn to try 'the issues:' and if on one of the issues the jury had been withdrawn, yet both would have come on for trial and have been tried. (*s*)

An indictment alleged that a certain action came on to be tried in due form of law, and was duly tried by a jury of the county in that behalf duly sworn. The record stated that the jury were sworn, and after evidence given withdrew to consider their verdict, and after they had agreed returned to the bar to give their verdict, 'whereupon the plaintiff being called, comes not, &c.' It was objected that the trial was not complete, as the jury had not given any verdict. It was answered that, as far as the jury were concerned, the cause was by them duly tried. They were sworn to 'truly try and a true verdict give,' and they might try and yet not give a verdict; and the objection was overruled. (*t*)

Upon an indictment for perjury charged as having been committed on the trial of an action in the High Court of Justice, the production by the officer of the court of the copy writ filed under Ord. V., rule 7, and the copy pleadings filed under Ord. XLI., rule 1, is sufficient evidence of the existence of the action. (*u*)

An indictment for perjury averred that there was an action pending between W. C. and B. and the defendant. The writ was not produced, but to show the existence of the action, the attorney for the plaintiffs in the action produced a notice of set-off entitled in the cause, which he had received from the attorneys for the defendant in the action; it was objected that the notice of set-off was inadmissible, as at most it was only secondary evidence; and the objection was held good. (*v*)

(*p*) *Fisher v. Dudding*, 9 Dowl. P. C. 872.

(*q*) *R. v. Gordon*, C. & M. 410. The prisoner was convicted, and no motion made on the point, as there were other counts which did not allege the entering up of the judgment.

(*r*) *R. v. Brown*, M. & M. 315. 3 C. & P. 572.

(*s*) *R. v. Schlesinger*, 10 Q. B. 670.

(*t*) *R. v. Bray*, 9 Cox, C. C. 218. The Recorder, after consulting Bramwell, B., and Byles, J.

(*u*) *R. v. Scott*, 2 Q. B. D. 415.

(*v*) *R. v. Stoveld*, 6 C. & P. 489. Lord Denman, C. J.

On a trial for perjury at the Central Criminal Court the caption of the same court of oyer and terminer or gaol delivery at which the indictment for perjury is preferred, the former indictment with the indorsement of the prisoner's plea, the verdict, and sentence of the court thereon, together with the minutes of the trial, made by the officer of the court, are sufficient evidence of the former trial, without a regular record or any certificate thereof. (*w*)

An indictment alleged that there being a certain plaint lodged against the prisoner in a county court, the same came on to be tried, and that the prisoner was duly sworn, &c. It was proved by the clerk of the court that such a plaint had been filed, (*x*) and it was proposed to give parol evidence of the proceedings on the trial; but it appearing that there was a minute book wherein were entered the plaints, the appearance of the parties and the result of the trial, it was objected that that book ought to be produced, in order to prove the plaint and the appearance of the prisoner. That the evidence of the prisoner could not be proved by parol if it was taken down in the book. And lastly, that the summons must be proved in order to give the court jurisdiction. Maule, J., 'I think the want of the proof of the summons is answered by the fact of the prisoner's appearance, which may be proved by parol. That is sufficient to carry the case on; but, if it should be necessary, I will reserve the other points;' and the evidence was received. (*y*)

Where an indictment is preferred for perjury committed on the hearing of a plaint in the county court, the only proper course to prove the proceedings in that court is to produce the clerk's book or a copy having the seal of the court, and purporting to be signed and certified as a true copy by the clerk of the court under the 9 & 10 Vict. c. 95, s. 111. (*z*)

An indictment for perjury alleged that a certain suit was instituted in the Prerogative Court of Canterbury, in which M. S. Merryweather was plaintiff, and J. Turner, J. H. Turner, W. B. Wood, and W. T. Abud, defendants; and in order to prove this allegation, an officer from the registrar's office in the Prerogative Court produced from the office an original allegation put in on behalf of M. S. Merryweather and the original allegation put in on behalf of the executors in answer to it, and proved the signatures of two advocates, who acted as advocates in the court, to each of the allegations; and Erle, J., held that this was sufficient proof of the suit having been instituted as alleged. (*a*)

An indictment alleged that the prisoner appeared at a petty sessions in pursuance of a summons requiring him to answer a complaint of A. Jones touching a bastard child of which she alleged him to be the father, and alleged that he committed perjury on the hearing of that complaint. The magistrate's clerk produced a book containing the minutes made by him on the occasion, headed 'Ann Jones *v.* Richard

(*w*) R. *v.* Newman, 2 Den. C. C. 300. The trial for perjury was in December, 1851; the trial on which the perjury was committed was at a session held on the 12th of May, 1851, and the caption was dated on that day.

(*x*) It is not stated how this was proved.

(*y*) R. *v.* Ward, 3 Cox, C. C. 279. It is

not stated how the evidence given by the prisoner was proved. He was convicted.

(*z*) R. *v.* Rowland, 1 F. & F. 72. Bramwell, B., who said he had ruled in the same way previously, and held that the proceedings on hearing the plaint could not be proved by the assistant clerk of the court.

(*a*) R. *v.* Turner, 5 C. & K. 732.

Newell, affiliation,' and then the evidence was set out. There was no other evidence of the proceedings before the justices. It was objected that the summons ought to have been produced, or notice to produce it served on the prisoner. Wightman, J., 'The 7 & 8 Vict. c. 101, provides that "upon complaint by the mother, the justices shall have power to summon the putative father, and upon the appearance of the person so summoned, or upon proof of the service of the summons, to hear and adjudicate upon the case." A summons was, therefore, necessary to give the magistrates jurisdiction; and to prove that they had jurisdiction in this case it must be proved that the prisoner was duly summoned, either by production of the summons, or by secondary evidence after notice to the prisoner to produce it. The minutes of examination in this case were no more than the minutes of a short-hand writer. (b)

Upon an indictment for perjury committed at the hearing of an information in bastardy, laid under the 7 & 8 Vict. c. 101, which indictment alleged the application for a summons, the issuing thereof, and the hearing upon it, proof of the information, of the appearance of the defendant, of the hearing, of evidence being given on both sides, and of no objection being made of the want of a summons, is sufficient to show jurisdiction in the justices who heard the information, without proof of the summons which issued upon that information: and a conviction for perjury upon the above indictment was upheld. (c)

Where, upon an indictment for perjury alleged to have been committed on the trial of an appeal against an order of removal, the sessions book was produced by the clerk of the peace in order to prove the trial of the appeal, and the clerk of the peace stated that he would, if applied to, have drawn up a record of the trial of the appeal on parchment; it was held that the sessions book was not sufficient evidence of the trial of the appeal. (d) But it has since been held that the sessions book containing the orders and other proceedings of the court made up and recorded after each sessions, with an entry containing the style and the date of the sessions, and the name of the justices in the usual form of a caption, no other record being kept, is good evidence of the trial of an appeal against an order of removal. (e)

Where perjury was assigned on the answer to a bill in chancery as it originally stood, which bill had afterwards been amended, and the bill was produced by a clerk from the six clerks' office, who stated that it was an amended bill, but that it was the original record which was filed in the six clerks' office in the first instance, but altered by the amendments, which were made by altering the original record, and that these alterations were all made by a clerk in the six clerks' office, whose handwriting he knew, and that that person wrote the word 'amendment' against each alteration; but none of the alterations related to the particular parts of the answer upon which the perjury was assigned. It was contended that this was not sufficient evidence of

(b) *R. v. Newell*, 6 Cox, C. C. 21, A. D. 1852. Three duplicate orders had been made, but none of them was produced, or notice to produce any of them given. See the subsequent cases of *R. v. Berry*, *ante*, p. 315, and *R. v. Simmonds*, *ante*, p. 306; see *R. v. Whybrow*, 8 Cox, C. C. 438; *R. v. Hurrell*, 3 F. & F. 271. *R. v. Smith*, *infra*.

If the information is in writing it must be produced. *R. v. Dillon*, 14 Cox, C. C. 4.

(c) *R. v. Smith*, 37 L. J. M. C. 6; see *R. v. Carr*, 10 Cox, C. C. 564.

(d) *R. v. Ward*, 6 C. & P. 366, J. A. Park, J.

(e) *R. v. Yeoveley*, 8 A. & E. 806.

what the bill was before the alterations, and that the person who made the alterations ought to be called. But Lord Tenterden, C. J., was of opinion that the amendments were sufficiently proved, and also thought them not material to the case. (*f*)

In one case, upon an indictment for perjury, a copy of a bill in chancery was rejected which contained many abbreviations, (*g*) and had all the dates in figures, it being proved that in the original bill all the words were written at full length, and all the dates expressed by words. (*h*)

It seems that if a party produce an affidavit, purporting to have been made by him before commissioners in the country, and make use of it in a motion in the cause, it will be evidence against him that he made it. (*i*)

Where, upon an indictment for perjury committed upon a trial, the supposed perjury arose upon evidence given in reply to the testimony of one of the defendants on the former trial, who was acquitted and examined as a witness, and the indictment for perjury did not state his acquittal, nor did the minute of the verdict produced show it; it was held that, although the evidence of a shorthand writer, who stated that the defendant was acquitted and then examined, was not any proof of his acquittal, yet it was good proof that he was examined. (*j*)

If perjury is assigned upon an affidavit made by a marksman, either the jurat must state that the affidavit was read over to the defendant, or it must be proved that it was so read. Upon an indictment for perjury in an affidavit, which was signed with the mark of the defendant, but the jurat to which omitted to state that it was read over to the defendant; Littledale, J., said, 'As the defendant is illiterate, it must be shown that she understood the affidavit. In those cases where the affidavit is made by a person who can write, the supposition is that such person was acquainted with its contents, but in the case of a marksman it is not so. If in such case the master by the jurat authenticates the fact of its having been read over, we give him credit; but if he does not, and the fact were so, he ought to be called to prove it. I should have difficulty in allowing the evidence of any other person to that fact.' And no evidence being adduced to show that the affidavit was read over in the presence of the defendant, it was held that the assignments of perjury on this affidavit could not be supported. (*k*)

It was held in the same case, that where one affidavit, which has a perfect jurat, refers to another affidavit which is inadmissible for want of proof that it was read over to the defendant, the former affidavit cannot be read. (*l*)

Where an indictment for perjury, alleged to have been committed in the Insolvent Debtors Court, stated that the defendant gave in his schedule on oath that the same and all its contents were true, and

(*f*) *R. v. Laycock*, 4 C. & P. 326.

(*g*) Such as 'possed of consible pnl este.'

(*h*) *R. v. Christian*, MSS. C. S. G. and C. & M. 388, Lord Denman, C. J.

(*i*) *R. v. James*, Show. 397. 3 Stark. Evid. 857. And see *Brickell v. Hulse*, 7 A. & E. 454.

(*j*) *R. v. Brown*, M. & M. 315. Lord

Tenterden, C. J., after consulting the other judges of the Court of King's Bench. See this case as to another point, *ante*, p. 335.

(*k*) *R. v. Hailey*, R. & M. N. P. C. 94. 1 C. & P. 258.

(*l*) *R. v. Hailey*, 1 C. & P. 258. The report does not state in what manner the one affidavit referred to the other.

contained a full, true, and perfect account of all his just debts, credits, &c., and then went on to state that the said schedule and its contents were not true, and that certain persons whose names were set out were debtors to the defendant at the time of giving in his schedule; Lord Tenterden, C. J., held that the evidence must be confined to the cases specified in the indictment, as the defendant could only come prepared to answer those cases, and that evidence that other persons, whose names were not set out in the indictment, were also debtors to the defendant and were omitted in the schedule, was inadmissible. (*m*)

An indictment for perjury alleged that the defendant made an affidavit, which stated that the creditors of the defendant were all, with two exceptions (which were explained), paid in full; whereas the said creditors were not all, with two exceptions only, paid in full; and whereas divers creditors of the defendant exceeding the number of two, naming several creditors, were not paid in full; and evidence being tendered of debts to other persons than those named being unpaid; it was objected that the first assignment was bad as too general, and that evidence as to debts due to others than those named ought not to be admitted. Tindal, C. J., 'You might have demurred to this assignment only, if it be too general; and as you have not done so, I do not see how I can exclude the evidence.' But 'I think that omitting the names in one assignment of perjury and inserting them in the next is likely to mislead the defendant; as he would be very likely to suppose that the debts, mentioned in general terms in one assignment, were those particularized in the other;' whereon the evidence was not pressed. (*n*)

Where an indictment for perjury alleged that Hallett exhibited a bill in chancery, by which he set forth that he, Bowden, and Tucker (the defendant), entered into a verbal agreement to become joint dealers and co-partners in the trade or business of druggists; and assigned perjury against the defendant in swearing that he, Hallett, and Bowden did not become joint dealers in the trade or business of druggists; and it appeared that Hallett was a druggist, but the defendant and Bowden were drug brokers, and had nothing to do with Hallett's shop, or the drugs sold there, but were continually in the drug market; but being brokers of the city of London they could not deal in their own names and it was agreed that they should buy and sell drugs in Hallett's name, and then they were to divide the profit and loss. Abbott, C. J., held that the allegation in the bill in chancery could only apply to an ordinary partnership, and not to such a transaction as this, and consequently, that the indictment could not be supported. (*o*)

Where an indictment for perjury alleged that a bill was pending in the Court of Chancery, and that it became material to ascertain whether an annuity granted by G. Hawkins to the defendant, or granted to J. B. Bostock, as trustee for the defendant, had been paid up to the year 1828, and that the defendant falsely swore that the annuity had not been paid up to 1828; and in order to show that

(*m*) *R. v. Mudie*, 1 M. & Rob. 128. S. C. as *R. v. Moody*, 5 C. & P. 23. The indictment is set out in the note to the latter report.

(*n*) *R. v. Parker*, C. & M. 639.

(*o*) *R. v. Tucker*, 2 C. & P. 500.

Bostock, who was abroad, had paid the money to the defendant, it was proved that Bostock had sent money to his banker's by his clerk; it was held that what the clerk said about the money at the time he paid it into the banker's was admissible in evidence, on the ground that it was a declaration made by an agent acting at the time within the scope of his authority. (*p*)

Upon an indictment for perjury alleged to have been committed upon the hearing of an information for sporting without a game certificate, in order to prove what the defendant swore before the magistrate, his deposition taken in writing before the magistrate was put in, and it was held that evidence was not admissible of other things stated by the defendant, when he was examined as a witness before the magistrate, but which were not contained in the written deposition. (*q*)

An indictment alleged that the prisoner was a member of a benefit society, the rules of which were duly certified, and a transcript of them filed with the clerk of the peace, and that by a rule of the society it was provided that if any free member should have his property destroyed by fire, he should produce a certificate, and if the property was not insured the society would indemnify him to a certain amount if the claim were authenticated by a solemn declaration before a magistrate, and then charged the prisoner with making a false declaration before a magistrate contrary to the 5 & 6 Will. 4, c. 62, s. 18, that he had sustained a loss by fire. In order to prove the rules of the society a copy of the rules was produced, and the 24th rule, which was applicable to the allegations in the indictment, was proved to have been examined with the transcript at the clerk of the peace's office; but no other rule had been so examined; and Erskine, J., held that all the rules ought to have been compared. To prove the rules, either the original transcript should have been produced, or an examined copy of the whole of it. It was then objected that the indictment was not proved. But Erskine, J., held that all the statements in the indictment with reference to the society might be rejected as surplusage, if there was enough on the face of the indictment to show that an offence was committed without any reference to the society or its rules, which appeared to be the case. The making of the declaration was then proved, and it referred to the certificate, which was put in; and Erskine, J., allowed the persons whose names purported to be signed to it, to prove that their names were forgeries, as it might go to show that the declaration was wilfully false. (*r*)

(*p*) *R. v. Hall*, 8 C. & P. 358, Little-dale, J.

(*q*) *R. v. Wyld*, 6 C. & P. 380, J. A. Park, J. The correctness of this decision seems questionable. In the case of summary convictions there is no statute which requires magistrates to take down the evidence in writing, and therefore what a party says in an examination before a magistrate on such an occasion may be proved by parol, whether any person took it down or not. *Robinson v. Vaughton*, 8 C. & P. 252, Alderson, B. Inasmuch, therefore, as all the defendant said might have been proved by parol, it is difficult to see how the deposition being put in could prevent other matters not contained

in it from being proved by parol. The distinction between depositions in felony and in summary convictions was not noticed in this case, nor was any reference made to *R. v. Harris*, R. & M. C. C. R. 338. And the decision in the text appears at variance with the ordinary practice of cross-examining a witness in cases of felony as to other statements made by him before the committing magistrate, after his deposition has been put in and read. C. S. G.

(*r*) *R. v. Boynes*, 1 C. & K. 65. The declaration mentioned the name of the society, and that the prisoner had 'forwarded to the said society a certificate as required by the 24th rule of the said society.' *Quere*

The prisoner was indicted for falsely swearing that the signature to a paper was not his signature. On a trial in a county court the paper was produced, and the prisoner swore that he never signed it: the judge directed him to write his name on a piece of paper; which he did, and the judge compared it with the signature to the disputed document. Wightman, J., inclined to think that the jury might look at and compare the two signatures. The signing of the name by the prisoner during his examination on oath formed in fact part of the transaction out of which the charge arose; and the counsel for the prisoner not objecting, the paper was handed to the jury. (*s*)

An indictment alleged that the prisoner falsely swore in a county court that the words J. S. were written by J. S. at the house of M. P. in the parish of St. Mellon's in the county of G. The proof by the judge's notes was that the prisoner swore as alleged, except that he did not describe M. P.'s house as in the parish of St. Mellon's; but Rolfe, B., held that the allegation might well be made out by showing that M. P.'s house was in that parish. (*t*)

Upon an indictment against Moreau for perjury alleged to have been committed in an affidavit in a cause wherein Moreau was plaintiff, and Encontre defendant, by deposing that Encontre owed him 50*l.*, evidence is not admissible that the cause and all matters in dispute were, after the making of the affidavit, referred by consent, and an award made that Encontre owed nothing to Moreau; because the decision of the arbitrator in respect of that fact is no more than a declaration of his opinion, and there is no instance of such a declaration of opinion being received as evidence of a fact against a party to be affected by proof of it in any criminal case. (*u*)

Where perjury is assigned upon the evidence of a witness examined before magistrates on the hearing of an information, the conviction is not admissible in evidence on the trial of the indictment for perjury, as it is irrelevant to the matter in issue. (*v*)

Where a count alleged perjury to have been committed before magistrates in examining a charge of feloniously receiving stolen silks, knowing them to have been stolen, and it appeared that the evidence was given upon the hearing of an information, under the 17 Geo. 3, c. 56, for having possession of silks suspected to have been purloined or embezzled; Paterson, J., held that the count was not supported, as the evidence was given upon the specific charge contained in the information. (*w*)

The jury may infer the corrupt motive of the defendant from the circumstances of the case, (*x*) and in order to show that the defendant

whether this was not sufficient evidence against the prisoner when connected with the 24th rule, proved to have been examined with the transcript, of the allegations in the indictment? See *R. v. Westley*, *ante*, p. 383.

(*s*) *R. v. Taylor*, 6 Cox, C. C. 58. As to comparison of handwriting by court and jury see Vol. III., *Evidence*.

(*t*) *R. v. Withers*, 4 Cox, C. C. 17.

(*u*) *R. v. Moreau*, 11 Q. B. 1028. The real objection in this case was that the finding of the arbitrator was not necessarily

inconsistent with the fact of 50*l.* being due; as it might proceed on the absence or loss of the only evidence that ever existed of the debt, and it rather seems that the prisoner was not examined on the reference.

(*v*) *R. v. Goodfellow*, MSS. C. S. G. and C. & M. 569. See *R. v. Dowlin*, 5 T. R. 311.

(*w*) *R. v. Goodfellow*, *supra*.

(*x*) *R. v. Knill*, 5 B. & Ald. 929, *ante*, p. 372.

swore wilfully and corruptly what was not true, evidence may be given of expressions of malice used by the defendant towards the person against whom he gave the false evidence. (y) The evidence appears to have been received in this case without objection.

The prisoner was indicted for perjury on the hearing of an information against Blackburn for trespassing in pursuit of game; the occupier of the land and two of his men swore that they saw Blackburn on the land on a particular Sunday morning. The prisoner was called by Blackburn as a witness, and swore that Blackburn lodged with him, and that he never was absent from his lodgings on any Sunday morning during the whole time that they lodged together, which included the Sunday on which the alleged offence was committed. Pollock, C. B., was of opinion that the attention of the prisoner ought to have been called to the particular day on which the transaction took place as to which he was asked to speak; and that a general allegation, such as had been made in this case, including all Sundays between two fixed dates, was not sufficiently precise upon which to found an indictment for perjury, and directed an acquittal. (z)

An indictment for perjury charged that prisoner swore (on a plaint in the County Court for the price of coals obtained on credit at different times, in which it was a material question whether or not the prisoner had received any coals on credit from P., either on account of himself or A.), 'that he had never received any coals on credit from P., either on account of himself or A.' Held, that the allegation in the indictment was not too general, although no specific instance was averred in which the prisoner had received coals on credit from P. At the trial the prisoner was asked three or four times by the advocate and judge whether he did at any time, either on his own account or that of A., have any coals on credit from P., to which the prisoner always answered, 'I did not.' Held, that the prisoner's attention was sufficiently called to the subject so as to found a charge of perjury upon the answer, although no distinct transactions on credit were suggested to him during his examination. (a)

(y) *R. v. Munton*, 3 C. & P. 498, Lord Tenterden, C. J. 3 Stark. Evid. 860, citing 1 Hawk. c. 69, s. 2. *R. v. Melling*, 5 Mod. 349. *R. v. Muscott*, 10 Mod. 192.

(z) *R. v. Stolady*, 1 F. & F. 518. This case is very unsatisfactorily reported; no date is given, or anything more than is above stated. As the proof of the offence was on 'a particular Sunday morning,' the prisoner, if present, *must* have had his attention drawn to that particular date; and, if absent, still the date would have been known to Blackburn from the summons, and, as he called the prisoner as his witness, he no doubt had communicated the day to him, so that the ground of the decision really did not exist. But supposing the decision to be as reported, it is very confidently submitted that it is erroneous. Suppose a man called to prove an *alibi* swears that he and the prisoner were in Paris during all the month in which the offence was committed, can it be the law that he is not guilty of perjury because he is not asked as to the particular

day? If a man swears that he was not absent from church on any Sunday in January, is not that as precise a swearing as to each and every Sunday as if he were asked as to each in succession? An information, which charges the defendant with killing ten deer between the 1st of July and the 10th of September, without showing the particular days on which they were killed, is good. *R. v. Chandler*, 1 Ld. Raym. 581, 1 Salk. 378. And where, on a similar information, the evidence was that the defendant did, within such a time and such a time, steal a deer, so that the time was left as uncertain in the evidence as in the information, it was held sufficient. *R. v. Simpson*, 10 Mod. R. 248. C. S. G.

(a) *R. v. London*, 12 Cox, C. C. 50, per Bovill, C. J., 'We are all of opinion that this conviction was good. The first question is upon the form of the indictment, that is sufficient in our opinion. The second point is whether the attention of the prisoner was sufficiently called to the transaction he was

The defendant, although perjury be assigned on his answer, affidavit, or deposition in writing, may prove that an explanation was afterwards given qualifying or limiting the first answer (b)

Thus where the perjury was assigned upon an answer in chancery, in which the defendant had sworn that she had received no money; the defendant proved that, upon exceptions taken to this answer for the insufficiency thereof, she had put in another answer, which explained the generality of the first answer, and stated that she had received no money before such a day; and it was held, upon a trial at bar, that nothing could be assigned as perjury, which was explained by the second answer, because the second answer clearly showed that that which at first appeared to be perjury was not perjury. (c)

Where an indictment for perjury contains several assignments of perjury, and no evidence is adduced upon one of the assignments, the defendant is not entitled to give any evidence to show that the matter, charged by such assignment to be false, was in fact true. (d)

The crime of perjury is complete at the time when an affidavit is sworn; it is no defence, therefore, that the affidavit cannot, through certain omissions in the jurat, be received in the Court for which it is sworn. Upon an indictment for perjury, in an affidavit relating to the service of a petition upon a bankrupt, it appeared that the affidavit was signed with the mark of the defendant, and the jurat did not state either where it was sworn, or that the affidavit was read over to the party, and it was proved by a clerk in the Master's office in Southampton Buildings that in cases where the party swearing the affidavit cannot write, the jurat ought, after stating the place where it was sworn, to state that the witness to the mark of the deponent had been first duly sworn, that he had truly, distinctly, and audibly read over the affidavit to the deponent, and saw the mark affixed; and that no affidavit would be received which did not contain this form of jurat when the party could not write. *Littledale, J.*, 'The omission of the form directed by this and other Courts to be used in the jurat of affidavits may be an objection to their being received in the Court, whose rules and regulations the party has neglected to comply with; but I am of opinion that the perjury is complete at the time the affidavit is sworn, and although it cannot be used in the Court for which it is prepared, that nevertheless perjury may be assigned upon it,' (e) So where an affidavit when sworn had been marked by the judge's clerk with his initials, but through mistake not then presented to the judge for his signature, but some days afterwards it was signed by the judge; *Alderson, B.*, in the presence

being questioned about, and we are all of opinion it was amply called to it, even if the second point had been reserved for us; ' *et per Willes, J.*, 'We do not intend to overrule what *Pollock, C. B.*, said, "that the attention of a witness ought to be called to the point upon which his answer is supposed to be erroneous, before a charge for perjury can be founded upon it." Mr. Greaves in his last edition of "*Russell on Crimes*," makes some observations on *R. v. Stoddy*, which are in accordance with the judgment of the Lord Chief Justice.'

(b) 3 Stark. Evid. 860.

(c) *R. v. Carr*, 1 Sid. 418. 2 Kebl. 576. 3 Stark. Evid. 860. The reporter adds, 'at which unexpected evidence and resolution the counsel for the prosecution were surprised.'

(d) *R. v. Hemp*, 5 C. & P. 468.

(e) *R. v. Hailey*, R. & M. N. P. C. 94. 1 C. & P. 258. See *R. v. Crossley*, *ante*, p. 340, and *R. v. Phillpotts*, *ante*, p. 313, that it is perjury as soon as the evidence is given, whatever may afterwards occur.

of the other Barons of the Exchequer, expressed a clear opinion that perjury might be assigned upon the affidavit, although the judge's signature was omitted. (*f*)

Upon an indictment for perjury, it appeared that the defendant had filed a bill in chancery for an injunction, and had made the affidavit, on which the perjury was assigned, in support of the allegations in that bill. The indictment averred the bill to have been filed, and the affidavit exhibited in support of it; and it stated the matters assigned as perjury to be material to the questions arising on the bill; but it did not contain any statement that a motion had been made for an injunction, and it did not appear by the evidence that any such motion had in fact been made. It was submitted that the defendant was entitled to an acquittal. By the practice of the Court of Chancery, an injunction could not be obtained, except for want of an answer, or on the insufficiency of the answer, or on evidence disproving the answer, in none of which cases is the affidavit of the plaintiff admissible; or else *ex parte* before the time allowed to the defendant for answering has elapsed. In the last case, and in that only, could the plaintiff's affidavit be used. The averment, therefore, that the perjury was assigned on the matter material to the bill was not true; it could only be material to an application of a peculiar nature, and it did not appear, and was not alleged, that such an application was ever made. It was answered that the objection, if tenable at all, amounted to this, that perjury could not be assigned upon an affidavit which had not been used. Lord Tenterden, C. J., 'I do not think the averment or proof, the absence of which is objected to, can be necessary. The statements in the affidavit are material to the matters contained in the bill, which is for an injunction; and it may well have been filed in anticipation of a contemplated motion for an injunction, on which it might have been used. Can it make any difference that it afterwards turns out that the motion is not made? The crime, if any, is the same, morally, in each case; and I certainly shall not, where the objection is open hereafter, hold it necessary to give proof of a fact which does not vary the conduct of the party in taking the oath in question.' (*g*) And it has been since held that an affidavit sworn for the purpose of being used in a cause, but which is neither used nor filed, is nevertheless the subject of perjury. (*h*)

Where an indictment for perjury alleged that the defendant produced before a Master in Chancery an affidavit, 'entitled, in the said Court of Chancery, and in the said suit therein at the suit of the said E. J. C., and also in the said suit therein at the suit of the said *Commissioner* of Charitable Donations and Bequests in Ireland,' and the affidavit, when produced, appeared to be entitled 'between the *Commissioner* of Charitable Donations and Bequests in Ireland, against J. E. D., &c. (naming the other defendants), and between E. J. C. and

(*f*) Bill v. Bament, 8 M. & W. 317.

(*h*) Hammond v. Chitty. Q. B., E. T

(*g*) R. v. White, M. & M. 271. The 1846, MSS. C. S. G.¹
defendant was acquitted.

AMERICAN NOTE.

¹ And the same has been held in America. Munson, 34 Wis. 579; 17 Am. R. 461; S. v. Whittemore, 50 N. H. 245; Miller v. Mairer v. Marriner, 34 Wis. 582.

J. E. D., the Commissioners of Charitable Donations and Bequests in Ireland, *and others.*' It was objected that this affidavit was not one on which perjury could be assigned, as there was no such suit as that in which the *Commissioner* of Charitable Bequests were plaintiffs; and the affidavit was improperly entitled, as the names of all the defendants were not stated, and therefore the affidavit was not admissible in the Court of Chancery. Lord Denman, C. J., 'The courts are quite right in not receiving affidavits which are not properly entitled; but I do not think the question whether there be perjury or not depends on the rule as to entitling being strictly complied with.' (i)

Where perjury was charged to have been committed in an affidavit of service of notice of an application for leave to issue execution against a shareholder in a joint stock company, and the affidavit was produced, but the notice was not annexed to it; Cockburn, C. J., held that the affidavit was inadmissible. (j)

On an indictment for perjury alleged to have been committed on the trial of A. Poole, for an indecent assault, it appeared that the prisoner had sworn that Poole had assaulted her at a certain time and place, but on cross-examination she had admitted that certain liberties had been taken without resistance; whereon the judge directed an acquittal. Poole and others were called to prove that no such assault could have been committed at the time alleged; and it was held that the prisoner was entitled to prove what her conduct was immediately after the alleged assault; that she had made immediate complaint; and that all the evidence which was admissible on the trial of the assault was admissible for the purpose of showing that the prisoner was not guilty. (k)

If any one distinct assignment of perjury be proved, the defendant ought to be convicted. (l)

In a case of a prosecution against T. Reilly for suborning one Macdaniel to commit perjury, it was contended on the part of the crown that the bare production of the record of Macdaniel's conviction was of itself sufficient evidence that he had, in fact, taken the false oath as alleged in the indictment. But it was insisted, for the prisoner, that the record was not of itself sufficient evidence of the fact; that the jury had a right to be satisfied that such conviction was right; that Reilly had a right to controvert the guilt of Macdaniel; and that the evidence given on Macdaniel's trial ought to be submitted to the consideration of the present jury; and the Recorder obliged the counsel for the crown to go through the whole case in the same manner as if the jury had been charged to try Macdaniel. (m)

(i) *R. v. Christian*, C. & M. 388.

(j) *R. v. Hudson*, 1 F. & F. 56.

(k) *R. v. Harrison*, 9 Cox, C. C. 508.

(l) *R. v. Rhodes*, 2 Lord Raym. 886, 887. 3 Stark. Evid. 860. And see *Compagnon v. Martin*, 2 Black. Rep. 790. *R. v. Virrier*, 12 Ad. & E. 317. *R. v. Gardiner*, *ante*, p. 349. In *R. v. Nicholls*, Gloucester Sum. Ass. 1838, perjury was alleged to have been committed by the defendant in evidence given on a trial for larceny, in which he denied having been at a particular house

on a particular occasion, and denied having had a conversation with certain persons there, and the indictment contained many distinct assignments on the going to the house, and the conversation, upon all of which evidence was given; and Patteson, J., directed the jury simply to consider whether the defendant had been to the house, and if they were satisfied that he had, to convict him, which they did. MSS. C. S. G.

(m) Reilly's case, 1 Leach, 454. See *ante*, p. 139.

The first count assigned perjury on an affidavit of the defendant, which alleged that the defendant did not retain or employ W. U. to act as attorney for him and J. I., or for either of them, in and about the business mentioned in the said W. U.'s bill of costs; and that he, the defendant, never retained or employed the said W. U. to act as attorney or agent for him in any cause or manner whatever. The second count assigned perjury on the statement in the affidavit as follows: 'that he the said defendant did not retain or employ (meaning that he the defendant did not alone, or jointly with the said J. I., retain or employ) W. U. to act as attorney for him and J. I.' The third count was the same as the first, and the fourth as the second. The plea was, that the defendant was not guilty of the premises in the indictment specified. The venire was 'to recognize whether the defendant be guilty of the perjury and misdemeanor aforesaid, or not guilty.' The verdict was that the defendant 'is guilty of the perjury and misdemeanor aforesaid,' and the judgment that the defendant 'be imprisoned and kept to hard labour for ten calendar months.' It was urged that the venire, the verdict and judgment, were uncertain for not showing to which of the counts they referred. That they were in the singular number, speaking of 'the perjury and misdemeanor aforesaid,' and that this could only mean one perjury and misdemeanor; and that as four were alleged in the indictment, it was uncertain which of them the jury was summoned to try, and of which of them the defendant was found guilty; but the Courts of Queen's Bench and Exchequer Chamber held, that 'misdemeanor' was *nomen collectivum*, and meant 'the misconduct aforesaid.' The consequence was that the venire applied to all the counts of the indictment, and that the defendant had been found guilty by the verdict on all the counts. (n)

Where on an indictment for perjury containing several counts the judgment was that the prisoner for the offence charged upon him in and by each and every count be imprisoned for the space of eight calendar months now next ensuing; it was held by the Court of Exchequer Chamber that the judgment was good, on the ground that it meant that the prisoner was to be imprisoned for the same period of eight months for each offence. (o)

Punishment. — The punishment of perjury and subornation of perjury, at common law, has been various, being anciently death; afterwards banishment, or cutting out the tongue; then forfeiture of goods. (p) At the present time it is fine and imprisonment, at the discretion of the court, (q) to which, as we have already seen, the 2 Geo. 2, c. 25, (r) superadds a power for the Court to order the

(n) *Ryalls v. R.*, 11 Q. B. 781. *R. v. Powell*, 2 B. & Ad. 75, was recognized as good law by both courts.

(o) *King v. R.*, 14 Q. B. 31.

(p) 4 Black. Com. 138.

(q) 4 Black. Com. 138. *R. v. Nueys and Galey*, 1 Black. R. 416. *R. v. Lookup*, 3 Burr. 1901. In this last case the form of the sentence was that the defendant 'should be set in and upon the pillory at C. cross, for an hour between the hours of twelve and two, and that he should afterwards be transported to some of his Majesty's colonies or plantations in America, for the space of seven

years; and be now remanded to the custody of the marshal, to be by him kept in safe custody, in execution of the judgment aforesaid, and until he shall be transported as aforesaid.' The 1 Vict. c. 23, abolishes the punishment of the pillory in all cases, 'provided that nothing herein contained shall extend, or be construed to extend, in any manner to change, alter, or affect any punishment whatsoever, which may now be by law inflicted in respect of any offence except only the punishment of pillory.'

(r) *Ante*, p. 322. The statute does not, however, impose on the Court the necessity

offender to be sent to the house of correction for a term not exceeding seven years, or to be transported for the same period ;(s) and makes it felony, without benefit of clergy, to return or escape within the time. If the prosecution proceeds upon the 5 Eliz. c. 9, that statute, as we have seen, (t) inflicts the penalty of perpetual infamy, and a fine of 40*l.* on the suborner; and, in default of payment, imprisonment for six months, and to stand with both ears nailed to the pillory ;(u) and punishes perjury itself with six months imprisonment, perpetual infamy, and a fine of 20*l.*, or to have both ears nailed to the pillory.

The 3 Geo. 4, c. 114, enacts, that 'whenever any person shall be convicted of any of the offences hereinafter specified and set forth, that is to say (*inter alia*), of wilful and corrupt perjury, or of subornation of perjury, it shall and may be lawful for the Court before which any such offender shall be convicted, or which by law is authorized to pass sentence upon any such offender, to award and order (if such court shall think fit) sentence of imprisonment with hard labour, for any term not exceeding the term for which such court may now imprison for such offences, either in addition to or in lieu of any other punishment which may be inflicted on any such offenders by any law in force before the passing of this Act; and every such offender shall thereupon suffer such sentence, in such place, and for such time as aforesaid, as such court shall think fit to direct.' See *ante*, p. 81.

Upon a conviction for perjury at the Chester Assizes, after the entry of the verdict the record proceeded, 'it is therefore *ordered* that the said L. K. be transported to the coast of New South Wales, or some one or other of the islands adjacent, for and during the term of seven years;' and upon a writ of error the following errors were relied upon: that the judgment was erroneous in form, being, 'it is ordered;' whereas it should have been 'it is considered;' that it was bad in substance, being a judgment of transportation only, whereas the 2 Geo. 2, c. 25, s. 2, enacts that judgment of transportation may be pronounced, *besides* the punishment that might before be inflicted; that the place, to which the prisoner was to be transported ought not to have been fixed by the Court, the power of appointing that being given to the King in council by the 56 Geo. 3, c. 27; and that at all events the appointment of the place was bad, being to one or other of various places, and, therefore, uncertain. And the Court of King's Bench held that by the 2 Geo. 2, c. 25, s. 2, two things were required to be done by the Court before which the party was tried; an order for transportation was to be made, and thereupon judgment was to be given; and here the Court had made an order not followed up by a judgment. Inasmuch, therefore, as no judgment had been entered in the Court below, and the Court of King's Bench had no power to supply the deficiency, as the punishment was discretionary, that Court awarded a *procedendo*, commanding the Court below to proceed to give judgment on the conviction. (v)

The Court may also adjudge the defendant to give surety to keep the

of awarding any punishment previous to that of penal servitude so as to make the penal servitude an additional punishment. *Castro v. R.*, 6 Ap. Cas. 229.

(s) Penal servitude for any term not

exceeding seven and not less than three years.

(t) *Ante*, p. 320.

(u) See note (q), *supra*.

(v) *R. v. Kenworthy*, 1 B. & C. 711.

peace and be of good behaviour for a reasonable time, to be computed from and after the expiration of the term of his imprisonment, himself in a sum named in such judgment, with two sufficient sureties, each in a sum therein also mentioned, and may adjudge the defendant to be further imprisoned until such security be given; and such sentence does not amount to perpetual imprisonment, as in default of sureties being given the defendant would be entitled to be discharged at the expiration of the term during which the sureties were required. (*w*)

A consequence of a conviction for perjury, though it formed no part of the judgment, was, that the offender was incapacitated from giving evidence in a court of justice. (*x*) But by the 6 & 7 Vict. c. 80, s. 1, a person is competent as a witness though he has been convicted of a crime or offence. (*y*)

The following cases may be introduced in this place.

Making a false schedule of debts.—An indictment for perjury, alleged to have been committed in the insolvent Debtors Court, stated that the defendant gave in his schedule on oath that the same contained a true and correct account of all his debts, credits, &c, and then went on to state that certain persons whose names were set out, were debtors to the defendant at the time of giving in his schedule, and that they were omitted in the schedule. It was objected that no indictment for perjury would lie on such omissions; that the offence of wilfully making such omissions was made punishable as a misdemeanor by the 7 Geo. 4, c. 57, s. 70, and the offence of perjury created by sec. 71 only applied to positive affirmations contained in the schedule. Lord Tenterden, C. J., 'I think the legislature contemplated the particular case of omissions, and provided for them in the seventieth section, the debts omitted being comprehended under the terms "effects or property" there used. The Act then goes on in the seventy-first section to make other falsehoods in the oath of the party punishable as perjury. I therefore think the defendant must be acquitted.' (*z*)

Making false answers to questions at elections.—Upon an indictment against the defendant under the 2 Will. 4, c. 45, s. 58, (*a*) for giving a false answer to the question whether he had the same qualification to vote as that for which he was registered, it appeared that the defendant had occupied a house at the time of the registration, for which he was on the register as a voter, but he had left it before the election, and the landlord's agent had, before the election, given the key of the house to another person, who had put horses into the stable and beer into the cellar, but the rent of such person did not commence till after the election; it was held that the defendant must be acquitted, as there was not evidence as to the determination of the defendant's tenancy. (*b*)

(*w*) *R. v. Dunn*, 12 Q. B. 1026, decided on the authority of *R. v. Hart*, 30 How. St. Tr. 1131, 1194, and 1344, where the judges, in answer to a question from the House of Lords, delivered their unanimous opinion that in all cases of misdemeanor the Court might give sentence in that form.

(*x*) *Gilb. Ev.* 126. *Bull. N. P.* 291. 4

Black. Com. 138. 2 *Hawk. P. C.* c. 46, s. 101.

(*y*) See this Act, Vol. III., *Evidence*.

(*z*) *R. v. Mudie*, 1 M. & Rob. 128. S. C. as *R. v. Moody*, 5 C. & P. 23.

(*a*) This enactment is now repealed, see 35 & 36 Vict. c. 38, sched.

(*b*) *R. v. Harris*, 7 C. & P. 253, Lord Denman, C. J.

Upon an indictment against the defendant under the 2 Will. 4, c. 45, s. 58, (c) for falsely answering that he had the same qualification for which his name was originally inserted in the register of voters, it appeared that the defendant at the time of the registration was occupying a house at Turnham Green, as tenant of Mr. Kay, at the rent of 60*l.* per annum, but he left that house at Lady Day following, and in April commenced the occupation of another house at Turnham Green, as tenant to Mr. L., at a rent of 50*l.* and upwards per annum, and he continued in the occupation of this house from April till the time of the election. The defendant had been told that he had no right to vote, before so doing, but he said that he believed he had a right to vote, and that he had been so informed by the committee of two of the candidates, and that their opinion was sufficient to warrant him in voting. It was held that the nature of the qualification being the same, did not give the party a right to vote, merely because it fell within the general terms of the description which he had given to the revising barrister. The identity of the qualification must continue; and if a voter ceased to occupy the premises in respect of which he was registered, he thereby ceased to have a right to vote; and it was no answer to say that, although he had ceased to occupy those premises, he had entered upon the occupation of other premises of equal value. It had been urged that if the statement of the defendant was untrue, he made it under the advice of a committee; but that made very little difference, for if a party made a statement which he knew to be untrue, the opinion of an election committee (which generally had a pretty strong bias one way or the other) did not alter the character of the offence. But still the term 'same qualification' was undoubtedly an equivocal expression, and almost necessarily implied something of opinion as to a matter of law, and the jury ought not to convict a person of a misdemeanor, who possessed property of equal value to that which he held at the time of the registration, if he had acted *bonâ fide*, and had been guided in his conduct in a matter of law by persons who were conversant with the law, and who had told him that he possessed the same qualification for which his name was originally inserted in the register of voters. (d)

The word 'wilfully' in an indictment on the 2 & 3 Will. 4, c. 45, s. 58 (now repealed), for giving a false answer at the poll, must be construed in the same way, and supported by the same sort of evidence, as in an indictment for perjury. To be untrue is not enough; for to be wilful it must have been false to the knowledge of the party at the time. (j) An indictment under the same section against a

(c) The section is now repealed. As to the meaning in it of the phrase 'the same qualification,' see *R. v. Bowler*, C. & M. 559; *R. v. Ellis*, C. & M. 564.

(d) *R. v. Dodsworth*, 8 C. & P. 218. 2 Moo. & Rob. 72, Lord Denman, C. J. In *R. v. Irving*, 2 M. & Rob. 75, note (a), the same points arose, and Bosanquet, J., was decidedly of opinion that in point of law the qualification was not the same, but said that if the answer was given by the prisoner under a *bonâ fide* belief that he still retained his qualification, he should be acquitted. In the same note the learned reporters advert

to the case where a voter is registered for 'land,' described as in his own occupation, or for 'freehold houses,' in some specified street, and after the registration he sells part of the land which was in his own occupation at the time of the registration, or some of the houses of which he then possessed the freehold; in each case, however, retaining enough in point of value to confer a qualification, and intimate a doubt whether such a party could truly answer the question in the affirmative. C. S. G.

(j) *R. v. Ellis*, *supra*.

voter for giving a false answer at the poll, which stated that at a certain election for a member of Parliament for the borough of Stoke-upon-Trent, the defendant appeared as a voter, and tendered his vote as such, and that he gave a false answer that he had the same qualification for which he was put on the register, whereas in truth he had not, was held to be bad, because it stated all the matters by way of recital, and neither stated the writ nor the precept for holding the election, nor that the defendant's name was on the register. (*k*) Where on the trial of an indictment under the same section, c. 45, s. 58, against the defendant for giving a false answer to the question, 'Have you the same qualification for which your name was originally inserted in the register of voters now in force for the city of Bristol?' the sheriff's deputy stated that on the defendant tendering his vote he had asked him the question as set out in the indictment, but did not, at the end of the question, read from the register the line in which his name and qualification were inserted, 'Lucy William, House, Lodge Street.' Wightman, J., held that the defendant must be acquitted, as the particular qualification ought to have been read over. (*l*)

The first four counts of an indictment upon 5 & 6 Will. 4, c. 76, s. 34 (now repealed), stated that the defendant, upon delivering in a voting paper, in the name of a burgess entitled to vote at the election, was asked by the presiding officer the three questions in the terms of the Act, and then alleged, 'to which questions (each of the two first) the defendant then and there falsely and fraudulently answered, "I am;"' and Williams, J., after consulting Patteson, J., held that these four counts were bad for omitting the word '*wilfully*.' 'Wilfully to make a false answer to the question' proposed was the definition of the offence by the legislature itself, and it was a safe and certain rule that the words of the statute must be pursued. (*m*) The prisoner was indicted for falsely answering a question at a municipal election under the same section. The prisoner's father, William Goodman, had been a burgess in St. Alban's and those names remained on the overseer's lists; but he had been absent from home for a considerable time; and the prisoner, whose name was also William, resided in the same house, and paid the parish rates, &c. At a municipal election the prisoner offered to vote, and being asked, 'Are you the person whose name appears as "William Goodman" on the burgess roll now in force,' answered 'Yes.' There was only one William Goodman on the roll. Wightman, J., held that there was no case against the prisoner. (*n*)

Upon an indictment against the defendant for a misdemeanor, in falsely swearing that he *bonâ fide* had such an estate in law or equity of the annual value of 300*l.*, above reprises, as qualified him to be a member of Parliament for a borough; a surveyor stated that the fair annual value of the property was about 200*l.* a year, but another witness stated that it was badly let, and believed it was worth more than

(*k*) R. v. Bowler, C. & M. 559, per Patteson, J. The defendant was acquitted in this case. In R. v. Ellis, C. & M. 564, the indictment was in a similar form, the defendant convicted, and the judgment arrested in the Queen's Bench, no cause being shown.

(*l*) R. v. Lucy, C. & M. 510.

(*m*) R. v. Bent, 1 Den. C. C. R. 157, 2 C. & K. 179.

(*n*) R. v. Goodman, 1 F. & F. 502.

300*l.* a year, and that he told the defendant so, and that he did not think that the defendant had any reason to believe that the qualification, in point of value, was not sufficient. It was held that the jury must be satisfied, beyond all doubt, that the property was not of the value of 300*l.* a year, and that, at the time the defendant made the statement, he knew that it was not of that value. (o)

Administering an oath contrary to the 5 & 6 Will. 4, c. 62, s. 13. — The first count of an indictment upon the 5 & 6 Will. 4, c. 62, s. 13, charged that the defendant, being a justice of the peace, did unlawfully administer to and receive from J. Huxtable a certain voluntary oath touching certain matters and things whereof the defendant had not jurisdiction or cognizance by any statute. The second and third counts slightly varied, and the fourth count negatived the proviso in sec. 13. There were other counts charging the defendant with administering oaths to two other persons. The defendant had made a complaint to the bishop against two clergymen, who officiated in his parish, that one had played at thimble-rig, and that both had neglected the duties of the parish. The bishop intimated that, before he could call on the clergymen to answer the complaint, the defendant must either bring before him the persons who proved the charges, or obtain statements in writing of the facts. The defendant obtained statements from the three persons mentioned in the indictment, and swore them before himself, as a justice of the peace, to the truth of the statements. The bishop had before appointed a day for hearing the charges, and had summoned the clergymen to attend; but on finding that the depositions had been thus sworn, he declined to look at them; he went, however, into the charges on other evidence. It appeared that the defendant was ignorant of the statute rendering the administering voluntary oaths illegal. It was contended that the enacting part of the statute must be construed with reference to the preamble; that the enacting clause, which prohibits 'any justice of the peace, or other person,' from administering oaths, other than in matters over which jurisdiction was given by statute, if taken by itself, would render unlawful the taking of many oaths which could be administered by the common law, that the enactment construed together with the proviso was still too stringent, and that the enactment and proviso must be governed by the preamble. Coleridge, J., in summing up, said, he was of opinion that the enacting part of the statute was not governed by the preamble; that he considered the enacting part of the section and the proviso preserved to justices of the peace all the jurisdiction they had, as well at the common law as by statute, to administer oaths; and that the inquiry before the bishop was clearly a matter in respect of which the defendant had no jurisdiction, either at common law or by statute. He directed the jury, that, if they were satisfied the defendant did administer the oaths, they should find him guilty. The jury found the defendant 'guilty of inadvertently administering an oath or oaths;' and Coleridge, J., held that that was a verdict of guilty. (p) But the judgment was afterwards arrested upon the ground

(o) *R. v. De Beauvoir*, 7 C. & P. 17, Lord Denman, C. J. A property qualification for a member of Parliament is not now

necessary, see 21 & 22 Vict. c. 26; 37 & 38 Vict. c. 66.

(p) *R. v. Nott*, C. & M. 288. See the section, *ante*, p. 327.

that the indictment did not in any count show what the nature of the oath was. There ought to have been a distinct allegation of the subject-matter of the oath, showing affirmatively that it was out of the jurisdiction of the magistrate. The question was matter of law for the Court, and though it was not necessary to set out the whole of the oath, still the facts should have been so stated as to enable the Court to form its opinion upon the question whether the oath was within the jurisdiction of the magistrate or not. (*g*)

False declarations. — Where a prisoner was indicted for making a false declaration before a justice in pursuance of the rules of a benefit society, which required a loss by fire in certain cases to be verified by such a declaration; it was objected that the 5 & 6 Will. 4, c. 62, s. 18, did not extend to any declarations except those mentioned in the preamble of that section; but Erskine, J., held that the section extended to all declarations generally. (*r*)

The prisoner was indicted for swearing a false declaration under the 5 & 6 Will. 4, c. 62, s. 18, that he had done no act to encumber certain lands, and that he was in possession of those lands, and in the receipt of the rents and profits thereof. The declaration was duly sworn and made in support of an application to a building society in 1861, for an advance of 150*l*. The mortgage deed of 1861 to the building society was produced, but the attesting witness was not called to prove it. The original conveyance of the property to the prisoner was put in. It was objected that the declaration was confirmatory of the mortgage deed, and as that was not proved, it was not shown that the matter sworn was material. It was answered that the declaration was made to confirm the original conveyance, and not the mortgage, which was executed after the declaration. Byles, J., 'I am of opinion that the objection is fatal. The preamble of the 5 & 6 Will. 4, c. 62, s. 18, (*s*) must be read with the enacting part; and as the deed, which rendered the declaration necessary, is not proved, this indictment cannot be sustained.' (*t*)

The prisoner was indicted under the 5 & 6 Will. 4, c. 62, s. 12, (*u*) for making a false declaration before a justice for the borough of Liverpool that she had lost the pawn ticket of certain goods pledged by her. The clerk to the justice could only speak to the handwriting of the justice on the declaration, and, from the great number of these declarations, he could not remember when or where it was made. It was contended that there was no evidence that the declaration had been made before the justice acting as such or even within the borough; and Gurney, B., held that the objection was good. The justice might at all events have proved that he had never taken such a declaration out of the borough. (*v*)

(*g*) *R. v. Nott*, 4 Q. B. 768. In the argument it was contended that the defendant on the finding of the jury had been guilty of no offence, and Lord Denman, C. J., said, 'If the statute in terms create an offence, all persons are bound to know it. But if a statute enacts something, without in terms making it an offence, and you would convict a person of misdemeanor in having disobeyed such an enactment, are you not bound to show that the disobedience was wilful, and in the nature of a contempt?'

But no opinion was pronounced upon this point.

(*r*) *R. v. Boynes*, 1 C. & K. 65. See this case, *ante*, p. 390.

(*s*) *Ante*, p. 328.

(*t*) *R. v. Cox*, 9 Cox, C. C. 301.

(*u*) *Ante*, p. 326.

(*v*) *R. v. Morgan*, 1 Cox, C. C. 109. No case was cited, and this decision requires reconsideration. See the next case, and the note to it.

The prisoner was indicted for having at Stroud, in the county of Gloucester, made a false declaration before E. G. Hallewell, a justice of the peace, that he had lost a pawnbroker's ticket. It was opened that the prisoner told the pawnbroker that he had lost the ticket, and the pawnbroker told him he must make a declaration of the loss before a magistrate, and for that purpose handed the prisoner a copy of the ticket and a form, to be filled up according to the Act; the prisoner paid for the form, saying he would go to a magistrate; he returned the same day with the form properly filled up, and with his name and that of Mr. Hallewell attached. Mr. Hallewell was not able to recollect the fact of the declaration having been made, and therefore was not present; but the pawnbroker identified the declaration. But there was only one witness to prove that the prisoner had not lost the duplicate. Platt, B., 'As regards the proof of the declaration having been made by the prisoner, I think there may be sufficient evidence to support the indictment, if you can bring home to him a knowledge of its contents; but I am of opinion that the falsity of that declaration must be proved by the oaths of two witnesses as in a case of perjury, otherwise there would be but oath against oath.' (*w*)

(*w*) *R. v. Browning*, 3 Cox, C. C. 437. The ruling of the learned Baron was right on both points; though an idle doubt has been raised on the first point. If a man in writing admitted that he had made a declaration before a justice under the Act, no doubt can exist that such writing would be sufficient evidence against him; and in this case the prisoner produced a declaration in the form under the Act, signed by himself and the justice, and dealt with it, and obtained the goods by it, as a valid declaration; and it is perfectly clear that this was abundant evidence that he had made that

declaration in the manner and with the formalities described in it. In *R. v. Spencer*, 1 C. & P. 260, *ante*, p. 381, Lord Tenterden, C. J., said, 'The courts always give credence to the signature of the magistrate or commissioner; and if his signature to the jurat is proved, that is sufficient evidence that the party was duly sworn, and if the place at which it was sworn is mentioned in the jurat, that is sufficient evidence that it was sworn at that place.' And see *R. v. James*, and *Brickell v. Hulse*, *ante*, p. 388, and *R. v. Westley*, Bell, C. C. 193, *ante*, p. 383.

CHAPTER THE THIRTEENTH.

OF ADMINISTERING OR TAKING UNLAWFUL OATHS.

THE 37 Geo. 3, c. 123, s. 1, recites that wicked and evil disposed persons had attempted to seduce his Majesty's forces and subjects from their duty and allegiance, and to incite them to acts of mutiny and sedition; and had endeavoured to give effect to their wicked and traitorous proceedings, by imposing upon the persons whom they had attempted to seduce the pretended obligation of oaths unlawfully administered. From this preamble it appears as if the statute were mainly directed against combinations for purposes of mutiny and sedition: but in the enacting part, after dealing with offences of that description, it goes on in much more extensive terms, and embraces other more general objects. It enacts, 'that any person or persons who shall in any manner or form whatsoever administer, or cause to be administered, or be aiding or assisting at, or present at, and consenting to, the administering or taking of any oath or engagement, purporting or intending to bind the person taking the same to engage in any mutinous or seditious purpose; or to disturb the public peace; or to be of any association, society, or confederacy, formed for any such purpose; or to obey the orders or commands of any committee or body of men not lawfully constituted, or of any leader or commander, or other person not having authority by law for that purpose; or not to inform or give evidence against any associate, confederate, or other person; or not to reveal or discover any unlawful combination or confederacy; or not to reveal or discover any illegal act done or to be done; or not to reveal or discover any illegal oath or engagement which may have been administered or tendered to or taken by such person or persons, or to or by any other person or persons, or the import of any such oath or engagement;' shall on conviction be adjudged guilty of felony, and be transported (a) for any term not exceeding seven (b) years; 'and every person who shall take any such oath or engagement, not being compelled thereto, shall, on conviction, be adjudged guilty of felony, and may be transported (a) for any term not exceeding seven (b) years.'

In one case a question was made, whether the unlawful administering of an oath by an associated body of men to a person, purporting to bind him not to reveal or discover an unlawful combination or conspiracy of persons, nor any illegal act done by them, (c) was within this statute; the object of the association being a conspiracy to raise

(a) Penal servitude by the 20 & 21 Vict. c. 3, s. 2.

(b) And not less than three, 54 & 55 Vict. c. 69.

(c) The oath was, 'You shall be true to every journeyman shearman, and not to hurt any of them, and you shall not divulge any of their secrets; so help you God.'

wages and make regulations in a certain trade, and not to stir up mutiny or sedition. It was contended that the words of the statute, however large in themselves, must be confined to the object stated in the preamble; and could not have been intended to reach a case where it was plain that the fact arose entirely out of a private dispute between persons engaged in the same trade, and was confined in its object to that alone; and that the general words therefore must be construed with relation to the antecedent offences, which are confined in their objects to mutiny and sedition. But the Court, though they did not upon the particular circumstances feel themselves called upon to give an express decision, appear to have entertained no doubt but that the case was within the statute. (*d*)

So where sixteen persons, with their faces blackened, met at a house at night, having guns with them, and intending to go out for the purpose of night poaching, and were all sworn not to betray their companions, and it was objected that this oath was not within the statute, as it was not for a mutinous or seditious object, and that the statute only prohibited those oaths of secrecy which related to some illegal act, and that the word 'illegal' imported a criminal act, and not a mere civil trespass, whereas it was a mere civil trespass which was contemplated at the time when the oath was administered, it was held that the oath was within the statute; and as to the assembly itself, and its object, it was impossible that a meeting to go out with faces thus disguised, at night, and under such circumstances, could be other than an unlawful assembly: in which case, the oath to keep it secret was an oath prohibited by the statute. (*e*) So where an oath was administered to the members of a trades' union, binding them not to make buttons for less than the lodge prices, and not to divulge the secrets of the lodge, it was held that this was an oath within the statute, for to administer an oath or engagement not to reveal the secrets of any association is within the 37 Geo. 3, c. 137, as explained by subsequent statutes, not because it has reference to any matter respecting wages, but on the ground that every association of that kind, bound together by an oath, not to disclose the proceedings of that society, is for that reason an unlawful combination within the statutes. (*f*)

So where an oath not to reveal what they saw or heard was administered by members of an association, which was formed for the purpose of raising wages by a general strike on the part of its members, and for other purposes in furtherance of that design, it was held that it was within the 37 Geo. 3, c. 123. (*g*)

The 52 Geo. 3, c. 104, s. 1, which was passed to render the foregoing Act more effectual in respect to oaths of a particular nature, enacts, 'that every person who shall in any manner or form whatsoever administer, or cause to be administered, or be aiding or assisting at the administering of any oath or engagement, purporting or

(*d*) *R. v. Marks*, 3 East, 157. Lawrence, J., said, 'It is true that the preamble and the first part of the enacting clause are confined in their objects to cases of mutiny and sedition; but it is nothing unusual in Acts of Parliament for the enacting part to go beyond the preamble; the remedy often extends beyond the particular act or mischief which first suggests the necessity of the law.'

(*e*) *R. v. Brodribb*, 6 C. & P. 571, Holroyd, J.

(*f*) *R. v. Ball*, 6 C. & P. 563, Williams, J.

(*g*) *R. v. Loveless*, 1 M. & Rob. 349; S. C., 6 C. & P. 596, Williams, J. See *R. v. Dixon*, 6 C. & P. 601, Bosanquet, J.

intending to bind the person taking the same to commit any treason or murder, or any felony punishable by law with death,' shall, on conviction, be adjudged guilty of felony, and suffer death as a felon without benefit of clergy; (*h*) and 'every person who shall *take* any such oath or engagement, not being compelled thereto,' shall, on conviction, be adjudged guilty of felony, and be transported (*i*) for life, or for such term of years as the Court shall adjudge.

But persons taking the oaths mentioned in either of these Acts by compulsion must make a full disclosure of the fact, and the circumstances attending it, within a limited time, in order to be justified or excused. The 37 Geo. 3, c. 123, s. 2, enacts, 'that compulsion shall not justify or excuse any person taking such oath or engagement, unless he or she shall, within *four days* after the taking thereof, if not prevented by actual force or sickness, and then within four days after the hindrance produced by such force or sickness shall cease, declare the same, together with the whole of what he or she shall know touching the same, and the person or persons by whom, and in whose presence, and when and where, such oath or engagement was administered or taken, by information on oath before one of his Majesty's justices of the peace, or one of his Majesty's principal secretaries of state, or his Majesty's privy council: or in case the person taking such oath or engagement shall be in actual service in his Majesty's forces by sea or land, then by such information on oath as aforesaid, or by information to his commanding officer.' The 52 Geo. 3, c. 104, s. 2, contains a similar enactment as to the oaths or engagements within that Act, except that the words '*fourteen days*' are substituted for 'four days.'

By the 37 Geo. 3, c. 123, s. 5, any engagement or obligation whatsoever in the nature of an oath, and by the 52 Geo. 3, c. 104, s. 6, any engagement or obligation whatsoever in the nature of an oath purporting or intending to bind the person taking the same to commit any treason or murder, or any felony punishable by law with death, shall be deemed an oath within the intent and meaning of those Acts, in whatever form or manner the same shall be administered or taken: and whether the same shall be actually administered by any person or persons to any other person or persons, or taken by any person or persons without any administration thereof by any other person or persons.

If the oath administered was intended to make the party believe himself under an engagement, it is equally within the Act, whether the book made use of be a testament or not. (*j*) So the precise form of the oath is immaterial; it is an oath within the meaning of the Acts, if it was understood by the party tendering, and by the party taking it, as having the force and obligation of an oath. (*k*)

(*h*) But this punishment was abolished by the 1 Vict. c. 91, s. 1, by which, and sec. 2, and other statutes, the punishment now is penal servitude for life, or for any term not less than three years, or imprisonment, with or without hard labour, in the common gaol or house of correction for any term not exceeding three years, and solitary confinement for any portion or portions of such imprisonment, or of such

imprisonment with hard labour, not exceeding one month at a time, or three months in the course of one year.

(*i*) Penal servitude as stated in the preceding note.

(*j*) *R. v. Brodribb*, 6 C. & P. 571, Holroyd, J., where an account book, called *The Young Man's Best Companion*, was used.

(*k*) *R. v. Loveless*, M. & Rob. 349, Williams, J.

With respect to persons aiding and assisting at the administering or taking these unlawful oaths, the 37 Geo. 3, c. 123, s. 3, enacts, that persons aiding and assisting at, or present and consenting to, the administering or taking of any oath or engagement before mentioned in that Act; and persons causing any such oath or engagement to be administered or taken, though not present at the administering or taking thereof, shall be deemed principal offenders, and tried as such; although the person or persons who actually administered such oath or engagement, if any such there shall be, shall not have been tried or convicted. A similar enactment is contained in the 52 Geo. 3, c. 104, s. 4, with respect to persons aiding and assisting at the administering of any oath or engagement mentioned in that Act, and persons causing any such oath or engagement to be administered, though not present at the administering thereof: such persons are to be deemed principal offenders, and, on conviction, to be adjudged guilty of felony, and to suffer death without benefit of clergy, *(l)* although the person or persons who actually administered the oath or engagement, if any such there shall be, shall not have been tried or convicted.

Both the statutes provide that it shall not be necessary to set forth in the indictment 'the words of the oath or engagement;' and that 'it shall be sufficient to set forth the purport of such oath or engagement, or some material part thereof.' *(m)* Upon an indictment on the 37 Geo. 3, the fourth count charged, that the defendants administered to J. H. an oath 'intended to bind him not to inform or give evidence against any member of a certain society formed to disturb the public peace for any act or expression of his or theirs, done or made collectively or individually, in or out of that or other similar societies, in pursuance of the spirit of that obligation;' and the eighth count stated the oath to be 'intended to bind the said J. H. not to give evidence against any associate in certain associations and societies of persons formed for seditious purposes;' and the other counts stated the objects of the oath administered, and the objects of the society, differently and more generally adapted to several prohibitory parts of the statute. Upon objection taken at the trial to the generality of the statements in the indictment, Lord Avenley was of opinion that the Act intended that it should be sufficient to allege and prove what the object of the oath and engagement was, without stating any words at all; and that the offence being described in the words of the Act, was well described; but that supposing the objection made to the generality of the counts was good, which he did not admit, yet that in the fourth and eighth a material part of the oath or engagement was set forth according to the clause of the Act. The point was submitted to the judges, who, without giving any opinion against the other counts, all agreed that at any rate the fourth and eighth counts were good. *(n)*

If the indictment state the oath to have been not to inform or give evidence against any person belonging to a confederacy of persons associated together to do 'a certain illegal act,' it is sufficient without going on to state what the illegal act was. For the offence is not the illegal act, but the administration of the oath, which preceded it, and

(l) Abolished by the 1 Vict. c. 91, s. 1, see note *(h)*, *ante*, p. 406, for the present punishment.

(m) 37 Geo. 3, c. 123, s. 4. 52 Geo. 3, c. 104, s. 5.

(n) *R. v. Moors*, 6 East, 419, note *(b)*

all that the rules of pleading require is that the offence — that is the oath itself — should be sufficiently set out. (*o*) Where an indictment charged that the prisoner administered 'a certain oath' to J. Penny, and fifteen others, naming them, and it was proved that the sixteen were all sworn in the same manner, on the same book, two or three at a time, at the same meeting, it was held that this was sufficient, for it was the same act of administering. Or it might be taken to be a complete transaction with respect to each person sworn; and the charge would be substantiated by evidence of the prisoner having sworn any one of the party, in the same way as a man may be convicted of larceny on proof of stealing one out of several articles named in an indictment. (*p*)

Where the witness, swearing to the words spoken by way of oath by the prisoner when he administered it, said that he held a paper in his hand at the time when he administered the oath, from which paper it was *supposed* that he read the words; it was held, that parol evidence of what he in fact said was sufficient, without giving him notice to produce such paper. (*q*) And where the oath on the face of it did not purport to be for a seditious purpose, though it was objected that no parol evidence could be given to show that the '*brotherhood*' mentioned in it was of a seditious nature, it was held that declarations made at the time by the party administering such oath were admissible to prove the real object of it. (*r*)

Both the 37 Geo. 3 and 52 Geo. 3, provide that offences committed on the high seas, or out of the realm, or in England, shall be tried before any court of oyer and terminer or gaol delivery for any county in England in such manner and form as if such offence had been therein committed. (*s*)

It is also provided by both these statutes that any person who shall be tried and acquitted or convicted of any offence against the Acts, shall not be liable to be prosecuted again for the same offence or fact as high treason, or misprision of high treason. And further, that nothing in the Acts contained shall be construed to extend to prevent any person guilty of any offence against the Acts, and who shall not be tried for the same as an offence against the Acts, from being tried for the same, as high treason, or misprision of high treason, in such manner as if those Acts had not been made. (*t*)

By the 57 Geo. 3, c. 19, s. 25, it is enacted that all societies or clubs, the members whereof shall be required or admitted to take any oath or engagement, which shall be an unlawful engagement within the 37 Geo. 3, c. 123, or the 52 Geo. 3, c. 104, or to take any oath not required or authorized by law; and every society or club, the members whereof, or any of them, shall take, or in any manner bind themselves by any such oath or engagement on becoming, or in order to become, or in consequence of being a member or members of such society or club; and every society or club, the members or any member whereof shall be required or admitted to take, subscribe, or assent to any test

(*o*) *R. v. Brodribb*, 6 C. & P. 571, Holroyd, J.

(*p*) *Ibid.*

(*q*) *R. v. Moors and others*, 6 East, 421.

(*r*) *Id. ibid.*

(*s*) 37 Geo. 3, c. 123, s. 6; 52 Geo. 3, c. 104, s. 7.

(*t*) 37 Geo. 3, c. 123, s. 7; 52 Geo. 3, c. 104, s. 8.

or declaration not required or authorized by law, in whatever manner or form such taking or assenting shall be performed, whether by words, signs, or otherwise, either on becoming, or in order to become, or in consequence of being a member or members of any such society or club; shall be deemed and taken to be *unlawful combinations and confederacies* within the meaning of the 39 Geo. 3, c. 79, (u) and may be prosecuted, proceeded against, and punished according to the provisions of the said Act. (v)

The mutual promises and engagements of societies are lawful, unless they are clearly prohibited by law; and it lies on the party who alleges that such promises and engagements are illegal to prove that they are so. Where, therefore, it appeared from the rules of a lodge of Oddfellows that the members entered into an engagement to abide by the rules, and one of the rules was to keep the secrets of the society; but all secrets had been abolished; and the rules had not been enrolled: Erle, J., held that there was nothing to show that the engagement was illegal; the subjects of this realm might enter into any engagement they pleased, unless prohibited by law, and the party objecting to the legality of an engagement must show that it is illegal. (w)

This statute further enacts, that a person compelled by inevitable necessity to commit any of these offences, shall be excused and justified upon proof of such necessity, if within ten days (not being prevented by actual force or sickness, and then within seven days after such actual force or sickness shall cease to disable him) he disclose to a justice of peace, by information on oath, the whole of what he knows touching his compulsion. (x) Persons aiding at the administering or tendering the oath or engagement, and persons causing the oath or engagement to be administered or tendered, though not present, are to be deemed principal offenders, and tried as such, though the person who actually administered such oath or engagement shall not have been tried or convicted. (y) And the statute also provides, that it shall be sufficient to set forth in the indictment the purport or object of such oath or engagement. (z)

The 5 & 6 Will. 4, c. 62, in many cases substituted a declaration in lieu of an oath; and by sec. 13, reciting that 'a practice has prevailed of administering and receiving oaths and affidavits voluntarily taken and made in matters not the subject of any judicial inquiry, nor in any wise pending or at issue before the justice of the peace or other person by whom such oaths or affidavits have been administered or received,' and that 'doubts have arisen whether or not such proceeding is illegal; for the more effectual suppression of such practice and removing such doubts,' enacts that, after the 1st of October, 1835, 'it shall not be lawful for any justice of the peace or other person to administer, or cause or allow to be administered, or to receive, or cause

(u) See this Act, *post*.

(v) This statute is not to extend to Freemasons' lodges, nor to any declaration approved by two justices, nor to *Quakers'* meetings, nor to meetings or societies for charitable purposes, sec. 26. By sec. 39, the Act is not to extend to Ireland.

(w) *R. v. Rouse*, 4 Cox, C. C. 7.

(x) Sec. 2. And the section provides

also, that no person shall be excluded from the defence of inevitable necessity, who shall be tried for an offence within ten days from the commission of it, or of seven days from the time when the force or sickness shall cease.

(y) Sec. 3.

(z) Sec. 4.

or allow to be received, any oath, affidavit, or solemn affirmation touching any matter or thing whereof such justice or other person hath not jurisdiction or cognizance by some statute in force at the time being. Provided always that nothing herein contained shall be construed to extend to any oath, affidavit, or solemn affirmation before any justice in any matter or thing touching the preservation of the peace, or the prosecution, trial, or punishment of offences, or touching any proceedings before either of the Houses of Parliament, or any Committee thereof respectively, nor to any oath, affidavit, or affirmation which may be required by the laws of any foreign country to give validity to instruments in writing designed to be used in such foreign countries respectively.'

It has been doubted whether an indictment can be sustained for administering an oath contrary to this clause, and, supposing it can, such an indictment is bad unless it set out so much at least of the oath as may enable the Court to see that the oath is one which is prohibited by the clause. An indictment alleged in several counts that the defendant administered a voluntary oath¹ touching certain matters whereof he had not jurisdiction by any statute, and some counts negatived the oaths, &c., in the proviso; and the Court of Queen's Bench held that the indictment was bad; for the having or not having jurisdiction is a matter of law depending upon the facts, upon which the Court is to form an opinion. There ought, therefore, to be a distinct allegation of the subject-matter of the oath, showing affirmatively that it was out of the jurisdiction. But the Court expressed no opinion whether the indictment would lie; Lord Denman, C. J., however, seems to have thought that it would be necessary to show that the disobedience was wilful and in the nature of a contempt, in order to convict a person of disobeying the clause. (a)

(a) *R. v. Nott*, 4 Q. B. 768. The majority of the Court thought that it was not necessary to set out the whole oath; but the 37 Geo. 3, c. 128, and 52 Geo. 3, c. 104,

contain express provisions to that effect (*ante*, p. 406), and, therefore, it would certainly be prudent to set out the whole oath, if practicable, in some counts.

CHAPTER THE FOURTEENTH.

OF MISPRISION OF FELONY AND OF COMPOUNDING OFFENCES.

By misprision of felony is generally understood the *concealment of felony*, or a *procuring* such concealment, whether it be felony by the common law, or by statute. (a) Thus, silently to observe the commission of a felony without using any endeavour to apprehend the offender, is a misprision; (b) for a man is bound to discover the crime of another to a magistrate with all possible expedition, (c) as the law does not allow any private person to forego a prosecution on any account. (d) But there must be knowledge merely without assent; for if a man assent to a felony, he will be either principal or accessory. (e) The punishment of this offence in an officer is imposed by the statute of Westminster, 3 Edw. 1, c. 9, which enacts (as amended), that 'if any bailiff within a franchise, or without, for reward, or for prayer, or for fear, or for any manner of affinity, conceal, consent, or procure to conceal, the felonies done in their liberties; or otherwise will not attach nor arrest such felons there (as they may), or otherwise will not do their office, for favour borne to such misdoers, and be attainted thereof, they shall have one year's imprisonment, and after make a grievous fine at the King's pleasure, if they have where-with; and if they have not whereof, they shall have imprisonment of three years.' The punishment in the case of a common person, is imprisonment for a less discretionary time; and in both cases fine and ransom at the King's pleasure. (f)

Compounding felony. — Of a similar nature to this offence of misprision of felony, is the offence of *compounding of felony*, mentioned in the books by the more ancient appellation of *theft-bote*, which is where the party robbed not only knows the felon, but also takes his goods again, or other amends, upon agreement not to prosecute. (g) It is said to have been anciently punishable as felony; but is now punished only with fine and imprisonment, unless it is accompanied with some degree of maintenance given to the felon, which makes the party an accessory after the fact. (h) But the barely taking again of one's own goods which have been stolen, is no offence at all unless some favour be shown to the thief. (i)

(a) 1 Hawk. P. C. c. 59, s. 2. 3 Inst. 139.

(b) 1 Hale, 374, 375. 1 Hawk. P. C. c. 59, s. 2, note (1).

(c) 3 Inst. 140.

(d) R. v. Daly, 9 C. & P. 342. Gurney, B.

(e) 4 Blac. Com. 121. But see 1 Hale, 616, cited *ante*, p. 170.

(f) 4 Blac. Com. 121, where it is said, 'which pleasure of the King must be

observed, once for all, not to signify any extrajudicial will of the sovereign, but such as is declared by his representatives, the judges in his courts of justice; *voluntas Regis in curia, non in camera.*'

(g) 1 Hawk. P. C. c. 59, s. 5. 4 Blac. Com. 133.

(h) 1 Hawk. P. C. c. 59, s. 6. 2 Hale, 400.

(i) 1 Hawk. P. C. c. 59, s. 7.

Compounding a mere charge of felony is illegal; as where a person, having charged a man before a magistrate with embezzlement, agrees not to prosecute the charge in consideration of a bill of exchange being accepted by another person. (*j*)

Where an indictment for compounding felony alleged that after taking a sum of money for compounding, the defendant desisted from prosecuting, and it appeared that he did prosecute to conviction, the defendant was held entitled to be acquitted. (*k*) But where the indictment did not allege that the defendant desisted from prosecution it was held that this was good. (*kk*) The offence of compounding a larceny may be committed by a person other than the owner of the stolen goods or a material witness for the prosecution. So where the owner of the goods said he would leave the matter in the hands of another, and that other compounded the felony, it was held that the latter could be convicted. (*l*)

It is made felony by the 24 & 25 Vict. c. 96, s. 101, (*m*) to take any reward for helping a person to any property stolen or obtained by false pretences; and to advertise a reward for the return of things stolen, involves a forfeiture of fifty pounds by sec. 102 of the same Act. (*n*)

Compounding misdemeanors.¹—An agreement to put an end to a prosecution for a *misdemeanor* has been considered to be illegal, as impeding the course of public justice; (*o*) but it is sometimes done after conviction, with the sanction of the Court, in cases where the offence principally and more immediately affects an individual; the defendant being permitted to *speak with the prosecutor* before any judgment is pronounced, and a trivial punishment being inflicted if the prosecutor declares himself satisfied. (*p*) And where, in a case of an indictment for ill-treating a parish apprentice, a security for the fair expenses of the prosecution had been given by the defendant after conviction, upon an understanding that the Court would abate the period of his imprisonment, the security was held to be good, upon the ground that it was given with the sanction of the Court, and to be considered as part of the punishment suffered by the defendant in expiation of his offence, in addition to the imprisonment inflicted on him. (*q*)

So where a defendant was prosecuted by parish officers, and con-

(*j*) *Fivaz v. Nicholls*, 2 C. B. 501.
Rawlings v. The Coal Consumers' Association Limited, 43 L. J. M. C. 111.

(*k*) *R. v. Stone*, 4 C. & P. 379. *Bosanquet, J.*

(*kk*) *R. v. Burgess*, 16 Q. B. D. 141.

(*l*) *R. v. Burgess, supra.*

(*m*) See vol. 2, ch. 29.

(*n*) See vol. 2, ch. 29.

(*o*) *Collins v. Blantern*, 2 Wils. 341.
Edgecombe v. Rodd, 5 East, 294.

(*p*) 4 Blac. Com. 363, 364.

(*q*) *Beeley v. Wingfield*, 11 East, 46.
See the observations on this case in 6 Q. B. 320; and see also *Baker v. Townshend*, 7 Taunt. 422. But in general any contract or security made in consideration of dropping a criminal prosecution, suppressing evidence, soliciting a pardon, or compounding any public offence, without leave of the Court, is invalid. 1 Chit. Crim. Law, 4.²

AMERICAN NOTES.

¹ According to Mr. Bishop's view of the law it is no offence to compound a very small misdemeanor. *Bishop, i. s. 711.*

² In America the acceptance of a note

signed by the guilty party as a consideration for not prosecuting has been held to be a compounding of a felony. *Co. v. Pease*, 16 Mass. Rep. 91.

victed for disobeying an order of maintenance, and sentence was deferred by the Court with a view to an arrangement, and in the meantime he was committed to prison, and the officers demanded a sum considerably exceeding the amount of maintenance due, but part of which was to cover costs; the defendant paid part, and gave a note for the remainder, and was then brought into Court, fined 1s. and discharged; it did not appear whether the particulars of the arrangement were made known to the Court, but the defendant made no complaint when brought up; it was held that the compromise was legal. (r)

It has been laid down, that 'the law will permit a compromise of all offences, though made the subject of a criminal prosecution, for which offences the injured party might recover damages in an action.' (s) But it seems that this proposition should be limited to the 'cases where the private rights of the injured party are made the subject of agreement, and where by the previous conviction of the defendant the rights of the public are also preserved inviolate.' (t) For 'when a verdict of guilty is taken, and the Court suspend judgment, and allow the questions between the parties to be referred, the matter is very different, for then it is only to enable the Court the better to see what sentence ought to be given.' (u) 'But if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it.' (v) A contract therefore to withdraw a prosecution for perjury, and to give no evidence against the accused, is founded on an illegal consideration and void. (w)

So where an action was brought on an agreement, by which the defendants, in consideration that the plaintiff, being the prosecutor of an indictment against certain persons for an assault and riot, would not proceed further on such indictment, promised the plaintiff to pay him a certain sum of money, and in pursuance of that agreement the plaintiff did not proceed further with the indictment, and informed the Court, before which the indictment was pending, of the premises, and, by leave of the Court, forbore to give evidence upon the indictment, and thereupon there was an acquittal; it was held that the agreement was illegal; for the offence was not confined to the personal injury, but was accompanied with a riot, which was a matter of public concern, and therefore not legally the subject of compromise. (x)

In one case an indictment for a nuisance by making an embankment in the Thames, whereby the navigation was obstructed, was referred; (y) but the question of the legality of the reference was not raised. But where an indictment had been preferred against the defendant for non-repair of a highway, which it was alleged he ought to have repaired *ratione tenuræ*; the prosecutor and defendant before the trial agreed to leave the question of liability to repair to reference; the arbitrator was to make an award on the evidence adduced before him; a verdict

(r) *Kirk v. Strickwood*, 4 B. & Ad. 421.

(s) *Keir v. Leeman*, 6 Q. B. 308.

(t) *Keir v. Leeman*, 9 Q. B. 371, in error, affirming the judgment of the Queen's Bench. *Windhill L. B. v. Vint*, 45 Ch. D. 351, as to indictment for obstructing a highway.

(u) *R. v. Hardey*, 14 Q. B. 529. *R. v. Roxburgh*, 12 Cox, C. C. 8, an indictment for a common assault.

(v) *Keir v. Leeman*, 6 Q. B. 308.

Cannon v. Randa, 11 Cox, C. C. 631.

(w) *Per Curiam*, *ibid.* citing *Collins v. Blantern*, 2 Wils. 341.

(x) *Keir v. Leeman*, *supra*.

(y) *R. v. Dobson*, 6 Q. B. 637. See *Fallowes v. Taylor*, 7 T. R. 475, and the observations on this case, 9 Q. B. 393.

was to be entered according to the result of the award, and the arbitrator awarded that the defendant was guilty of the non-repair alleged in the indictment: it was held that the reference was illegal, as the question of liability to repair was of public concern. (z)

An indictment for conspiracy cannot be compromised. (a)

Where, however, indictments for perjury and conspiracy were removed into the Queen's Bench, and on the indictment for perjury coming on for trial, it was agreed, under the strong advice of counsel, that no evidence should be tendered, a verdict of not guilty taken on both indictments, and that all matters in difference between the prosecutor and defendant should be referred to a barrister; it was held that it would have been illegal to refer the indictment for perjury, and, as it should seem, the indictment for conspiracy; but that the indictments were not referred, and the verdicts of acquittal must at all events stand; and that there was nothing illegal in referring all matters in difference and at the same time consenting to verdicts of acquittal, unless there was a corrupt agreement to stifle the prosecution, which did not appear to be the fact. (b)

It is clear that the consent of the Court cannot make an agreement to abandon a prosecution valid, if it would otherwise be unlawful. (c)

Compounding informations on penal statutes. — The compounding of informations on penal statutes is a misdemeanor against public justice, by contributing to make the laws odious to the people. (d) Therefore in order to discourage malicious informers, and to provide that offences, when once discovered, shall be duly prosecuted, it was enacted by the 18 Eliz. c. 5, s. 4,¹ that if any person, 'by colour or pretence of process, or without process upon colour or pretence of any matter of offence against any penal law, make any composition, or take any money, reward, or promise of reward,' without the order or consent of some Court, he shall stand two hours in the pillory, (e) be for ever disabled to sue on any popular or penal statute, and shall forfeit ten pounds. This severe statute extends even to penal actions, where the whole penalty is given to the prosecutor. (f) But it does not apply to penalties which are only recoverable by information before justices. (g)

In a case where it was held that threatening, by letter or otherwise, to put in motion a prosecution by a public officer to recover penalties for selling *Fryer's Balsam* without a stamp, (h) for the purpose of obtaining money to stay the prosecution (not being such a threat as a

(z) *R. v. Blakemore*, 14 Q. B. 544.

(a) *R. v. Hardey*, *supra*. See *R. v. Bardell*, 5 A. & E. 619, where such an indictment was referred, but the lawfulness of the reference was not raised.

(b) *R. v. Hardey*, *supra*.

(c) *Keir v. Leeman*, *supra*.

(d) 4 Blac. Com. 136.

(e) This part of the punishment is abolished by the 56 Geo. 3, c. 138. But sec. 2 empowers the Court to pass such sentence of

fine or imprisonment, or of both, in lieu of the sentence of pillory, as to the Court shall seem proper; and see the 7 Will. 4 & 1 Vict. c. 23. The 18 Eliz. was made perpetual by the 27 Eliz. c. 10.

(f) 4 Blac. Com. 136, note (3).

(g) *R. v. Crisp*, 1 B. & Ald. 282.

(h) By the 42 Geo. 3, c. 56, it was prohibited to be vended without a stamped label.

AMERICAN NOTE.

¹ It seems doubtful whether this statute would be acted upon in America. In some States there are statutes providing for the

discharge of the wrongdoer on his making full reparation. Bishop i. ss. 712, 713 (3).

firm and prudent man might not be expected to resist), was not in itself an indictable offence at common law, though it was alleged that money was obtained, it seems to have been considered that such an offence would be indictable under the foregoing section of this statute of Elizabeth. (*i*) But no indictment for any *attempt* to commit such a statutable misdemeanor can be sustained as a misdemeanor at common law, without at least bringing the offence intended within, and laying it to be against, the statute. Though if the party so threatened had been alleged to be guilty of the offence imputed, within the statute imposing the duty and creating the penalty, such an attempt to compound and stifle a public prosecution for the sake of private lucre, in fraud of the revenue, and against the policy of the statute (which gives the penalty as auxiliary to the revenue, and in furtherance of public justice for the sake of example), might also, upon general principles, have been deemed a sufficient ground on which to have sustained the judgment at common law (*j*)

A party is liable to the punishment prescribed by the 18 Eliz. c. 5, for taking the penalty imposed by a penal statute, though there is no action or proceeding for the penalty. The prisoner applied to one Round, and demanded five pounds, as a penalty which Round had incurred under the General Turnpike Act, by suffering his waggon to be drawn on a turnpike road by more than four horses. Round had incurred such a penalty, and the prisoner obtained the money by way of composition to prevent any legal proceedings; no process had been sued out, and no information had been laid before a magistrate. The prisoner having been convicted, judgment was respited, upon a doubt whether the offence was within the statute, so as to subject the prisoner to the specific punishment therein prescribed, inasmuch as no action or proceeding was depending in which the order or consent of any Court in Westminster Hall for a composition could have been obtained. But the judges were all of opinion that the conviction was right, and that the statute applies to all cases of taking a penalty incurred, or pretended to be incurred, without leave of a Court at Westminster, or without judgment or conviction. (*k*)

A person may be convicted under the 18 Eliz. c. 5, s. 4, for taking money upon colour or pretence of a party having committed an offence, though in fact no offence liable to a penalty has been committed by the person from whom the money is taken. (*l*) As to taking rewards for the recovery of stolen goods, &c., see further, Vol. ii, ch. 29.

(*i*) *R. v. Southerton*, 6 East, 126. But *quære*, and see *R. v. Crisp*, 1 B. & Ald. 286, 287.

(*j*) *Id. ibid.*

(*k*) *R. v. Gotley*, East, T. 1805. Russ. & Ry. 84.

(*l*) *R. v. Best*, 2 Moo. C. C. R. 124; S. C., 9 C. & P. 368.

CHAPTER THE FIFTEENTH.

OF OFFENCES BY PERSONS IN OFFICE.¹

WHERE an officer neglects a duty incumbent on him, either by common law or by statute, he is indictable for his offence; and this, whether he be an officer of the common law, or appointed by Act of Parliament: (a) and a person holding a public office under the King's letters patent, or derivatively from such authority, has been considered as amenable to the law for every part of his conduct, and obnoxious to punishment for not faithfully discharging it. (b) And it is laid down generally that any public officer is indictable for misbehaviour in his office. (c) There is also the further punishment of the forfeiture of the office for the misdemeanor of doing anything directly contrary to its design. (d) And in the case of a coroner, the 50 & 51 Vict. c. 71, s. 8, makes particular provision, and enacts, that when convicted of extortion, or wilful neglect of duty, or misdemeanor in office, he may be removed from office by the judgment of the Court in which he is convicted. And the Lord Chancellor may remove any coroner for inability or misbehaviour in his office. Where a duty is thrown upon a body of several persons, and they neglect it, each is individually liable to prosecution for the neglect. (e)

It is proposed to treat shortly, in the present chapter, of oppression, negligence, fraud, and extortion, by persons in office; and of the refusal of persons to execute the duties of their offices when properly appointed; leaving the subjects of buying and selling offices, and of bribery, for subsequent chapters.

Oppression by public officers. — The *oppression* and tyrannical partiality of judges, justices, and other magistrates in the administration, and under colour of their offices, may be punished by impeachment in Parliament, or by information or indictment, according to the rank of the offenders, and the circumstances of the offence. (f) Thus if a justice of the peace abuses the authority reposed in him by law, in order to

(a) R. v. Wyat, 1 Salk. 380. Anon. 6 Mod. 96.

(b) R. v. Bembridge, M. 24 Geo. 3. 1 Salk. 380, note (a).

(c) Anon. 6 Mod. 96.

(d) 1 Hawk. P. C. c. 66, s. 1.

(e) R. v. Holland, 5 T. R. 607.

(f) 4 Blac. Com. 141. A judge is not indictable for an error in judgment. R. v. Loggen and another, 1 Str. 74. As to County Court judges and other officers they may be removed from office and fined for misconduct. See 51 & 52 Vict. c. 43, ss. 15, 50, 51.

AMERICAN NOTE.

¹ In America it has been held that if a public officer intentionally neglects to do an act in the belief that he is not bound to do

it, that affords him no defence. P. v. Brooks, 1 Denio, 471.

gratify his malice, or promote his private interests or ambition, he may be punished by indictment or information.

Misconduct of licensing justices. — But though a justice of the peace should act illegally, yet if he has acted honestly and candidly, without oppression, malice, revenge, or any bad view or ill-intention whatsoever, the Court will never punish him by the extraordinary course of an information, but will leave the party complaining to his ordinary remedy. (*g*) And whenever justices have been challenged, either by way of indictment, or application for a criminal information, the question has always been, not whether the act done might, upon full and mature investigation, be found strictly right, but from what motive it had proceeded; whether from a dishonest, oppressive, or corrupt motive,¹ under which description fear and favour may generally be included, or from mistake or error. In the former case, alone, they have become the subjects of punishment. (*h*) But where two sets of magistrates had a concurrent jurisdiction, and one set of them appointed a meeting to grant ale licences, and, after such appointment, the other set of magistrates appointed a meeting for the same purpose on a subsequent day, and having met, granted a licence which had been refused by the first set; it was held that the proceedings of the magistrates appointing the second meeting were illegal, and the subject of an indictment. Lord Kenyon, C. J., said that it was proper the question should be settled whether it were *legal* for two different sets of magistrates, having a concurrent jurisdiction, to run a race in the exercise of any part of their jurisdiction; and that it was of infinite importance to the public that the acts of magistrates should not only be substantially good, but also that they should be decorous. And Ashhurst, J., said that it was a breach of the law to attempt to wrest the jurisdiction out of the hands of the magistrates who first gave notice of the meeting; for what the law says shall not be done, it becomes illegal to do, and is therefore the subject-matter of an indictment, without the addition of any corrupt motives. (*i*) So, if a magistrate were wilfully, and in defiance of the known law, to refuse bail in a case where the defendant was entitled to be bailed, he would be liable to a criminal information or indictment. (*j*) The conduct of justices of the peace in granting or refusing licences to sell ale has been frequently the subject of investigation; and it seems to be clear that though upon this matter the justices have a discretionary jurisdiction given them by the law, and though discretion means the exercising the best of their judgment upon the occasion that calls for it, yet if this discretion be wilfully abused, it is criminal, and under the control of the Court of King's Bench. (*k*) That Court will, therefore,

(*g*) *R. v. Palmer*, 2 Burr. 1162. 1 Blac. Com. 354, note (17).

(*h*) Per Lord Tenterden, C. J., *R. v. Borron*, 3 B. & Ald. 434. *Ex parte Fentiman*, 2 Ad. & E. 127. 1 Blac. Com. 354, note (17).

(*i*) *R. v. Sainsbury*, 4 T. R. 451.

(*j*) *R. v. Badger*, 4 Q. B. 468; and see *R. v. Dodgson*, 9 A. & E. 704.

(*k*) *R. v. Young*, 1 Burr. 556, 560, *et seq.*

AMERICAN NOTE.

¹ Mr. Bishop (Vol. ii. s. 975) seems to doubt whether the law is well settled that a justice of the peace is indictable for a judicial act however corrupt.

grant an information against justices who refuse, from corrupt and improper motives, to grant such licences; (*l*) and an information will be granted against them as well for granting a licence improperly as for refusing one in the same manner. (*m*)

Gaolers. — To prevent abuses of the extensive power which the law is obliged to repose in gaolers, the 14 Edw. 3, c. 10, enacted (*n*) that if any gaoler, by too great duress of imprisonment, makes any prisoner that he hath in ward become an *approver* or an *appellor* against his will; that is, to accuse and turn evidence against some other person; it shall be felony in the gaoler. For it is not lawful to induce or excite any man even to a just accusation of another; much less to do it by duress of imprisonment; and least of all by a gaoler to whom the prisoner is committed for safe custody. (*o*) And a gaoler may be discharged and fined for voluntarily suffering his prisoner to escape, or for barbarously misusing him. (*p*) So, a gaoler is indictable for refusing to receive a prisoner under the commitment of a magistrate. (*q*)

Overseers of the poor. — An *overseer* of the poor is also indictable for misfeasance in the execution of his office; (*r*) if he misuse the poor, as by keeping and lodging several poor persons in a filthy, unwholesome room, with the windows not in a sufficient state of repair to protect them against the severity of the weather (*s*) or by exacting labour from them when they are unable to work. (*t*) And if overseers conspire to prevail upon a man to marry a poor woman big with child, for the purpose of throwing the expense of maintaining her and the issue from themselves upon another parish or township, they may be indicted. (*u*) And for most breaches of their duty overseers may be punished by indictment or information: (*v*) but with respect to the proceeding by information, as it is an extraordinary remedy, the Court of King's Bench will not suffer it to be applied to the punishment of ordinary offences. (*w*)

An indictment against overseers on the 5 & 6 Will. 4, c. 76, s. 47, (*x*) for not accounting to the auditor of a union, upon request, on a day appointed by him, is bad, unless it appear that there was some rule, order, or regulation of the poor-law commissioners that the overseers should account upon such request; and where no such order, &c., is alleged, the indictment cannot be sustained after verdict, merely because it appears, by inference, or by the inducement, that the defendants have not in fact accounted for one whole quarter. (*y*)

(*l*) *R. v. Williams*, 3 Burr. 1817. The licences in this case had been refused, because the persons applying for them would not give their votes for members of Parliament as the justices would have had them. And see *R. v. Hann*, id. 1716, 1786.

(*m*) *R. v. Holland*, 1 T. R. 692. And see 1 Burn's Just. tit. *Alehouses*.

(*n*) This statute is, however, repealed by the Stat. Law Rev. Act, 1863.

(*o*) 4 Blac. Com. 128. 3 Inst. 91.

(*p*) 1 Hawk. P. C. c. 66, s. 2.

(*q*) *R. v. Cope*, 6 A. & E. 226. 1 N. & P. 515. 7 C. & P. 720. See the form of indictment there.

(*r*) *Tawney's case*, 16 Vin. Abr. 415. 1 Bott. 358, pl. 371.

(*s*) *R. v. Wetheril*, Cald. 432.

(*t*) *R. v. Winship*, Cald. 76.

(*u*) *R. v. Compton*, Cald. 246. *R. v. Tarrant*, 4 Burr. 2106; and *R. v. Herbert*, 1 East, P. C. c. 11, s. 11, p. 461.

(*v*) *R. v. Commings*, 1 Bott. 357, pl. 370. *R. v. Robinson*, 2 Burr. 799. *R. v. Jones*, 1 Bott. 360, pl. 377, 2 Nol. 474. From these authorities it appears that such proceeding may be had in some cases where a particular punishment is created by statute, and a specific method of recovering the penalty is pointed out. But as to this, see *ante*, p. 199.

(*w*) *R. v. Slaughter*, Cald. 246, note (*a*).

(*x*) Repealed by 45 & 46 Vic. c. 50.

(*y*) *R. v. Crossley*, 10 A. & E. 132. 2 P. & D. 319.

An overseer of the poor is not indictable if (without fraud or menace), he remove a pauper under an order of removal after it has been confirmed on appeal by the sessions, subject to the opinion of the Queen's Bench, and before its final determination by that Court. (2) As to an overseer wilfully neglecting his duties under the Registration Acts, see *R. v. Hale, ante*, p. 202.

Negligence by public officers.¹ — It has been already stated, that an officer *neglecting* the duties of his office is guilty of an indictable offence. (a) In some cases also the offence will amount to a forfeiture of his office, if it be a beneficial one; (b) for, by the implied condition that the grantee of an office shall execute it diligently and faithfully, it appears to be clear that he will be liable to a forfeiture of it, not only for doing a thing directly contrary to its design, but also for neglecting to attend to his duty at all usual, proper, and convenient times and places, whereby any damage shall accrue to those by or for whom he was made an officer. (c) A coroner neglecting the duties of his office is indictable. (d) A sheriff is indictable for refusing or neglecting to execute a criminal according to his sentence; but he is not bound to execute a criminal if he be not in his custody, and in such case, if it is intended by the Court which passed the sentence that the sheriff should do execution, there should be a special mandate to the party having the prisoner in custody to deliver him to the sheriff, and another to the sheriff to receive the prisoner and execute him. (e) And an indictment lies at common law against all subordinate officers for neglect, as well as misconduct, in the discharge of their official duties. A constable is therefore indictable for neglecting the duties required of him by common law or by statute; (f) and when a statute requires him to do what without requiring had been his duty, it is not imposing a new duty, and he is indictable at common law for the neglect. (g)

Negligence by overseers of the poor. — An overseer of the poor is indictable for the wilful neglect of his duty. Thus overseers have been held to be indictable for not providing for the poor; (h) for refusing to account within four days after the appointment of new overseers, under the 43 Eliz. c. 2; (i) for not making a rate to reimburse constables

(2) *R. v. Cooper*, 3 Sess. C. 346.

(a) *Ante*, p. 416.

(b) 4 Blac. Com. 140.

(c) 1 Hawk. P. C. c. 66, s. 1. And see further as to forfeiture of offices, Com. Dig. *Officer*, (K. 2) (K. 3), and the *Earl of Shrewsbury's case*, 9 Co. 50.

(d) See precedents of indictments against coroners for refusing to take inquisitions, or for not returning inquisitions according to evidence. 2 Chit. Crim. Law, 255, Cro. Circ. Comp. (10th edit.) 173. See however 50 & 51 Vict. c. 71, s. 8.

(e) *R. v. Antrobus*, 6 C. & P. 784. 2 A. & E. 788. 4 N. & M. 565.

(f) *R. v. Wyat*, 1 Salk. 380. *Crowther's case*, Cro. Eliz. 654; indictment against a constable for refusing to make hue and cry after notice of a burglary.

(g) *R. v. Wyat*, 1 Salk. 381.

(h) 2 Nolan, 475. *Tawney's case*, 1 Bott. 358, pl. 371. *R. v. Winship*, Cald. 72.

(i) *R. v. Commings*, 5 Mod. 179. 2 Nol. 453, 476, where it is observed in the note (3) that this case occurred prior to 17 Geo. 2. c. 38.

AMERICAN NOTE.

¹ There are statutes in some of the States of America dealing with malfeasance and non-feasance of public officers. *S. v. Carr*, 71 N. C. 106; *S. v. Hein*, 50 Mo. 362; *Pippin v. S.*, 36 Tex. 696; *S. v. Bevans*, 37

Iowa, 178; *C. v. Mitchell*, 3 Bush, 30; *McBride v. C.*, 4 Bush, 331; *Watson v. Hall*, 46 Conn. 204; *S. v. Furguson*, 76 N. C. 197; *Edwards v. S.*, 2 Tex. Ap. 525; *S. v. Lareche*, 28 La. An. 26.

under the 14 Car. 2, c. 14; (*j*) and for not receiving a pauper sent to them by order of two justices; (*k*) or disobeying any other order of justices, where the justices have competent jurisdiction. (*l*) There may be cases in which the neglect to provide a pauper with necessaries will render an overseer liable to be indicted. Thus where an indictment stated that the defendant, an overseer, had under his care a poor person belonging to his township, but neglected and refused to provide for her necessary meat, &c., whereby she was reduced to a state of extreme weakness, and afterwards, through want of such reasonable and necessary meat, &c., died, the defendant was convicted and sentenced to a year's imprisonment. (*m*) And where an overseer was indicted for neglecting to supply medical assistance when required to a pauper labouring under dangerous illness, the learned judge before whom the indictment was tried held that an offence was sufficiently charged and proved, though such pauper was not in the parish workhouse, nor had previously to his illness received or stood in need of parish relief. (*n*)

Churchwardens and Clergymen. — By the 1 & 2 Will. 4, c. 60, s. 11, an Act for the better regulation of vestries, 'if any churchwarden, rate-collector, overseer, or other parish officer, shall refuse to call meetings according to the provisions of this Act, or shall refuse or neglect to make and give the declarations and notices directed to be made and given by this Act, or to receive the vote of any ratepayer as aforesaid, or shall in any matter whatsoever alter, falsify, conceal, or suppress any vote or votes as aforesaid, such churchwarden, rate-collector, overseer, or other parish officer, shall be deemed and taken to be guilty of a misdemeanor.'

It has been doubted whether a clergyman who refuses to marry a couple is indictable for such refusal. (*o*)

Mayors. — The absence or misconduct of the chief officers of corporations at the time of elections, whereby the completion of the election of other chief officers may be prevented, is punishable by the 11 Geo. 1, c. 4, s. 6, which enacts, 'that if any mayor, bailiff or bailiffs, or other chief officer or officers of any city, borough, or town corporate, shall voluntarily absent himself or themselves from, or knowingly and designedly prevent or hinder the election of any other mayor, bailiff, or other chief officer in the same city, borough, or town corporate, upon the day, or within the time appointed by charter or ancient usage for such election;' such offender being convicted shall, for every offence, be imprisoned for six months, and be for ever disabled from exercising any office belonging to the same city, borough, or corporation. This voluntary absence from the election of a chief officer must be an

(*j*) *R. v. Barlow*, 2 Salk. 609. 1 Bott. 357, pl. 369.

(*k*) *R. v. Davis*, 1 Bott. 361, pl. 378. Say. 163, S. C.

(*l*) 2 Nol. 476. *R. v. Boys*, Say. 143. But otherwise where the justices have no jurisdiction, *R. v. Smith*, 1 Bott. 415, pl. 461.

(*m*) *R. v. Booth*, R. & R. 47, note (*a*).

(*n*) *R. v. Warren*, *cor.* Holroyd, J., Worcester Lent Assizes, 1820. See *Hays v. Bryant*, 1 H. Blac. 253. *R. v. Meredith*, R. & R. 46. For an indictment against a re-

lieving officer for refusing to supply medical assistance see *R. v. Curtis*, 15 Cox, C. C. 746.

(*o*) *R. v. James*, 2 Den. C. C. 1. 3 C. & K. 167. The indictment seemed open to several objections. It did not aver that the parties might lawfully marry; or that the clergyman was required to perform the ceremony at a lawful time, between the appointed hours. Strong intimations were thrown out that a refusal to marry is merely an ecclesiastical offence.

absence whereby the mischief complained of in the preamble of the statute, namely, the preventing the completion of the election of a chief officer, may possibly be occasioned. It has been decided, therefore, that a chief officer voluntarily absenting himself upon the charter day of election of his successor is not indictable, unless his presence as such chief officer be *necessary* by the constitution of the corporation to constitute a legal corporate assembly for such purpose. (*p*)

Officers and clerks in Chancery. — By the 3 & 4 Will. 4, c. 94, s. 41, (*q*) 'if any master in ordinary of the high Court of Chancery, or any person holding any office, situation, or employment in any office of the said Court, or under any of the judges or officers thereof, shall, for anything done or pretended to be done relating to his office, situation, or employment, or under colour of doing anything relating to his office, situation, or employment, wilfully take, demand, receive, or accept, or appoint or allow any person whatsoever to take for him or on his account, or for or on account of any person by him named, or in trust for him, or for any other person by him named, any fee, gift, gratuity, or emolument, or anything of value, other than what is allowed or directed to be taken by him as aforesaid, the person so offending, when duly convicted, shall forfeit and pay the sum of 500*l.*, and shall be removed from any office, situation, or employment he may hold in the said Court, and shall be rendered, and is hereby rendered, incapable for ever thereafter of holding any office, situation, or employment in the said Court, or otherwise serving his Majesty, his heirs, or successors.'

By sec. 42, 'any such offender may be prosecuted either by information at the suit of his Majesty's Attorney-General, or by criminal information before his Majesty's Court of King's Bench, or by indictment.'

By the 15 & 16 Vict. c. 80, masters in ordinary in the Court of Chancery are abolished, and certain duties imposed upon the chief and junior clerks of the Master of the Rolls and Vice-Chancellors; and by sec. 24, 'Every chief clerk and every junior clerk' appointed under the Act 'shall be subject and liable to such and the same prohibitions, prosecutions, penalties, and punishments,' as are by the preceding Act (3 & 4 Will. 4, c. 94, s. 41), 'imposed and directed with respect to persons holding any office, situation, or employment in the said Court of Chancery, or under any of the judges or officers thereof, in the same manner as if the enactments therein contained relating to such officers of the said Court respectively were here repeated.' And by the 18 & 19 Vict. c. 134, s. 2, the provisions contained in the preceding section are applied to junior clerks appointed under that Act.

Indictment. — Upon an indictment against an officer for neglect of duty, it is sufficient to state that he was such officer, and it is not necessary to state his appointment. (*r*) And in the case of a delinquent in India, prosecuted under the 24 Geo. 3, c. 25, for neglect of duty, it was held not to be necessary to state that the neglect was corrupt; the statute making it a misdemeanor if it was wilful. (*s*) And the indict-

(*p*) *R. v. Corry*, 5 East, 372. The Act is repealed as to boroughs by the Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50.

(*q*) This enactment is repealed by the Statute Law Revision Act, 1874.

(*r*) *R. v. Holland*, 5 T. R. 607.

(*s*) *Id. ibid.*; ss. 1 to 63 of this statute are repealed by 35 & 36 Vict. c. 63.

ment for neglect of duty need not aver that the defendant had notice of all the facts it states, if it was his duty to have known them. (*t*) Where some of the charges against the defendant were for disobeying orders, and it was stated that those orders were made and communicated to him, but their continuance in force was not averred, such an averment was insisted upon as essential; but the Court said that the orders must be taken to continue in force until they were revoked; and the objection was overruled. (*u*)

Frauds by public officers.—Public officers may also be indicted for frauds committed in their official capacities.¹ Thus where two persons were indicted for enabling others to pass their accounts with the pay office in such a way as to enable them to defraud the government, though it was objected that it was only a private matter of account and not indictable, the Court held otherwise, as it related to the public revenue. (*v*) And if an overseer of the poor receive from the putative father of a bastard child born within the parish a sum of money as a composition with the parish for the maintenance of the child, he is liable to an indictment for fraudulently omitting to give credit for this sum in his accounts with the parish. (*w*) It was objected in this case, that the defendant was not bound to bring this sum to account, the contract being illegal; (*x*) that the whole might have been recovered back, and that the defendant himself would have been personally answerable for it to the putative father; that the money, therefore, was not the money of the parish, and that the parish was neither defrauded nor damaged by its being omitted in the overseer's accounts. But Lord Ellenborough was of opinion, that though the defendant would have been liable to the putative father for so much of the money as was not expended upon the maintenance of the child and the lying-in of the mother, yet having taken the money as overseer for the benefit of the parish, he was bound to bring it to account, and that he was guilty of an indictable offence by attempting to put it into his own pocket.

So a clerk to the justices of the peace who imposed a penalty under the Alehouse Act (9 Geo. 4, c. 61, s. 26, now repealed), was indictable for wilfully neglecting and refusing to pay a moiety of such penalty to the treasurer of the county according to the provisions of that Act. (*y*)

By the Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54) s. 46, 'If any registrar or other person employed in the register office is party or privy to any act of fraud or collusion in relation to the registration of any assurance, will, or other instrument under this Act, or the giving of any certificate or copy, or the making of any search or the taking of any extract or copy under this Act, or any rules made thereunder, he shall be guilty of a misdemeanor and shall upon con-

(*t*) *Id. ibid.*

(*u*) *Id. ibid.*

(*v*) *R. v. Bembridge*, cited 6 East, 136.

R. v. Baxter, Salop Spr. Ass. 1850. MSS.

C. S. G. 5 Cox, C. C. 302, Patteson, J.

(*w*) *R. v. Martin*, 2 Campb. 268.

(*x*) See *Townson v. Wilson*, 1 Campb. 396.

(*y*) *R. v. Dale*, Dears. C. C. 37.

viction or indictment be liable to imprisonment with or without hard labour for any period not exceeding two years.

By 53 Vict. c. 5, a person who has become disqualified to be a commissioner in lunacy or a secretary or clerk to the commissioners, and continues to act as such, shall be guilty of a misdemeanor.

It may be observed, that where a duty is thrown on a body consisting of several persons, each is individually liable for a breach of duty, as well for acts of commission as for omission; and where a public officer is charged with a breach of duty, which duty arises from certain acts which he is bound to take notice of, it is not necessary to state that he had notice of those acts, for he is presumed from his situation to know them. (z)

Extortion by public officers.¹ — *Extortion* in a large sense signifies any oppression under colour of right: but in a more strict sense signifies the unlawful taking by any officer, by colour of his office, of any money or thing of value that is not due to him, or more than is due, or before it is due. (a)

Sheriffs. — By the Sheriffs' Act, 1887 (50 & 51 Vict. c. 55), s. 29 —

'(1) If a person being a sheriff, under-sheriff, bailiff, or officer of a sheriff, whether within a franchise or without, does any of the following things, that is to say: —

(a) Conceals or procures the concealment of any felon; or

(b) Refuses to arrest any felon in his bailiwick; or

(c) Lets go at large a prisoner who is not bailable; or

(d) Is guilty of an offence against or breach of the provisions of this Act;

He shall (without prejudice to any other punishment under the provisions of this Act) be guilty of a misdemeanor, and be liable on conviction to imprisonment for a term not exceeding one year and to pay a fine, or, if he has not wherewith to pay a fine, to imprisonment not exceeding three years.

(2) If any person being either a sheriff, under-sheriff, bailiff, or officer of a sheriff, or being employed in levying or collecting debts due to the Crown by process of any Court, or being an officer to whom the return or execution of writs belongs, does any of the following things, that is to say —

(z) *R. v. Holland*, 5 T. R. 607.

(a) 4 Blac. Com. 141. 1 Hawk. P. C. c. 68, s. 1.

AMERICAN NOTE.

¹ As to extortion in America, see *Williams v. S.*, 2 Sneed, 160; *S. v. Brown*, 12 Minn. 490; *P. v. Rust*, 1 Caines, 130; *C. v. Bayley*, 7 Pick. 279. There are many statutes in America which deal with this offence. *Bishop*, ii. s. 404.

It seems that in America a person who is not an officer, but who serves as such and claims to be such, is estopped from denying his official appointment. *Bishop*, ii. s. 392, citing 1 Gab. Crim. Law, 788; *S. v. McIntyre*, 3 Ire. 171, 174; *S. v. Sellers*, 7 Rich. 368, 372; *P. v. Cook*, 4 Seld. 67, 59 Am. D. 451. This is said to follow from the maxim "*omnia presumuntur rite esse acta*" where

a man is doing a lawful thing, and it is presumed to be done lawfully; but if a man does an unlawful act it cannot be presumed that he does it lawfully. The presumption is the other way. The English case of *R. v. Borrett*, 6 C. & P. 124, only decides that in a charge of stealing a post letter it is not necessary to produce the actual appointment, the words of the statute being "every person employed by or under the post-office," and it is sufficient to prove that he acted under the post-office. There seem to be cases in America which are called "extortion" where the defendant cannot be called an officer at all, see *Bishop*, ii. s. 392.

(a) Withholds a prisoner bailable after he has offered sufficient security; or

(b) Takes or demands any money or reward under any pretext whatever other than the fees or sums allowed by or in pursuance of this or any other Act; or

(c) Grants a warrant for the execution of any writ before he has actually received that writ; or

(d) Is guilty of any offence against or breach of the provisions of this Act, or of any wrongful act or neglect or default in the execution of his office, or of any contempt of any superior court;

He and any person procuring the commission of any such offence shall, without prejudice to any other punishment under the provisions of this Act, but subject as hereinafter mentioned, be liable

(i) To be punished by the Court as hereinafter mentioned, and

(ii) To forfeit two hundred pounds, and pay all damages suffered by any person aggrieved.

And such forfeiture and damage may be recovered by such person as a debt by an action in her Majesty's High Court of Justice.

(3) Any of the following courts, that is to say, her Majesty's High Court of Justice, any Court of Assize, Oyer and Terminer or gaol delivery, or any judge of any of the said Courts, also where the alleged offence has been committed in relation to any writ issued out of any other Court of record than those above mentioned, the Court out of which such writ issued may, on complaint made of any such offence as aforesaid having been committed and on proof on oath given by the examination of witnesses or by affidavit or on interrogatories of the commission of the alleged offence, and after hearing anything which the alleged offender may urge in his defence (which evidence and hearing may be taken and had in a summary matter), punish the offender or cause proceedings to be taken for his punishment in like manner as a person guilty of contempt of the said Court may be punished.

(4) The Court may order the costs of or occasioned by any such complaint to be paid by either party to the other, and an order by the High Court of Justice in any such summary proceeding to pay any costs, damages, or penalty, shall be of the same effect as a judgment of the High Court, and may be enforced accordingly.

(5) Any of the said Courts being a superior Court of record may also proceed for and deal with such offence in like manner as for any contempt of such Court.

(6) If any person not being an under-sheriff, bailiff, or officer of a sheriff, assumes or pretends to act as such, or demands or takes any fee or reward under colour or pretext of such office, he shall be liable to be punished in manner provided by this section as if he were an under-sheriff guilty of a contempt of Court.

(7) Any proceeding in pursuance of this section against a sheriff, under-sheriff, or any other person to whom this section applies shall be taken within two years after the alleged offence was committed, and not subsequently, and if the proceeding is in a summary manner shall be taken before the end of the sittings of the Court held next after the offence was committed and not subsequently.

(8) Nothing in this section shall render a person liable to be pun-

ished twice in respect of the same offence, but if any proceeding is taken against a person under this section for any offence the Court or Judge may postpone or stay proceedings and direct any other available proceeding to be taken for punishing such offence.'

Justices of the peace.—Justices of the peace are bound by their oath of office to take nothing for their office of justice of the peace to be done, but of the King, and fees accustomed, and costs limited by statute. And generally no public officer may take any other fees or rewards for doing anything relating to his office than some statute in force gives him, or such as have been anciently and accustomably taken; and if he do otherwise, he is guilty of extortion. (*b*) And it should be observed, that all prescriptions which have been contrary to the statute and to the common law, in affirmation of which it was made, have been always holden to be void; as where the clerk of the market claimed certain fees as due time out of mind for the examination of weights and measures; this was adjudged to be void. (*c*)

But the stated and known fees allowed by the courts of justice to their respective officers, for their labour and trouble, are not restrained by the common law, or by the statute of Westm. 1, c. 26, and therefore such fees may be legally demanded and insisted upon without any danger of extortion. (*e*) And it seems that an officer who takes a reward, which is voluntarily given to him, and which has been usual in certain cases, for the more diligent or expeditious performance of his duty, cannot be said to be guilty of extortion; for without such a *premium* it would be impossible in many cases to have the laws executed with vigour and success. (*f*) But it has been always holden, that a promise to pay an officer money for the doing of a thing which the law will not suffer him to take anything for is merely void, however freely and voluntarily it may appear to have been made. (*g*) It has been held to be extortion to oblige the executor of a will to prove it in the Bishop's Court, and to take fees thereon, when the defendants knew that it had been proved before in the Prerogative Court. (*h*)

Other public officers.—It is extortion in a *churchwarden* to obtain a silver cup or other valuable thing, by colour of his office. (*i*) And a *coroner* is guilty of this offence, who refuses to take the view of a dead body until his fees are paid. (*j*) So if an *under-sheriff* obtain his fees by refusing to execute process till they are paid, (*k*) or take a bond for

(*b*) Dalt. c. 41. Burn's Just. tit. *Extortion*.

(*c*) 1 Hawk. P. C. c. 68, s. 2. Bac. Abr. tit. *Extortion*.

(*e*) 1 Hawk. P. C. c. 68, s. 3. 2 Inst. 210. Co. Lit. 368. Bac. Abr. tit. *Extortion*.

(*f*) Bac. Abr. tit. *Extortion*. 2 Inst. 210. 3 Inst. 149. Co. Lit. 368.

(*g*) Bac. Abr. tit. *Extortion*.

(*h*) Rex v. Loggen, 1 Str. 73.

(*i*) Roy v. Eyres, 1 Sid. 307.

(*j*) 3 Inst. 149. See 50 & 51 Vict. c. 71, s. 8.

(*k*) Hestcott's case, 1 Salk. 330. The Court said that the plaintiff might bring an action against him for not doing his duty, or might pay him his fees, and then indict him for extortion.¹

AMERICAN NOTE.

¹ Demanding fees in advance has also been held to be extortion in America. See C. v. Bagley, 7 Pick. 279; S. v. Maires, 4 Vroom, 142; S. v. Vassel, 47 Mo. 416, but see also Lane v. S., 20 Vroom, 673. As to taking a larger fee than the law allows, and

setting up a custom to do so, see R. v. Han-num, 1 Yeates, 71; Lincoln v. Shaw, 17 Mass. 410; Shattuck v. Woods, 1 Pick. 171; C. v. Shed, 1 Mass. 227; see also P. v. Calhoun, 3 Wend. 420.

his fee before execution is sued out, (*l*) it will be extortion. And it will be the same offence in a *sheriff's officer* to bargain for money to be paid him by A. to accept A. and B. as bail for C., whom he has arrested; (*m*) or to arrest a man in order to obtain a release from him; (*n*) and also in a *gaoler* to obtain money from his prisoner by colour of his office. (*o*) In the case of a *mill*, where the custom has ascertained the toll, if the miller takes more than the custom warrants, it is extortion; (*p*) and the same if a *ferryman* takes more than his due by custom for the use of his ferry. (*q*) And it was held that if the *farmer of a market* erects so many stalls, as not to leave sufficient room for the market people to stand and sell their wares, so that for want of room they are forced to hire the stalls of the farmer, the taking money for the use of the stalls in such a case is extortion. (*r*) Where a *collector of post-horse duty* demanded a sum of money of a person, charging him with having let out post-horses without paying the duty, and threatened him with an Exchequer process, and he thereon gave him a promissory note for five pounds, which was afterwards paid and the proceeds handed over to the farmer of the post-horse duties, it was held to be extortion. (*s*) The question of exemption from toll cannot be tried by an indictment against a *turnpike-keeper* for extortion in taking the toll. (*t*) By the 4 Geo. 4, c. 95, s. 50, no person who shall take more toll than he is authorized to take, shall be prosecuted by indictment for extortion, or otherwise.

Indian officers. — The 33 Geo. 3, c. 52, s. 62, enacts that the demanding or receiving any sum of money, or other valuable thing, as a gift or present, or under colour thereof, whether it be for the use of the party receiving the same, or for or pretended to be for the use of the East India Company, or of any other person whatsoever, by any British subject holding or exercising any office or employment under his Majesty, or the Company in the East Indies, shall be deemed to be extortion and a misdemeanor at law, and punished as such. The offender is also to forfeit to the King the present so received, or its full value; but the Court may order such present to be restored to the party who gave it, or may order it, or any part of it, or of any fine which they shall set upon the offender, to be paid to the prosecutor or informer.

An information filed by the Attorney-General charged that the defendant, a British subject, held for a long time an office in the East Indies under the East India Company, viz., the office of resident at Tanjore, and during all that time resided in the East Indies, and that whilst he held the said office, and within six years before the filing of the information, in the East Indies, he did unlawfully receive from a certain person in the East Indies a sum of money, viz., 2,000 rupees, of the value of 200*l.* of lawful money of Great Britain, as a gift and present, against the statute; whereby he was guilty of extortion and a misdemeanor, and by force of the statute had forfeited the sum of

(*l*) *Empson v. Bathurst*, Hutt. 52, where it is said that an obligation made by extortion is against common law, for it is as robbery; and that the sheriff's fee is not due until execution.

(*m*) *Stotesbury v. Smith*, 2 Burr. 924.

(*n*) *Williams v. Lyons*, 8 Mod. 189.

(*o*) *R. v. Broughton*, Trem. P. C. 111. Stark. 588.

(*p*) *R. v. Burdett*, 1 Lord Raym. 149.

(*q*) *R. v. Roberts*, 4 Mod. 101.

(*r*) *R. v. Burdett*, 1 Lord Raym. 149.

(*s*) *R. v. Higgins*, 4 C. & P. 247. Vaughan, B.

(*t*) *R. v. Hamlyn*, 4 Campb. 379.

200*l.*, the value of the said rupees; and the Court of Queen's Bench held that it was no ground to arrest the judgment that the count did not state whether the rupees were Bombay, Madras, or Sicca rupees, or state the value of a single rupee; and that Court and the Court of Exchequer Chamber held that the count was good, although it did not aver that the gift was received by way of extortion or under colour of the office: first, because, supposing the statute were confined to such cases, the information was good after verdict by the 7 Geo. 4, c. 64, s. 21, as it described the offence in the words of the statute creating it; and secondly, because the 33 Geo. 3, c. 52, extended to any receipt of a gift by any officer; for the object of the Legislature was to prevent any officer from receiving any gift or present of money in the East Indies absolutely, whatever the reason of the gift might be; and, although the count did not allege for whose use or pretended use the gift was received; for even if an officer received a present under colour of its being a present to the Queen, he would be guilty of an offence within the statute. (*u*)

Indictment. — Two persons may be indicted jointly for extortion where no fee was due; and there are no accessories in this offence. Upon an indictment against the chancellor and the registrar of a bishop, it was objected that the offices of the defendants were distinct, that what might be extortion in one might not be so in the other, and that therefore the indictment ought not to be joint. But by Parker, C. J., 'this would be an exception if they were indicted for taking more than they ought; but it is only against them for contriving to get money where none is due: and this is an entire charge. For there are no accessories in extortion: but he that is assisting is as guilty as the extortioner, as he that is party to a riot is answerable for the acts of others.' (*v*) And an indictment against three averring that they, *colores officiorum suorum*, took so much, is good, for they might take so much

(*u*) *R. v. Douglas*, 13 Q. B. 42. The jury had found a verdict on several counts, charging receipts of sums in rupees as gifts, after which followed a finding as to each count severally that the sum received, as in the count mentioned, was the sum of so many rupees, which sum of rupees, at the time of receiving them, was of the value of so much British money, being at the rate of 1*s.* 11*d.* per rupee, and the Court of Queen's Bench adjudged fine and imprisonment separately upon each count upon which the defendant was convicted; and further, that the defendant, in pursuance of the statute, do also forfeit to the Queen the several sums following (naming the value of the sums in rupees, as found on each count respectively), the said forfeitures amounting together to the sum of (the aggregate of the values); and further, that the defendant be imprisoned until he shall have paid the said fines and forfeitures. And the Court of Exchequer Chamber held, 1*st*, that this judgment was good, although it did not give the defendant the option of forfeiting the gifts actually received, as the gift itself was money; 2*ndly*, that it was right to estimate the value at the time of the receipt, and not of the convic-

tion; 3*rdly*, that imprisonment in default of paying the forfeiture was rightly awarded, as that forfeiture was not arbitrarily imposed by the Court, but fixed by the statute, and superadded, by authority of the statute, to the other punishments of the offence. The Court of Queen's Bench held that the alterations in the Madras Courts made by several statutes did not preclude the issuing of a mandamus under the 13 Geo. 3, c. 63, s. 40, to examine witnesses, to the Madras Court as finally constituted, and that such a mandamus directed to the Chief Justice and other judges, who were two, of the Madras Supreme Court, requiring them to hold a Court and examine witnesses, was well executed by the Chief Justice and one other judge. See also this case as to what parchment writings are such examinations as are required by the Act to be returned to such a mandamus.

(*v*) *R. v. Loggen*, 1 Str. 75. *Quære*, whether this was not an indictment for a conspiracy to defraud, and not for extortion. But as to the rule, that several persons may be jointly indicted for extortion, see *R. v. Atkinson*, Lord Raym. 1248. 1 Salk. 382.

in gross, and afterwards divide it amongst them, of which the party grieved could have no notice. (*w*)

It is said, that an indictment for extortion may be laid in any county by the 31 Eliz. c. 5, s. 4; (*x*) but this position has been questioned. (*y*) It may be tried and determined by justices of the peace at their sessions by virtue of the term 'extortions' in their commission. (*z*) A count for extortion ought to charge a single offence only; because every extortion from every particular person is a separate and distinct offence, and each offence requires a separate and distinct punishment, and therefore a count charging the defendant with extorting divers sums exceeding the ancient rate for ferrying men and cattle over a river is bad. (*a*) The indictment must state a sum which the defendant received: but it is not material to prove the exact sum as laid in the indictment; so that if a man be indicted for taking extortionately twenty shillings, and there be proof of but one shilling, it will be sufficient. (*b*) An indictment for extortion, where nothing was due, ought to state that nothing was due; (*c*) and if it be for taking more than was due, it ought to show how much was due. (*d*) And the extortionate agreement is not the offence, but the taking; for a pardon after the agreement, and before the taking, does not pardon the extortion. (*e*)

Punishment. — The offence of extortion is punishable at common law by fine and imprisonment; and also by a removal from the office in the execution of which it was committed; (*f*) and there is a further additional punishment by the statute of Westm. 1, c. 26, by which it is enacted, 'that no sheriff nor other King's officer shall take any reward to do his office, but shall be paid of that which they take of the King; and that he who so doth shall yield twice as much, and shall be punished at the King's pleasure.' (*g*) And an action lies to recover this double value. (*h*)

Refusal to serve an office. — It is an offence at common law to refuse to serve an office when duly elected. (*i*) And the refusal of persons to execute ministerial offices to which they are duly appointed, and from the execution of which they have no proper ground of exemption, seems in general to be punishable by indictment.¹

Constables. — Thus it has been held to be indictable for a constable, after he has been duly chosen, to refuse to execute the office, (*j*) or to

(*w*) *Lake's case*, 3 Leon. 268. Com. Dig. tit. *Extortion*.

(*z*) 1 Hawk. P. C. c. 68, s. 6, note (3); Burn's Just. tit. *Extortion*; Stark. Crim. Plead. 385, note (*k*).

(*y*) 2 Hawk. P. C. c. 26, s. 50; 2 Chit. Crim. Law, 294, in the note.

(*x*) *R. v. Loggen*, 1 Str. 75.

(*a*) *R. v. Roberts*, Carth. 226.

(*b*) *R. v. Burdett*, 1 Lord Raym. 149; and see *R. v. Gillham*, 6 T. R. 267.

(*c*) *Lake's case*, 3 Leon. 268. Com. Dig. tit. *Extortion*.

(*d*) Ibid.

(*e*) By Holt, C. J., in *R. v. Burdett*, 1 Lord Raym. 149.

(*f*) 1 Hawk. P. C. c. 68, s. 5. Bac. Abr. tit. *Extortion*.

(*g*) By the 'king's pleasure' is meant by the king's justices before whom the cause depends, and at their discretion, 2 Inst. 210.

(*h*) Com. Dig. 323, tit. *Extortion* (C).

(*i*) *R. v. Bower*, 1 B. & C. 587.

(*j*) *R. v. Lowe*, 2 Str. 92. *R. v. Chapple*, 3 Campb. 91. *R. v. Genge*, Cowp. 13. *R. v. Clerke*, 1 Keb. 393. By the Parish Con-

AMERICAN NOTE.

¹ In America the refusal to serve an office has been held effectual without the consent of the appointing power. *P. v. Porter*, 6

Cal. 26. There are statutes making the refusal to serve penal. See *London v. Heden*, 76 N. C. 72.

refuse to take the oath for that purpose. (*k*) But a person is not liable to serve the office of constable unless he be resident in the parish. Where, therefore, a person occupied a house, and paid all parish rates in respect of it, and carried on the trade of a printer, frequenting the house daily on all working days, and sometimes remaining there during the night at work, but not sleeping in the house, it was held that he was not liable to serve the office of constable in the parish where the house was situated. (*l*) But where a person occupied a warehouse in M., and usually slept at a lodging-house in M. from Monday till Saturday, when he returned to his mother's in H., where he also had premises, and he did suit and service to the court-leet of H., the Court thought that he was liable to be appointed a constable of M. (*m*)

It is sufficient, in an indictment for refusing to execute the office of constable, to state that the defendant unlawfully, &c., 'did neglect and refuse to take upon himself the execution of the said office;' and it is not necessary to state that he refused to be sworn. (*n*) Upon such an indictment, proof that he refused to be sworn is sufficient *prima facie* evidence of a refusal to take the office; but if it were proved that, although not sworn, he had acted as constable, the refusal to take the oath would not prove that he refused to take the office. (*n*)

Where there is a special custom of swearing-in constables, as in the City of London, it is unnecessary to set such custom out in the indictment. (*n*)

Overseers of the poor. — A person is indictable for refusing to take upon himself the office of overseer of the poor. (*o*) For though the 43 Eliz. c. 2, says only that certain persons therein described shall be overseers, and gives no express indictment for a refusal of the office, yet upon the principles of common law, which are that every man shall be indicted for disobeying a statute, the refusal to serve when duly appointed is indictable. (*p*) But there should be previous notice of the appointment, and the indictment should show that the defendant was bound to undertake the office by setting forth how he was elected. (*q*) And if an indictment for refusing to serve the office of constable on being thereto chosen by a corporation do not set forth the prescription of the corporation so to choose, it is bad; for a corporation has no power of common right to choose a constable. (*r*)

An indictment for refusing to execute an office must aver that the party had notice of the appointment. (*s*)

stables Act, 1872, 35 & 36 Vict. c. 92, after the 24 March, 1873, no parish constable shall be appointed except as therein provided.

(*k*) *R. v. Harpur*, 5 Mod. 96. *Fletcher v. Ingram*, 5 Mod. 127.

(*l*) *R. v. Adlard*, 4 B. & C. 772, 7 D. & R. 340. See *Donne v. Martyr*, 8 B. & C. 62.

(*m*) *R. v. Mosley*, 3 A. & E. 488; 5 N. & M. 261. See this case as to what is an excessive fine for refusing to serve the office.

(*n*) *R. v. Brain*, 3 B. & Ad. 614.

(*o*) *R. v. Jones*, 2 Str. 1145; S. C., 7 Mod. 410. 1 Bott. 360, pl. 377. *R. v. Poynder*, 1 B. & C. 178; S. C., 2 D. & R. 258. *R. v. Hall*, 1 B. & C. 123; S. C., 2 D. & R. 241.

(*p*) *R. v. Jones*, 1 Bott. *supra*.

(*q*) *R. v. Harpur*, 5 Mod. 96. In *R. v. Burder*, 4 T. R. 778, it was held that an appointment of an overseer of the poor for the year next ensuing must be understood to be for the overseer's year; and an indictment, stating that the defendant was appointed 'overseer of the poor of the parish of A.' and that he afterwards refused 'to take the said office of overseer of the parish to which he was so appointed,' was held good on demurrer.

(*r*) *R. v. Bernard*, 2 Salk. 52. 1 Lord Raym. 94.

(*s*) *R. v. Fearnley*, 1 T. R. 316. *R. v. White*, Cald. 183. *R. v. Winship*, Cald. 72. *R. v. Kingston*, 8 East, 41.

Disclosing official secrets. — By the Official Secrets Act, 1889, 52 & 53 Vict. c. 52, (t) —

(1.) *a.* 'Where a person for the purpose of wrongfully obtaining information —

- (i.) enters or is in any part of a place belonging to her Majesty the Queen, being a fortress, arsenal, factory, dockyard, camp, ship, office, or other like place, in which part he is not entitled to be; or
- (ii.) when lawfully or unlawfully in any such place as aforesaid, either obtains any document, sketch, plan, model, or knowledge of anything which he is not entitled to obtain, or takes without lawful authority any sketch or plan; or
- (iii.) when outside any fortress, arsenal, factory, dockyard, or camp belonging to her Majesty the Queen, takes or attempts to take without authority given by or on behalf of her Majesty, any sketch or plan of that fortress, arsenal, factory, dockyard, or camp; or
- b.* where a person knowingly having possession of, or control over, any such document, sketch, plan, model, or knowledge as has been obtained or taken by means of any act which constitutes an offence against this Act at any time wilfully and without lawful authority communicates or attempts to communicate the same to any person to whom the same ought not, in the interest of the State, to be communicated at that time; or
- c.* where a person after having been entrusted in confidence by some officer under her Majesty the Queen with any document, sketch, plan, model, or information relating to any such place as aforesaid, or to the naval or military affairs of her Majesty, wilfully and in breach of such confidence communicates the same when, in the interest of the State, it ought not to be communicated;

he shall be guilty of a misdemeanor, and on conviction be liable to imprisonment, with or without hard labour, for a term not exceeding one year, or to a fine, or to both imprisonment and a fine.

(2.) Where a person having possession of any document, sketch, plan, model, or information relating to any fortress, arsenal, factory, dockyard, camp, ship, office, or other like place belonging to her Majesty, or to the naval or military affairs of her Majesty, in whatever manner the same has been obtained or taken, at any time wilfully communicates the same to any person to whom he knows the same ought not, in the interest of the State, to be communicated at that time, he shall be guilty of a misdemeanor, and be liable to the same punishment as if he committed an offence under the foregoing provisions of this section.

(3.) Where a person commits any act declared by this section to be a misdemeanor, he shall, if he intended to communicate to a foreign State any information, document, sketch, plan, model, or knowledge obtained or taken by him, or entrusted to him as aforesaid, or if he communicates the same to any agent of a foreign State, be guilty of felony, and on conviction be liable at the discretion of the Court to

(t) See *R. v. Guernsey*, 1 F. & F. 394.

penal servitude for life, or for any term not less than five years, ^(u) or to imprisonment for any term not exceeding two years, with or without hard labour.'

By Sec. 2. (1.) 'Where a person by means of his holding or having held an office under her Majesty the Queen, has lawfully or unlawfully either obtained possession of or control over any document, sketch, plan, or model, or acquired any information, or at any time corruptly or contrary to his official duty communicates or attempts to communicate that document, sketch, plan, model, or information to any person to whom the same ought not, in the interests of the State, or otherwise in the public interest, to be communicated at that time, he shall be guilty of a breach of official trust.

(2.) A person guilty of a breach of official trust shall —

a. if the communication was made or attempted to be made to a foreign State, be guilty of felony, and on conviction be liable at the discretion of the court to penal servitude for life, or for any term not less than five years, ^(v) or to imprisonment for any term not exceeding two years, with or without hard labour; and

b. in any other case be guilty of a misdemeanor, and on conviction be liable to imprisonment, with or without hard labour, for a term not exceeding one year, or to a fine, or to both imprisonment and a fine.

(3.) This section shall apply to a person holding a contract with any department of the government of the United Kingdom, or with the holder of any office under her Majesty the Queen as such holder, where such contract involves an obligation of secrecy, and to any person employed by any person or body of persons holding such a contract, who is under a like obligation of secrecy, as if the person holding the contract and the person so employed were respectively holders of an office under her Majesty the Queen.'

By Sec. 3. 'Any person who incites or counsels, or attempts to procure, another person to commit an offence under this Act, shall be guilty of a misdemeanor, and on conviction be liable to the same punishment as if he had committed the offence.'

By Sec. 4. 'The expenses of the prosecution of a misdemeanor under this Act shall be defrayed in like manner as in the case of a felony.'

By Sec. 5. 'If by any law made before or after the passing of this Act by the legislature of any British possession provisions are made which appear to her Majesty the Queen to be of the like effect as those contained in this Act, her Majesty may, by Order in Council, suspend the operation within such British possession of this Act, or of any part thereof, so long as such law continues in force there, and no longer, and such order shall have effect as if it were enacted in this Act:

Provided that the suspension of this Act, or of any part thereof, in any British possession shall not extend to the holder of an office under her Majesty the Queen who is not appointed to that office by the Government of that possession.

The expression "British possession" means any part of her Majesty's dominions not within the United Kingdom.'

^(u) Now three years; see 54 & 55 Vict. c. 69.

^(v) Now three years; see 54 & 55 Vict. c. 69.

By Sec. 6. (1.) 'This Act shall apply to all acts made offences by this Act when committed in any part of her Majesty's dominions, or when committed by British officers or subjects elsewhere.

(2.) An offence under this Act, if alleged to have been committed out of the United Kingdom, may be inquired of, heard, and determined, in any competent British court in the place where the offence was committed, or in her Majesty's High Court of Justice in England or the Central Criminal Court, and the Act of the forty-second year of the reign of King George the Third, chapter eighty-five, shall apply in like manner as if the offence were mentioned in that Act, and the Central Criminal Court as well as the High Court possessed the jurisdiction given by that Act to the Court of King's Bench.

(3.) An offence under this Act shall not be tried by any court of general or quarter sessions, nor by the sheriff court in Scotland, nor by any court out of the United Kingdom which has not jurisdiction to try crimes which involve the greatest punishment allowed by law.'

By Sec. 7. (1.) 'A prosecution for an offence against this Act shall not be instituted except by or with the consent of the Attorney-General.

(2.) In this section the expression 'Attorney-General' means the Attorney or Solicitor General for England; and as respects Scotland, means the Lord Advocate; and as respects Ireland, means the Attorney or Solicitor General for Ireland; and if the prosecution is instituted in any court out of the United Kingdom, means the person who in that court is Attorney-General, or exercises the like functions as the Attorney-General in England.'

By Sec. 8. 'In this Act, unless the context otherwise requires —

Any reference to a place belonging to her Majesty the Queen includes a place belonging to any department of the Government of the United Kingdom or of any of her Majesty's possessions, whether the place is or is not actually vested in her Majesty;

Expressions referring to communications include any communication, whether in whole or in part, and whether the document, sketch, plan, model, or information itself or the substance or effect thereof only be communicated;

The expression 'document' includes part of a document;

The expression 'model' includes design, pattern, and specimen;

The expression 'sketch' includes any photograph or other mode of representation of any place or thing;

The expression 'office under her Majesty the Queen,' includes any office or employment in or under any department of the Government of the United Kingdom, and so far as regards any document, sketch, plan, model, or information relating to the naval or military affairs of her Majesty, includes any office or employment in or under any department of the Government of any of her Majesty's possessions.'

By Sec. 9. This Act shall not exempt any person from any proceeding for an offence which is punishable at common law, or by military or naval law, or under any Act of Parliament other than this Act, so, however, that no person be punished twice for the same offence.'

CHAPTER THE SIXTEENTH.

OF BUYING AND SELLING OFFICES.

CONCERNING the sale of offices of a public nature, it has been well observed, that nothing can be more palpably prejudicial to the good of the public, than to have places of the highest concernment, on the due execution whereof the happiness of both king and people depends, disposed of, not to those who are most able to execute them, but to those who are most able to pay for them; nor can anything be a greater discouragement to industry and virtue than to see those places of trust and honour, which ought to be the rewards of persons who by their industry and diligence have qualified themselves for them, conferred on those who have no other recommendation than that of being the highest bidders; neither can anything be a greater temptation to officers to abuse their power by bribery and extortion, and other acts of injustice, than the consideration of having been at a great expense in gaining their places, and the necessity of sometimes straining a point to make their bargain answer their expectations. (a)

The buying and selling such offices has therefore been considered an offence *malum in se*, and indictable at common law. (b) In a case of an indictment for a conspiracy to obtain money, by procuring from the lords of the Treasury the appointment of a person to an office in the customs, it was proposed to argue that the indictment was bad on the face of it, as it was not a misdemeanor at common law to sell or to purchase an office like that of coast-waiter. But Lord Ellenborough, C. J., said that if that were to be made a question, it must be debated on a motion in arrest of judgment, or on a writ of error; but that, after reading the case of *R. v. Vaughan*, (c) it would be very difficult to argue that the offence charged in the indictment was not a misdemeanor. And Grose, J., afterwards, in passing sentence, said that there could be no doubt but that the offence charged was clearly a misdemeanor at common law. (d)

The case of *R. v. Vaughan* was an attempt only to bribe a cabinet minister and a member of the Privy Council to give the defendant an office in the colonies. (e) And where the defendant, who was clerk to the agent for the French prisoners of war at Porchester Castle, took bribes in order to procure the exchange of some of them out of their turn, it appears to have been made the subject of an indictment. (f)

(a) 1 Hawk. P. C. c. 67, s. 3. Bac. Abr. tit. *Offices and Officers*.

(b) *Stockwell v. North*, 102, Moor, 781, S. C.

(c) 4 Burr. 2494.

(d) *R. v. Pollman*, 2 Campb. 229.

(e) 4 Burr. 2494. A criminal information

was granted against the defendant for offering the Duke of Grafton, then First Lord of the Treasury, the sum of £5,000 as a bribe to procure the reversion of the office of clerk of the Supreme Court of the island of Jamaica.

(f) *R. v. Beale*, cited in *R. v. Gibbs*, 1 East, R. 183.

But it has been endeavoured to prevent the mischiefs of buying and selling offices, by several statutes.

The 12 Rich. 2, c. 2, enacted, 'that the chancellor, treasurer, keeper of the privy seal, steward of the King's house, the King's chamberlain, clerk of the rolls, the justices of the one bench and of the other, barons of the Exchequer, and all other that shall be called to ordain, name, or make, justices of the peace, sheriffs, escheaters, customers, comptrollers, or any other officer or minister of the King, shall be firmly sworn that they shall not ordain, name, or make, any of the above-mentioned officers for any gift or brokage, favour or affection; nor that none which pursueth by himself, or by other, privily or openly, to be in any manner of office, shall be put into the same office, or in any other, but that they make all such officers and ministers of the best and most lawful men, and sufficient to their estimation and knowledge.' (*g*)

The 50 & 51 Vict. c. 55, s. 19, provides that 'a sheriff shall not let to farm his county or any part thereof.' (*h*)

But a principal statute relating to this subject is the 5 & 6 Edw. 6, c. 16, (*i*) which, for the avoiding corruption which might thereafter happen in the officers, in places wherein there is requisite to be had the true administration of justice or services of trust, and to the intent that persons worthy and meet to be advanced should thereafter be preferred, enacts, that if any person bargain or sell any office, or deputation of office, or take any money or profit directly or indirectly, or any promise, &c., bond, or any assurance to receive any money, &c., for any office or deputation of office, or to the intent that any person should have, exercise, or enjoy any office or the deputation of any office, which office, or any part or parcel thereof, shall in anywise concern the administration or execution of justice, or the receipt, controlment, or payment of the King's treasure, rent, revenue, &c., or any the King's customs, or the keeping the King's towns, castles, &c., used for defence, or which shall concern any clerkship in any court of record where justice is ministered; the offender shall not only forfeit all his right to such office or deputation of office, but also shall be adjudged a person disabled to have, occupy, or enjoy such office or deputation. The statute further enacts, that such bargains, sales, bonds, agreements, &c., shall be void; (*j*) and provides that the Act shall not extend to any office whereof any person shall be seised of any estate of inheritance, nor to any office of the keeping of any park, house, manor, garden, chase, or forest. (*k*) It provides also that all judgments given or things done by offenders, after the offence and before the offender shall be removed from the exercise of the office or deputation, shall be good and sufficient in law.

(*g*) For the exposition of this statute, see the Earl of Macclesfield's trial, 6 Sta. Tri. 477: 16 Howells Sta. Tri. 767.

(*h*) By s. 27. 'A person shall not directly or indirectly by himself or by any person in trust for him or for his use buy, sell, let, or take to farm the office of under-sheriff, deputy sheriff, bailiff, or any other office or place appertaining to the office of sheriff, nor contract for promise or grant for any valuable consideration whatever any such office or place, nor give promise or receive any

valuable consideration whatever for any such office or place.' Any person acting in contravention of the section not being an under sheriff, deputy sheriff, bailiff, or sheriff's officer is to be punished as if he were such. As to the punishment, see s. 29, *ante*, p. 423.

(*i*) Repealed, 'so far as regards the revenue of customs, or offices in the service of the customs,' by 6 Geo. 4, c. 105, s. 10.

(*j*) Sec. 3.

(*k*) Sec. 4.

It has been held that the offices of chancellor, registrar, and commissary in ecclesiastical courts, are within the meaning of this statute; (*l*) also the place of cofferer, (*m*) and that of surveyor of the customs; (*n*) and the place of customer of a port; (*o*) and the offices of collector and supervisor of the excise; (*p*) and in a writ of error on a judgment in Ireland it was held that the offices of clerk of the crown, and clerk of the peace, were within the statute. (*q*) But offices in fee have been held to be out of the statute; (*r*) and the sale of a bailiwick of a hundred is not within it, for such an office does not concern the administration of justice, nor is it an office of trust. (*s*) And for the like reason the office of clerk to the deputy registrar in the prerogative Court of Canterbury is not within the Act. (*t*) It has also been adjudged that a seat in the six clerks' office is not within the statute, being a ministerial office only; (*u*) and it was held that it did not extend to military officers, (*v*) nor to the purser of a ship, (*w*) but this last decision was doubted; (*x*) and in a later case it was said by Lord Mansfield, that if the Lords of the Admiralty were to take money for their warrant to appoint a person to be a purser, it would be criminal in the corruptor and corrupted (*y*) It was decided also that this statute did not extend to the plantations. (*z*) But with respect to military and naval commissions, and the different places in the public departments of government, the colonies or plantations, or in the appointment of the East India Company, alterations have been made by statute, which will be presently mentioned.

One who makes a contract for an office contrary to the purport of this statute, is so far disabled to hold the same, that he cannot at any time during his life be restored to a capacity of holding it by any grant or dispensation whatever. (*a*)

With regard to the *deputation* of an office, it is held that where an office is within the statute, and the salary is certain, if the principal make a deputation reserving a less sum out of the salary, it is good; so, if the profits be uncertain, arising from fees, if the principal make a deputation reserving a certain sum out of the fees and profits of the office, it is good: for in these cases the deputy is not to pay unless the profits arise so much; and though a deputy by his constitution is in place

(*l*) 12 Co. 78. 3 Inst. 148. Cro. Jac. 269. 1 Hawk. P. C. c. 67, s. 4.

(*m*) Sir Arthur Ingram's case, 3 Bulst. 91. S. C., Co. Lit. 234, where it is said that the king could not dispense with this statute by any *non obstante*; and Cro. Jac. 385, S. C. is cited.

(*n*) 2 And. 55, 107.

(*o*) 1 H. Blac. 327.

(*p*) Law v. Law, Cas. temp. Talb. 140. 3 P. Wms. 391, S. C.

(*q*) Macarty v. Wickford, Trin. 9 Geo. 2, B. R. Bac. Abr. *Offices and Officers* (F.). It was also held in this case, that the statute did not extend to Ireland. But see *post*, 49 Geo. 3, c. 126.

(*r*) Ellis v. Ruddle, 2 Lev. 151.

(*s*) Godbolt's case, 4 Leon. 33. 4 Mod. 223, S. C. cited.

(*t*) Aston v. Gwinnell, 3 Y. & J. 136.

(*u*) Sparrow v. Reynold, Pasch. 26 Car. 2, C. B. Bac. Abr. *Offices and Officers* (F.).

(*v*) 1 Vern. 98.

(*w*) 2 Vern. 308. Ca. temp. Talb. 40.

(*x*) See 1 H. Blac. 326, where it is said by Lord Loughborough, C. J., that the case in 2 Vern. is contrary to an evident principle of law.

(*y*) Purly v. Stacy, 5 Burr. 2698.

(*z*) Blankard v. Galdy, 4 Mod. 222. 2 Salk. 411. 2 Lord Raym. 1245, S. C. cited, 2 Mod. 45. S. P. undetermined; and see Bac. Abr. *Offices and Officers* (F.). But if the office, though in the plantations, had been granted under the great seal of England, the sale of it would have been held criminal at common law. See the judgment of Lord Mansfield in R. v. Vaughan, 4 Burr. 2500.

(*a*) Hob. 75. Co. Lit. 234. Cro. Car. 361 Cro. Jac. 386. Ca. temp. Talb. 107.

of his principal, yet he has no right to his fees, they still continuing to be the principal's; so that, as to him, it is only reserving a part of his own, and giving away the rest to another. But where the reservation or agreement is not to pay out of the profits, but to pay generally a certain sum, it must be paid at all events; and a bond for performance of such agreement is void by the statute. (*b*)

But this statute has been much extended by the 49 Geo. 3, c. 126, which, after reciting it, enacts, 'that all the provisions therein contained shall extend to Scotland and Ireland, and to all offices in the gift of the crown, or of any office appointed by the crown; and all commissions, civil, naval, or military; and to all places and employments, and to all deputations to any such offices, commissions, places, or employments, in the respective departments or offices, or under the appointment or superintendence and control of the lord high treasurer, or commissioners of the Treasury, the secretary of state, the lords commissioners for executing the office of lord high admiral, [*the master-general and principal officers of his Majesty's ordnance, (c)*] the commander-in-chief [*the secretary at war, the paymaster-general of his Majesty's forces, the commissioners for the affairs of India, the commissioners of the excise, the treasurer of the navy, the commissioners of the navy, the commissioners for victualling, the commissioners of transport, the commissary-general, the store-keeper general, (c)*] and also the principal officers of any other public department or office of his Majesty's government in any part of the United Kingdom, or in any of his Majesty's dominions, colonies, or plantations, which now belong or may hereafter belong to his Majesty; and also to all offices, commissions, places, and employments belonging to or under the appointment or control of the East India Company, (*d*) in as full and ample a manner as if the provisions of the said Act were repeated, and made part of this Act; and the said Act and this Act shall be construed as one Act, as if the same had been herein repeated and re-enacted.'

Sec. 3. 'If any person or persons shall sell, or bargain for the sale of, or receive, have, or take any money, fee, gratuity, loan of money, reward, or profit, directly or indirectly, or any promise, agreement, covenant, contract, bond or assurance; or shall by any way, device, or means, contract or agree to receive or have any money, fee, gratuity, loan of money, reward or profit, directly or indirectly; and also if any person or persons shall purchase, or bargain for the purchase of, or give or pay any money, fee, gratuity, loan of money, reward or profit, or make or enter into any promise, agreement, covenant, contract, bond, or assurance to give or pay any money, fee, gratuity, loan of money, reward or profit; or shall by any ways, means, or device, contract or agree to give or pay any money, fee, gratuity, loan of money, reward, or profit, directly or indirectly, for any office, commission, place or em-

(*b*) *Bac. Abr. Offices and Officers* (F.). 1 Hawk. P. C. c. 87, s. 5. Salk. 468. 6 Mod. 234. *Godolphin v. Tudor*, Comb. 356, S. P.

(*c*) The parts within brackets are repealed by 35 & 36 Vict. c. 97.

(*d*) By the 33 Geo. 3, c. 52, s. 66, it was enacted that the making or entering into or being a party to any corrupt bargain or con-

tract, for the giving up or obtaining, or in any other manner touching or concerning the trust and duty of any office or employment under the crown, or the East India Company, by any British subject there resident, should be deemed a misdemeanor. See 21 & 22 Vict. c. 106, the Act for transferring the government of India to her Majesty.

ployment, specified or described in the said recited Act (5 & 6 Edw. 6, c. 16), or this Act, or within the true intent or meaning of the said Act, or this Act, or for any deputation thereto, or for any part, parcel, or participation of the profits thereof, or for any appointment or nomination thereto, or resignation thereof, or for the consent or consents, or voice or voices of any person or persons, to any such appointment, nomination, or resignation; then and in every such case, every such person, and also every person who shall wilfully and knowingly aid, abet or assist such person therein, shall be deemed and adjudged guilty of a misdemeanor.'

Sec. 4. 'If any person or persons shall receive, have or take, any money, fee, reward, or profit, directly, or indirectly, or take any promise, agreement, covenant, contract, bond, or assurance, or by any way, means, or device, contract or agree to receive or have any money, fee, gratuity, loan of money, reward or profit, directly or indirectly, for any interest, solicitation, petition, request, recommendation, or negotiation whatever, made or to be made, or pretended to be made, or under any pretence of making, or causing or procuring to be made, any *interest, solicitation, petition, request, recommendation, or negotiation*, in or about or in anywise touching, concerning, or relating to, any nomination, appointment, or deputation to, or resignation of, any such office, commission, place, or employment, as aforesaid, or under any pretence for using or having used any interest, solicitation, petition, request, recommendation, or negotiation, in or about any such nomination, appointment, deputation, or resignation, or for the obtaining or having obtained the consent or consents, or voice or voices, of any person or persons as aforesaid to such nomination, appointment, deputation, or resignation; and also if any person or persons shall give or pay, or cause or procure to be given or paid, any money, fee, gratuity, loan of money, reward, or profit, or make, or cause, or procure to be made, any promise, agreement, covenant, contract, bond, or assurance, or by any way, means, or device, contract or agree, or give or pay, or cause or procure to be given or paid, any money, fee, gratuity, loan of money, reward, or profit, for any solicitation, petition, request, recommendation, or negotiation whatever, made or to be made, that shall in anywise touch, concern, or relate to any nomination, appointment, or deputation to, or resignation of, any such office, commission, place, or employment as aforesaid, or for the obtaining or having obtained, directly or indirectly, the consent or consents, or voice or voices, of any person or persons as aforesaid, to any such nomination, appointment, deputation, or resignation; and also if any person or persons shall, for or in expectation of gain, fee, gratuity, loan of money, reward, or profit, solicit, recommend, or negotiate, in any manner, for any person or persons, in any matter that shall in anywise touch, concern, or relate to, any such nomination, appointment, deputation, or resignation aforesaid, or for the obtaining, directly or indirectly, the consent or consents, or voice or voices, of any person or persons to any such nomination, appointment, or deputation, or resignation aforesaid, then and in every such case every such person, and also every person who shall wilfully and knowingly aid, abet, or assist, such person therein, shall be deemed and adjudged guilty of a misdemeanor.'

Sec. 5. If any person shall open or keep any house or place for the soliciting or negotiating any business relating to vacancies in offices, &c., in or under any public department, or to the sale or purchase of such offices, or appointment to them, or resignation, transfer, or exchange of them, such offender, and every person aiding or assisting therein, is guilty of a misdemeanor. And by sec. 6, any person advertising any office, place, &c., or the name of any person as broker, &c., or printing any advertisement or proposal for such purposes, is liable to a penalty of 50*l*.

There are, however, several exceptions from the provisions of this statute, and it did not extend to purchases and exchanges of commissions in his Majesty's forces, at the regulated prices; or to anything done in relation thereto by authorized regimental agents not advertising and not receiving money, &c., in that behalf. But officers receiving, or paying, or agreeing to pay, more than the regulated prices, or paying agents for negotiating, on conviction by a court-martial, forfeited their commissions, and were cashiered.

By 38 Vict. c. 16, 'The Regimental Exchange Act, 1875,' sec. 2, her Majesty may, from time to time, by regulation, authorize exchanges to be made by officers in her Majesty's regular forces from one regiment or corps to another regiment or corps, on such conditions as to her Majesty may for the time being seem expedient, and nothing contained in the Army Brokerage Acts shall extend to any exchanges made in manner authorized by any regulation of her Majesty for the time being in force.'

Sec. 3. The expression 'The Army Brokerage Acts' means the Acts following: The 5 & 6 Ed. 6, c. 16, and 49 Geo. 3, c. 126.

The 49 Geo. 3, c. 126, also provides, that it shall not extend to any office excepted from the 5 & 6 Ed. 6, c. 16, or to any office which was legally saleable before the passing of this Act, and in the gift of any person by virtue of any office of which such person is or shall be possessed under any patent or appointment for his life. (*e*)

With respect to *deputations* to offices, it is enacted, that the Act shall not extend to prevent or make void any deputation to any office, in any case in which it is lawful to appoint a deputy, or any agreement, &c., lawfully made in respect of any allowance or payment to such principal or deputy respectively, out of the fees or profits of such office. (*f*)

Annual reservations, charges, or payments, out of fees or profits of any office, to any person who shall have held such office, in any commission, or appointment of any person succeeding to such office, and agreements, &c., for securing such reservations, charges, or payments, are also excepted; provided that the amount of the reservations, &c., and the circumstances and reasons under which they shall have been permitted, shall be stated in the commission or instrument of appointment of the successor. (*g*)

The statute enacts, that when the right, estate, or interest, of any person shall be forfeited under any of its provisions, or the provisions

(*e*) Id. s. 9. See 35 & 36 Vict. c. 97.

(*f*) 49 Geo. 3, c. 126, s. 10. And see *ante*, p. 435.

(*g*) Id. s. 11.

of the 5 & 6 Ed. 6, c. 16, the right of such appointment shall vest in the King. (*h*)

Offences against this Act, or the 5 & 6 Ed. 6, c. 16, by any governor, lieutenant-governor, or person having the chief command, civil or military, in his Majesty's dominions, colonies, or plantations, or his secretary, may be prosecuted and determined in the Court of Queen's Bench at Westminster, in the same manner as any crime, &c., committed by any person holding a public employment abroad may be prosecuted under the provisions of the 42 Geo. 3, c. 85. (*i*)

Where by an agreement, reciting that the plaintiff carried on the business of a law stationer, and was sub-distributor of stamps, collector of assessed taxes, and agent for the Birmingham Fire Office, and that being desirous of giving up his said business, he had agreed with the defendant for the sale of the same for the sum of 300*l.*, it was witnessed that, in consideration of the sum of 300*l.*, the plaintiff agreed to sell and the defendant agreed to buy all the said business of a law stationer so carried on by the plaintiff, and all his goodwill and interest therein, and that the plaintiff should not at any time afterwards carry on the business of a law stationer, or collect any of the assessed taxes, but would use his utmost endeavours to introduce the defendant to the said business and offices; it was held that the agreement was a contract for the sale of the offices of sub-distributor of stamps and collector of assessed taxes, and illegal within both the 5 & 6 Ed. 6, c. 16, and 49 Geo. 3, c. 126. It was one entire contract, and the defendant could not be called upon to pay, except upon the performance by the plaintiff of the whole consideration. According to the plain words of the agreement, a part of the consideration was the agreement by the plaintiff to recommend the defendant to the offices, which was prohibited by the statutes. (*k*)

Where a British subject, being a lieutenant in a regiment in the East Indian service, and divers other officers in the said regiment agreed with A. G., that the said lieutenant and other officers should subscribe and pay to the said A. G., being a major and their senior in the said regiment, and that he should accept from them a certain sum of money in consideration of his resigning his said position as major in the said regiment, and creating a vacancy of major therein, and the money was paid to A. G., and he resigned his said position in pursuance of the said agreement; it was held that the agreement was illegal, under the 49 Geo. 3, c. 126, s. 4, and that a bond given in pursuance of it was void. (*l*)

The sale of an East India Director's nomination to a cadetship is within the 49 Geo. 3, c. 126, s. 3, although by the practice of the company such nomination is given only in the form of a presentation of the party by the director to the Court of Directors, 'provided he shall appear to' them 'eligible for that station,' and he must afterwards be examined by the committee appointed for that purpose, and passed: and although the nomination only gives the party, when examined and passed, a right to go out to India, which he must do at his own expense, and obtain a commission on his landing; but before that time

(*h*) *Id.* s. 2.

(*i*) *Id.* s. 14.

(*k*) *Hopkins v. Prescott*, 4 C. B. 578.

(*l*) *Græme v. Wroughton*, 11 Exch. 146.

he receives no pay from the Company, and is not under their control. For the object of the enactment was to prevent all corrupt bargains for the sale of patronage in matters of public concernment; and with that view it is immaterial whether that to which the nomination is sold can be described with most critical correctness by any of the terms, 'office, commission, place, or employment.' And a cadetship may be described in an indictment under the Act as an 'office, commission, place, and employment.' (*m*)

A., an attorney, who held the offices of clerk of the peace for a liberty, clerk to the commissioners of land and assessed taxes, clerk to the commissioners of sewers, clerk to the magistrates, clerk to the deputy-lieutenants, steward of divers manors, and coroner to the said liberty, entered into articles of partnership with B., by which, after reciting that he held many offices, &c., and that it had been agreed that they should enter into partnership 'in the said business and in the emoluments of the said offices, &c., upon the terms thereafter expressed,' it was agreed that they should enter into partnership for twenty years, and that 'all the profits and emoluments arising from the said offices,' &c., during the said partnership should be considered as partnership property, and distributed accordingly; it was also agreed that if A. died within the term, then, during such period as no son of A. should be a partner in the said business, B. should be interested in one moiety of the said business, and the executors of A. should be entitled to the profits of the other moiety of the said business, to be applied as part of his personal estate; and it was held that the agreement was not a contract for the sale of an office within the 5 & 6 Ed. 6, c. 16, or 49 Geo. 3, c. 126. (*n*)

Where a count of an indictment for a misdemeanor in the sale of the office of a chaplain in the East Indies, alleged that the defendants unlawfully and corruptly did contract and agree with D. N. to procure the appointment to a certain office and employment under the appointment and control of the East India Company, to wit, the office and employment of a chaplain in India, of a person duly qualified for the said office to be named by the said D. N. in that behalf; it was held that the count was bad; for the contract or agreement must be to receive money or profit, and the word 'corruptly,' is not sufficient to bring it within the Act. (*o*)

By the Public Bodies (Corrupt Practices) Act, 1889, 52 & 53 Vict. c. 69, s. 1, —

(1) 'Every person who shall, by himself, or by or in conjunction with any other person, corruptly solicit or receive, or agree to receive for himself or for any other person, any gift, loan, fee, reward, or advantage (*p*) whatever, as an inducement to, or reward for, or other-

(*m*) *R. v. Charretie*, 13 Q. B. 447. See now, as to appointments to cadetships in India, 21 & 22 Vict. c. 106, the Act for transferring the government of India to her Majesty; and 24 & 25 Vict. c. 104.

(*n*) *Sterry v. Clifton*, 9 C. B. 110. It was also held that the latter clause was not a violation of the 22 Geo. 2, c. 46, s. 11, repealed by the 7 & 8 Vict. c. 73.

(*o*) *Samo v. R.*, 2 Cox, C. C. 178.

(*p*) By s. 7 'The expression "advantage"'

includes any office or dignity and any forbearance to demand any money or money's worth or valuable thing, and includes any aid, vote, consent, or influence, or pretended aid, vote, consent, or influence, and also includes any promise or procurement of or agreement or endeavour to procure, or the holding out of any expectation of any gift, loan, fee, reward, or advantage as before defined.'

wise on account of any member, officer, or servant of a public body, as in this Act defined, (*q*) doing, or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which the said public body is concerned shall be guilty of a misdemeanor.’

(2) ‘Every person who shall by himself or by or in conjunction with any other person, corruptly give, promise, or offer any gift, loan, fee, award, or advantage whatsoever, to any person whether for the benefit of that person, or of another person, as an inducement to, or reward for, or otherwise, on account of any member, officer, or servant of any public body, as in this act defined, (*r*) doing, or forbearing to do, anything in respect of any matter or transaction whatsoever, actual or proposed, in which such public body as aforesaid is concerned, shall be guilty of a misdemeanor.’

By sec. 2, ‘any person, on conviction, for offending as aforesaid, shall, at the discretion of the court before which he is convicted, —

- a. be liable to be imprisoned for any period not exceeding two years, with or without hard labour, or to pay a fine not exceeding 500*l.*, or to both such imprisonment and such fine; and
- b. in addition, be liable to be ordered to pay to such body, and in such manner as the court directs, the amount or value of any gift, loan, fee, or reward received by him, or any part thereof; and
- c. be liable to be judged incapable of being elected or appointed to any public office for seven years from the date of his conviction, and to forfeit any such office held by him at the time of his conviction; and
- d. in the event of a second conviction for a like offence, he shall, in addition to the foregoing penalties, be liable to be adjudged forever incapable of holding any public office, and to be incapable for seven years of being registered as an elector, or voting at an election, either of members to serve in Parliament or of members of any public body, and the enactments for preventing the voting and registration of persons declared, by reason of corrupt practices, to be incapable of voting, shall apply to a person adjudged in pursuance of this section to be incapable of voting; and
- e. if such person is an officer or servant in the employ of any public body, upon such conviction, he shall, at the discretion of the court, be liable to forfeit his right and claim to any compensation or pension to which he would otherwise have been entitled.’

By sec. 3 (1.) ‘Where an offence under this Act is also punishable under any other enactment or at common law, such offence may be prosecuted and punished either under this Act, or under the other enactment, or at common law, but so that no person shall be punished twice for the same offence.’

(2.) ‘A person shall not be exempt from punishment under this

(*q*) By s. 7 ‘The expression “public body” means any council of a county or county of a city or town, any council of a municipal borough, also any board, commissioners, select vestry, or other body which has power to act under and for the purposes of any Act relating to local government or the

public health or to poor law, or otherwise to administer money raised by rates in pursuance of any public general Act, but does not include any public body as above defined existing elsewhere than in the United Kingdom.’

(*r*) Sec. 7, *ante*.

Act by reason of the invalidity of the appointment or election of a person to a public office.'

Sec. 4 provides that no prosecution under the Act shall be instituted except by or with the consent of the Attorney-General.

By sec. 5 the expenses of the prosecution of an offence against this Act shall be defrayed in like manner as in the case of a felony.

By sec. 6 offences under the Act are made triable at Quarter Sessions.

CHAPTER THE SEVENTEENTH.

OF BRIBERY AND OFFENCES AT PARLIAMENTARY AND MUNICIPAL ELECTIONS. (a)

Bribery.¹—Bribery is the receiving or offering any undue reward by or to any person whatsoever, whose ordinary profession or business relates to the administration of public justice, in order to influence his behaviour in office, and incline him to act contrary to the known rules of honesty and integrity. (b) And it seems that this offence will be committed by any person in an official situation, who shall corruptly use the power or interest of his place for rewards or promises: as in the case of one who was clerk to the agent for French prisoners of war, and indicted for taking bribes in order to procure the exchange of some of them out of their turn. (c) And bribery sometimes signifies the taking or giving of a reward for offices of a public nature. (d) Corrupt and illegal practices in giving rewards or making promises, in order to procure votes in the elections of members to serve in Parliament, are also denominated bribery, and punishable. (e) So giving refreshments to voters before they vote, in order to induce them to vote for a particular candidate, is bribery at common law. (f) And the attempt to influence persons serving as jurymen corruptly to one side, by gifts or promises (which, with other practices tending to influence a jury, will be considered in treating of the crime called *embracery*), (g) may be mentioned as a species of bribery.

The law abhors the least tendency to corruption; and upon the principle which has been already mentioned, of an attempt to commit a misdemeanor, being itself a misdemeanor; (h) *attempts to bribe*,² though unsuccessful, have in several cases been held to be criminal. Thus, it is laid down generally, that if a party offers a bribe to a

(a) Illegal practices and illegal payments at elections are punishable on summary conviction, and are therefore not within the scope of this work.

(b) 3 Inst. 149. 1 Hawk. P. C. c. 67, s. 2. 4 Blac. Com. 139.

(c) R. v. Beale, E. T. 38 Geo. 3, cited in R. v. Gibbs, 1 East, R. 183; and see R. v. Vaughan, 4 Burr. 2494, *ante*, p. 435.

(d) 1 Hawk. P. C. c. 67, s. 3. As to this species of bribery, see the preceding Chapter.

(e) R. v. Pitt, 3 Burr. 1338. 2 Geo. 2, c. 24. 49 Geo. 3, c. 118.

(f) Hughes v. Marshall, 2 Tyrw. 184; S. C., 2 C. & J. 118. 5 C. & P. 151.

(g) *Post*, Chap. XXII.

(h) *Ante*, p. 196.

AMERICAN NOTES.

¹ Many statutes have been passed in America as well as in England upon the subject of bribery, but it is impossible even to refer to them in this work.

² An agreement to use a supposed influence with a street commissioner to induce

him to allow certain claims is illegal. *Devlin v. Brady*, 32 Barb. 518. And an offer of money to a member of a common council to vote for laying a railroad track. *S. v. Ellis*, 4 Vroom, 102; 97 Am. D. 707. *Bishop*, ii. s. 86.

judge, meaning to corrupt him in a case depending before him, and the judge takes it not; yet this is an offence punishable by law in the party that offers it. (*i*) And it has been held to be a misdemeanor to attempt to bribe a cabinet minister, and a member of the Privy Council, to give the defendant an office in the colonies. (*j*) And an information was granted against a man for promising money to a member of a corporation, to induce him to vote for the election of a mayor. (*k*) Paying or promising to pay for votes at the election of an assistant overseer is bribery and indictable at common law. (*l*) An information also appears to have been exhibited against a person for attempting by bribery to influence a juryman in giving his verdict. (*m*)

By the 46 & 47 Vict. c. 41, s. 7, 'Every person who receives any money or valuable consideration from the person to whom a boy is bound apprentice to the sea-fishing service, or to whom a boy under sixteen years of age is bound by any agreement with respect to the sea-fishing service, or from any one on his behalf, or from the boy or any one on his behalf in consideration of the boy being so bound, and every person who makes or causes to be made any such payment, shall be guilty of a misdemeanor whether such boy was or was not validly bound apprentice, or was or was not validly bound by such agreement.'

Bribery at elections for members of Parliament was always a crime at common law, and consequently punishable by indictment or information; (*n*) but in order to enforce the common law, and because it had not been found sufficient to prevent the evil, considerable penalties have been imposed upon this offence by different statutes. It would not be within the scope of the present work to deal fully with the subject of bribery and corruption. Only those portions of the various Acts of Parliament which deal with bribery as a crime or misdemeanor are here alluded to, and the reader is referred to other works for more general information upon the subject.

The 17 & 18 Vict. c. 102 (*o*) consolidated and amended the laws relating to bribery, treating, and undue influence at elections of members of Parliament.

Sec. 2. 'The following persons shall be deemed guilty of bribery, and shall be punishable accordingly:—

1. 'Every person who shall, directly or indirectly, by himself, or by any other person on his behalf, (*p*) give, lend, or agree to give or lend, or shall offer, promise, (*q*) or promise to procure, or to endeavour to procure, any money, or valuable consideration, to or for any voter, or to or for any person on behalf of any voter, or to or for any other person in order to induce any voter to vote, or refrain from voting, or

(*i*) 3 Inst. 147. *R. v. Vaughan*, 4 Burr. 2500. *Ante*, p. 435.

(*j*) *Vaughan's case*, 4 Burr. 2494; and see *R. v. Pollman*, 2 Campb. 229.

(*k*) *Plympton's case*, 2 Ld. Raym. 1377.

(*l*) *R. v. Lancaster*, 16 Cox, C. C. 737.

(*m*) *Young's case*, cited in *R. v. Higgins*, 2 East, R. 14 and 16.

(*n*) *R. v. Pitt*, 3 Burr. 1335, by Lord Mansfield, C. J.

(*o*) See the interpretation clause, s. 38, *post*, p. 447.

(*p*) See *Cooper v. Slade*, 6 H. L. C. 746.

(*q*) A letter was written to an outvoter, requesting him to come to a borough, and record his vote for S. A postscript added, 'Your railway expenses will be paid.' The voter did come and vote as requested: his travelling expenses were paid. Held, that the promise and payment constituted only one act of bribery within this section. *Cooper v. Slade*, 6 H. L. C. 746. This was an action for penalties.

shall corruptly do any such Act as aforesaid, on account of such voter having voted or refrained from voting at any election :

2. 'Every person who shall, directly or indirectly, by himself or by any other person on his behalf, give or procure, or agree to give or procure, or offer, promise, or promise to procure or to endeavour to procure, any office, place, or employment to or for any voter, or to or for any person on behalf of any voter, or to or for any other person, in order to induce such voter to vote, or refrain from voting, or shall corruptly do any such Act as aforesaid, on account of any voter having voted or refrained from voting at any election :

3. 'Every person who shall, directly or indirectly, by himself or by any other person on his behalf, make any such gift, loan, offer, promise, procurement, or agreement as aforesaid, to or for any person, in order to induce such person to procure, or endeavour to procure, the return of any person to serve in Parliament, or the vote of any voter at any election :

4. 'Every person who shall, upon or in consequence of any such gift, loan, offer, promise, procurement, or agreement, procure or engage, promise, or endeavour to procure the return of any person to serve in Parliament, or the vote of any voter at any election :

5. 'Every person who shall advance or pay, or cause to be paid, any money to or to the use of any other person with the intent that such money or any part thereof shall be expended in bribery at any election, or who shall knowingly pay or cause to be paid any money to any person in discharge or repayment of any money wholly or in part expended in bribery at any election.

'Provided always, that the aforesaid enactment shall not extend or be construed to extend to any money paid or agreed to be paid for or on account of any legal expenses *bonâ fide* incurred at or concerning any election.'

Sec. 3. 'The following persons shall also be deemed guilty of bribery, and shall be punishable accordingly :—

1. 'Every voter who shall, before or during any election, directly or indirectly, by himself or by any other person on his behalf, receive, agree, or contract for any money, gift, loan, or valuable consideration, office, place, or employment for himself or for any other person, for voting or agreeing to vote, or for refraining or agreeing to refrain from voting, at any election :

2. 'Every person who shall, after any election, directly or indirectly, by himself or by any other person on his behalf, receive any money or valuable consideration on account of any person having voted or refrained from voting, or having induced any other person to vote or to refrain from voting, at any election.'

By 30 & 31 Vict. c. 102 (The Representation of the People Act, 1867), s. 49, 'Any person, either directly or indirectly, corruptly paying any rate on behalf of any ratepayer for the purpose of enabling him to be registered as a voter, thereby to influence his vote at any future election, and any candidate or other person, either directly or indirectly, paying any rate on behalf of any voter for the purpose of inducing him to vote or refrain from voting, shall be guilty of bribery, and be punished accordingly ; and any person on whose behalf, and with whose

privity any such payment as in this section is mentioned, is made, shall also be guilty of bribery, and punishable accordingly.'

Where a test ballot was resorted to in order to determine which of three candidates should stand, it was held that bribery at such test ballot was within the above Act, 17 & 18 Vict. c. 102, sec. 2, sub-sec. 3. (*r*) Payments made to a voter for loss of time while going to deliver his vote are payments for voting, and constitute bribery. (*s*) So corruptly paying rates for the purpose of enabling a ratepayer to be registered and influencing his vote at a future election, is made bribery by the Representation of the People Act, 1867, (*t*) and payment corruptly given for attendance at a revising court may amount to bribery. (*u*) So also money given to induce a voter to vote under colour of a bet would be bribery. It has never been decided that a wager upon an election is bribery *per se*, nor does it seem that it would be so considered. If done corruptly there can be little doubt that it would be bribery. (*v*) A corrupt promise of refreshments to voters to induce them to vote is bribery. (*w*) So also the giving of money ostensibly for the purposes of charity may be an act of bribery if done corruptly. (*x*) So also it seems payment of money to induce a person to personate a voter is bribery. (*y*) A voter may be bribed though he is disqualified. (*z*) It should be observed that it is immaterial at what time before the election the act of bribery is committed if it be done with a view to influence a voter at a coming election. (*a*)

It seems that payment of money to a voter after the election is over for having voted is not bribery unless there was a corrupt promise before the election to pay him. (*b*)

A parliamentary election was about to take place at C.; S. was one of the candidates. In the committee-room of S. the question was discussed whether paying the expense of bringing up out-voters was legal. S., after referring to a law book, said that it was, but limited it to the payment of expenses out of pocket. A circular had been previously prepared and printed, requesting out-voters to come up and vote for S. Upon S. making this declaration of his opinion, a clerk to an agent of S. (without any express direction from S. or from the agent) wrote at the bottom of each circular, 'Your railway expenses will be paid.' A voter who resided at H. received one of the circulars with this added note; he came to C., voted for S., and afterwards received the sum of 8s., the expenses to which he had *bonâ fide* been put by his journey: Held, that the words added to the circular must be treated as written by the authority of S.; that the promise and payment were forbidden by the 17 & 18 Vict. c. 102, s. 2, *ante*, p. 444, and that for the purposes of that statute they must be treated as 'cor-

(*r*) Brett v. Robinson, L. R. 5 C. P. 503, 39 L. J. C. P. 265.

(*s*) The Taunton case, 1 O'M. & H. 183. Simpson v. Yeend, 38 L. J. Q. B. 313.

(*t*) The Cheltenham case, 1 O'M. & H. 64.

(*u*) The Hastings case, 1 O'M. & H. 219.

(*v*) Rogers on Elections, 11th ed., 359, *et seq.* Allen v. Hearn, 1 T. R. 56, and other cases collected in Rogers on Elections, 11th ed., 360-362; *post*, p. 456.

(*w*) Bodmin case, Willes, J.

(*x*) The Windsor case, 1 O'M. & H. 2.

(*y*) Rogers on Elections, 11th ed., 355; Coventry case, 1 O'M. & H. 105.

(*z*) The Guildford case, 1 O'M. & H. 15, Willes, J.

(*a*) The Hastings case, *supra*.

(*b*) See Cooper v. Slade, 6 H. L. C. 746, per Lord Wensleydale. Brecon case, No. 2, Lush, J.

ruptly' made. (c) In one case it was held, that if a man employs an agent to corrupt voters, and that agent in carrying such general instructions into effect employs subordinate agents within the scope of the authority received from the principal, such principal, with reference to the express terms of this statute, as well as upon general principles of law, will be guilty of a misdemeanor as a principal. (d)

By the 17 & 18 Vict. c. 102, s. 10, 'It shall be lawful for any Criminal Court, before which any prosecution shall be instituted for any offence against the provisions of this Act, to order payment to the prosecutor of such costs and expenses as to the said Court shall appear to have been reasonably incurred in and about the conduct of such prosecution; provided always, that no indictment for bribery or undue influence shall be triable before any Court of quarter sessions.'

Sec. 12. 'In case of any indictment or information by a private prosecutor for any offence against the provisions of this Act, if judgment shall be given for the defendant, he shall be entitled to recover from the prosecutor the costs sustained by the defendant by reason of such indictment or information, such costs to be taxed by the proper officer of the Court in which such judgment shall be given.'

Sec. 13. 'It shall not be lawful for any Court to order payment of the costs of a prosecution for any offence against the provisions of this Act, unless the prosecutor shall, before or upon the finding of the indictment or the granting of the information, enter into a recognizance, with two sufficient sureties, in the sum of two hundred pounds (to be acknowledged in like manner as is now required in cases of writs of *certiorari* awarded at the instance of a defendant in an indictment), with the conditions following; that is to say, that the prosecutor shall conduct the prosecution with effect, and shall pay to the defendant or defendants, in case he or they shall be acquitted, his or their costs.'

Sec. 38. 'Throughout this Act, in the construction thereof, except there be something in the subject or context repugnant to such construction, the word "county" shall extend to and mean any county, riding, parts, or division of a county, stewardry, or combined counties respectively returning a member or members to serve in Parliament; and the words, "city, or borough" shall mean any university, city, borough, town corporate, county of a city, county of a town, cinque port, district of burghs, or other place or combination of places (not being a county as hereinbefore defined), returning a member or members to serve in Parliament; and the word "election" shall mean the election of any member or members to serve in Parliament; and the words "returning officer" shall apply to any person or persons to whom, by virtue of his or their office under any law, custom, or statute, the execution of any writ or precept doth or shall belong for the election of a member or members to serve in Parliament, by whatever name or title such person or persons may be called; and the words "revising barrister" shall extend to and include an assistant barrister and chairman, presiding in any Court held for the revision of the list of voters, or his deputy in Ireland, and a sheriff or Sheriff's Court of Appeal in Scotland, and every other person whose duty it may be to hold a court for the revision and correction of the lists or registers of voters in any part

(c) *Cooper v. Slade*, 6 H. L. C. 746. This was an action for penalties. (d) *R. v. Leatham*, 3 L. T. 504.

of the United Kingdom; and the word "voter" shall mean any person who has or claims to have a right to vote in the election of a member or members to serve in Parliament.'

The 26 & 27 Vict. c. 29 (the Corrupt Practices Prevention Act, 1863) has the following proviso:—

Sec. 6. 'In any indictment or information for bribery or undue influence, and in any action or proceeding for any penalty for bribery, treating, or undue influence, it shall be sufficient to allege that the defendant was at the election at or in connection with which the offence is intended to be alleged to have been committed guilty of bribery, treating, or undue influence (as the case may require); and in any criminal or civil proceedings in relation to any such offence the certificate of the returning officer in this behalf shall be sufficient evidence of the due holding of the election, (e) and of any person therein named having been a candidate thereat.'

By 17 & 18 Vict. c. 102, s. 35, 'On the trial of any action for recovery of any pecuniary penalty under this Act, the parties to such action, and the husbands and wives of such parties respectively, shall be competent and compellable to give evidence in the same manner as parties, and their husbands and wives are competent and compellable to give evidence in actions and suits under the Act of the 14 & 15 Vict. c. 99, and the Evidence Amendment Act 1853, but subject to and with the exceptions contained in such several Acts, provided always, that any such evidence shall not thereafter be used in any indictment or criminal proceeding under this Act against the party giving it.'

In an action for bribery at an election it was held, that the register of voters at an election made in pursuance of the 6 & 7 Vict. c. 18, ss. 48, 49, is a document of such a public nature as to be admissible upon its mere production by the returning officer, and therefore an examined or certified copy of it is admissible. (f)

Where a book, which was in writing, and duly signed, contained the register of voters, Byles, J., held, that though there ought to be a copy of the list printed in a book and duly signed, in order to constitute a proper register, yet this register, though irregular, was valid and admissible in evidence. (g)

By the Representation of the People Act 1871 (30 & 31 Vict. c. 102) s. 11, 'No elector who within six months before or during any election for any county or borough shall have been retained, hired, or employed for all or any of the purposes of the election for reward by or on behalf of any candidate at such election as agent, canvasser, clerk, messenger, or in other like employment, shall be entitled to vote at such election, and if he shall so vote he shall be guilty of a misdemeanor.'

The 15 & 16 Vict. c. 57, which was passed for the more effectual inquiry into the existence of corrupt practices at elections of members of Parliament, provides that, upon a joint address of both Houses of Parliament, Her Majesty may appoint commissioners to inquire into

(e) See *Reed v. Lamb*, 6 H. & N. 75, a case decided before the passing of this Act; *R. v. Varle*, 6 Cox, C. C. 470, a case of an indictment for personating a voter at an election; and *R. v. Clarke*, 1 F. & F. 654.

(f) *Reed v. Lamb*, 6 H. & N. 75.

(g) *R. v. Clarke*, 1 F. & F. 654. *R. v. Colebourne*, *ibid*.

corrupt practices at elections, and makes provision for the conducting of such an inquiry. Sec. 8 empowers the commissioners to summon any person whose evidence they may deem material to the inquiry, and to require any person to produce books, papers, &c., necessary for arriving at the truth of the things to be inquired into by them; and provides that all persons 'shall answer all questions put to them by the commissioners touching the matters to be inquired into by them, and shall produce all books, papers, deeds and writings required of them, and in their custody or under their control, according to the tenor of the summons: provided always that no statement made by any person in answer to any questions put by such commissioners shall, except in cases of indictment for perjury committed in such answers, be admissible in evidence in any proceeding, civil or criminal.' (h)

Treating.— By the Corrupt Practices Prevention Act 1883 (46 & 47 Vic. c. 51) s. 1, (1) 'Any person who corruptly by himself or by any other person, either before, during or after an election, directly or indirectly gives or provides, or pays wholly or in part the expense of giving or providing any meat, drink, entertainment or provision to or for any person for the purpose of corruptly influencing that person or any other person to give or refrain from giving his vote at the election, or on account of such person or any other person having voted or refrained from voting, or being about to vote or refrain from voting, at such election, shall be guilty of treating.

(2) 'And every elector who corruptly accepts or takes any such meat, drink, entertainment or provision, shall also be guilty of treating.'

Undue Influence.— By sec. 2, 'Every person who shall directly or indirectly by himself or by any other person on his behalf make use of or threaten to make use of any violence, force, or restraint, or inflict, or threaten to inflict by himself or by any other person any temporal or spiritual injury, damage, harm or loss upon or against any person in order to induce or compel such person to vote or refrain from voting, or on account of such person having voted or refrained from voting at any election, or who shall by abduction, duress or any fraudulent device or contrivance, impede or prevent the free exercise of the franchise of any elector, or shall thereby compel, induce or prevail upon any elector either to give or to refrain from giving his vote at any election, shall be guilty of undue influence.' (i)

By sec. 3, the expression 'corrupt practice' is defined as meaning any of the following offences, namely, treating and undue influence as above defined, bribery as defined by 17 & 18 Vic. c. 102, ss. 2, 3 (*ante*, pp. 444, 445); 30 & 31 Vic. c. 102, s. 49 (*ante*, p. 445); 31 & 32 Vict. c. 48, s. 49; 44 & 45 Vic. c. 40, s. 2, and personation as defined by 35 & 36 Vic. c. 33, s. 24, *post*, p. 458, and also aiding, abetting, counselling

(h) In *R. v. Leatham*, 3 L. T. 777, 30 L. J. Q. B. 205, it was held this proviso did not prevent a letter, which had been produced before commissioners under this section, from being admissible on the trial of an information for bribery; for the proviso applies to statements made, and not to documents produced. See also 31 & 32 Vict. c. 125, s. 56.

(i) It is intimidation to threaten the deprivation of that which it would be bribery to promise the enjoyment of. *Westbury case*, 1 O'M. & H. 52. It is also intimidation to threaten a withdrawal of custom or dismissal from employment with intent to influence the vote of a voter. *R. v. Barnwell*, 5 W. R. 558. *The Blackburn case*, 1 O'M. & H. 204.

and procuring the offence of personation. Every offence which is a corrupt practice under this Act is also a corrupt practice under 31 & 32 Vict. c. 125.

Sec. 4 provides for the absolute disqualification of a candidate personally guilty of corrupt practices, and sec. 5, for his disqualification for seven years if his agents have been guilty of such.

By sec. 6 (1) 'A person who commits any corrupt practice other than personation or aiding, abetting, counselling or procuring the commission of the offence of personation, shall be guilty of a misdemeanor, and on conviction on indictment, shall be liable to be imprisoned, with or without hard labour, for a term not exceeding one year, or to be fined any sum not exceeding 200*l.*' (*j*)

(2) 'A person who commits the offence of personation, or of aiding, abetting, counselling or procuring the commission of that offence, shall be guilty of felony, and any person convicted thereof on indictment shall be punished by imprisonment for a term not exceeding two years together with hard labour.'

The third subsection provides for the disqualification for seven years of any person convicted of a corrupt practice in addition to the punishment above provided.

Secs. 7-12 deal with illegal practices, and sections 13-21 with illegal payments or hirings, all of which are punishable on summary conviction.

Secs. 22 and 23 deal with excuses for corrupt or illegal practices which may free the candidate from disqualification.

Secs. 24-35 contains provisions as to election officials and expenses.

False declaration as to election expenses. — Sec. 33 provides that a declaration as to expenses shall be made by the candidate, and a return of such expenses by his agent; and by subsection 7, 'If any candidate or election agent knowingly makes the declaration required by this section falsely he shall be guilty of an offence, and on conviction thereof on indictment shall be liable to the punishment for wilful and corrupt perjury; such offence shall also be deemed to be a corrupt practice within the meaning of this Act.'

Secs. 36-39 provide for the disqualification of electors convicted of corrupt or illegal practices.

Sec. 40 provides for the presentation of an election petition, and sec. 41 for its withdrawal. The latter section requires that an affidavit shall be produced stating that no agreement for withdrawal has been entered into and also the grounds of withdrawal. And by subsection 4,—

Improper withdrawal of election petition. — 'If any person makes any agreement or terms, or enters into any undertaking in relation to the withdrawal of an election petition, and such agreement, terms or undertaking is or are for the withdrawal of the election petition in consideration of any payment, or in consideration that the seat shall at any time be vacated, or in consideration of the withdrawal of any other election petition, or is or are (whether lawful or unlawful) not mentioned in the aforesaid affidavits, he shall be guilty of a misdemeanor, and shall be liable on conviction on indictment to imprison-

(*j*) An indictment charging a corrupt practice but not specifically alleging what it was, is bad for generality. *R. v. Norton*, 16

Cox, C. C. 59. *R. v. Stroulger*, 17 Q. B. D. 327 *ante*, p. 38.

ment for a term not exceeding twelve months, and to a fine not exceeding 200*l*.'

Sec. 42 provides for the trial of election petitions *de die in diem*.

By sec. 43 provision is made for the attendance at the trial of election petitions of the Director of public prosecutions. Subsection 4 provides for the summary trial by the Court of any person prosecuted by the Director for Corrupt or Illegal Practices, but in the case of a corrupt practice must give the person charged the option of being tried by a jury.

Trial of offences.—By subsection 5, 'Where a person is so prosecuted for any such offence, and either he elects to be tried by a jury or he does not appear before the Court, or the Court thinks it in the interests of justice expedient that he should be tried before some other Court, the Court, if of opinion that the evidence is sufficient to put the said person upon his trial for the offence, shall order such person to be prosecuted on indictment, or before a Court of Summary Jurisdiction as the case may require for the said offence, and in either case may order him to be prosecuted before such Court as may be named in the order, and for all purposes preliminary and of and incidental to such prosecution the offence shall be deemed to have been committed within the jurisdiction of the Court so named.' (*k*)

(6.) 'Upon such order being made, if the accused person is present before the Court and the offence is an indictable offence, the Court shall commit him to take his trial, or cause him to give bail to appear and take his trial for the said offence.

'If the accused person is not present before the Court, the Court shall, as circumstances require, issue a summons for his attendance, or a warrant to apprehend him and bring him before a Court of summary jurisdiction, and that Court, if the offence is an indictable offence, (*l*) shall, on proof only of the summons or warrant and the identity of the accused, commit him to take his trial, or cause him to give bail to appear and take his trial for the said offence.'

Sec. 45 provides for the institution of prosecutions by the Director of Public Prosecutions, and sec. 46 for the removal of any incapacity proved to have been brought about by perjured evidence.

By sec. 50. 'Where an indictment as defined by this Act for any offence under the Corrupt Practices Prevention Acts, or this Act is instituted in the High Court or is removed into the High Court by a writ of *Certiorari* issued at the instance of the Attorney-General, and the Attorney-General suggests on the part of the Crown that it is expedient for the purposes of justice that the indictment should be tried in the Central Criminal Court, or if a special jury is ordered, that it should be tried before a judge and jury at the Royal Courts of Justice, the High Court may, if it think fit, order that such indictment shall be so tried upon such terms as the Court may think just, and the High Court may make such orders as appear to the Court necessary or proper for carrying into effect the order for such trial.'

By sec. 51 (1), 'A proceeding against a person in respect of the offence of a corrupt or illegal practice or any other offence under the Corrupt Practices Prevention Acts or this Act, shall be commenced

(*k*) See *R. v. Shellard*, 23 Q. B. D. 278 ;
R. v. Ripley, 17 Cox, C. C. 120.

(*l*) See *R. v. Shellard*, *ante*.

within one year after the offence was committed, or, if it was committed in reference to an election with respect to which an inquiry is held by election commissioners, shall be commenced within one year after the offence was committed, or within three months after the report of such commissioners is made, whichever period last expires, so that it be commenced within two years after the offence was committed, and the time so limited by this section shall, in the case of any proceeding under the Summary Jurisdiction Acts for any such offence whether before an election court or otherwise, be substituted for any limitation of time contained in the last mentioned acts.'

(2) 'For the purposes of this section the issue of a summons, warrant, writ, or other process shall be deemed to be a commencement of a proceeding when the service or execution of the same on or against the alleged offender is prevented by the absconding or concealment or act of the alleged offender, but, save as aforesaid, the service or execution of the same on or against the alleged offender, and not the issue thereof, shall be deemed to be the commencement of the proceeding.'

By sec. 52, 'Any person charged with a corrupt practice, may, if the circumstances warrant such finding, be found guilty of an illegal practice (which offence shall for that purpose be an indictable offence), and any person charged with an illegal practice may be found guilty of that offence notwithstanding that the act constituting the offence amounted to a corrupt practice, and a person charged with illegal payment, employment, or hiring may be found guilty of that offence notwithstanding that the act constituting the offence amounted to a corrupt or illegal practice.'

By sec. 53 (1.), 'Secs. 10, 12 & 13, of 17 & 18 Vic. c. 102, and sec. 6 of 26 & 27 Vic. c. 29 (which relate to prosecutions for bribery and other offences under those Acts); shall extend to any prosecution on indictment for the offence of any corrupt practice within the meaning of this Act, and to any action for any pecuniary forfeiture for an offence under this Act, in like manner as if such offence were bribery within the meaning of those Acts, and such indictment or action were the indictment or action in those sections mentioned, and an order under sec. 10 of 17 & 18, Vic. c. 102, may be made on the defendant, but the Director of Public Prosecutions, or any person instituting any prosecution in his behalf or by direction of an election Court, shall not be deemed to be a private prosecutor nor required under the said sections to give any security.'

(2) 'On any prosecution under this Act, whether on indictment or summarily, and whether before an election Court or otherwise, and in any action for a pecuniary forfeiture, under this Act, the person prosecuted or sued, and the husband or wife of such person, may, if he or she think fit, be examined as an ordinary witness in the case.'

(3) 'On any such prosecution or action as aforesaid it shall be sufficient to allege that the person charged was guilty of an illegal practice, payment, employment, or hiring within the meaning of this Act, as the case may be, and the certificate of the returning officer at an election, that the election mentioned in the certificate was duly held, and that the person named in the certificate was a candidate at such election, shall be sufficient evidence of the facts therein stated.'

By sec. 55 (2), 'The enactments relating to charges before justices against persons for indictable offences shall, so far as is consistent with the tenor thereof, apply to every case where an election court orders a person to be prosecuted on indictment, in like manner as if the court were a justice of the peace.'

By sec. 56 (1), 'Subject to any rules of Court any jurisdiction vested by this Act in the High Court may, so far as it relates to indictments or other criminal proceedings, be exercised by any judge of the Queen's Bench Division, and in other respects may either be exercised by one of the judges for the time being on the rota for the trial of election petitions, sitting either in court or at chambers, or may be exercised by a master of the Supreme Court of Judicature in manner directed by and subject to an appeal to the said judges.'

It is however provided that a master shall not exercise jurisdiction to grant exceptions or excuses. The Court has power to make rules regulating procedure and practice.

By sec. 57 (1), 'The Director of Public Prosecutions, in performing any duty under this Act, shall act in accordance with the regulations under the Prosecution of Offences Act 1879 (42 & 43 Vict. c. 22), and subject thereto, in accordance with the directions (if any) given to him by the Attorney-General, and any assistant or representative of the Director of Public Prosecutions in performing any duty under this Act, shall act in accordance with the said regulations and directions, if any, and with the directions given to him by the Director of Public Prosecutions.'

Costs. — (2) 'Subject to the provisions of this Act the costs of any prosecution or indictment for an offence punishable under this Act, whether by the Director of Public Prosecutions or his representative, or by any other person, shall, so far as they are not paid by the defendant, be paid in like manner as costs in the case of a prosecution for felony are paid.'

By sec. 58 (1), provision is made for the payment of costs other than those of a prosecution or indictment.

(2) 'When any costs or other sums are under the order of an election court or otherwise under this Act to be paid by any person, those costs shall be a simple contract debt due from such person to the person or persons to whom they are to be paid, and if payable to the Commissioners of her Majesty's Treasury shall be a debt to her Majesty, and in either case may be recovered accordingly.'

Certificate of indemnity. — By sec. 59 (1), 'A person who is called as a witness respecting an election before any election court shall not be excused from answering any question relating to any offence at or connected with such election on the ground that the answer thereto may criminate or tend to criminate himself, or on the ground of privilege.'

Provided that —

a. A witness who answers truly all questions which he is required by the election Court to answer shall be entitled to receive a certificate of indemnity under the hand of a member of the Court stating that such witness has so answered; and

b. An answer by a person to a question put by or before any election Court shall not, except in the case of any criminal proceeding for

perjury in respect of such evidence (*m*) be in any proceeding, civil or criminal, admissible in evidence against him.

(2) Where a person has received such a certificate of indemnity in relation to an election, and any legal proceeding is at any time instituted against him for any offence under the Corrupt Practices Prevention Acts or this Act, committed by him previously to the date of the certificate, at or in relation to the said election, the Court having cognizance of the case shall, on proof of the certificate, stay the proceeding, and may in their discretion award to the said person such costs as he may have been put to in the proceeding.

(3) Nothing in this section shall be taken to relieve a person receiving a certificate of indemnity from any incapacity under this Act, or from any proceeding to enforce such incapacity (other than a criminal prosecution).

(4) This section shall apply in the case of a witness before any election commissioners in like manner as if the expression "election court" in this section included election commissioners.

(5) Where a solicitor or person lawfully acting as agent for any party to an election petition respecting any election for a county or borough has not taken any part or been concerned in such election, the election commissioners inquiring into such election shall not be entitled to examine such solicitor or agent respecting matters which came to his knowledge by reason only of his being concerned as solicitor or agent for a party to such petition.

By sec. 60, 'An election court or election commissioners, when reporting that certain persons have been guilty of any corrupt or illegal practice, shall report whether those persons have or not been furnished with certificates of indemnity, and such report shall be laid before the Attorney-General (accompanied, in the case of the commissioners, with the evidence on which such report was based), with a view to his instituting or directing a prosecution against such persons as have not waived certificates of indemnity, if the evidence should in his opinion be sufficient to support a prosecution.'

Definition of terms. — By sec. 64, the various terms used in the Act are defined, —

'Election' means the election of a member or members to serve in Parliament.

'Election petition' means a petition presented in pursuance of the Parliamentary Elections Act 1868 (31 & 32 Vict. c. 125) as amended by this Act.

(*m*) A witness before such a commission of inquiry was, after giving his evidence before it, indicted for perjury committed before a judge, on the trial of an election petition in respect of the same election with reference to which he was examined before the commissioners. Statements made by such witness, in answer to questions put by the commissioners relative to corrupt practices at such election, were given in evidence against him to prove the indictment for perjury. Held, that the exception in the proviso to 26 & 27 Vict. c. 29, s. 7, which provided an exception in the case of indict-

ments for perjury as to cases of indictments for perjury, must be considered to mean perjury committed in answer to questions put by the Commissioners on the inquiry, and not to perjury generally, and therefore that the above evidence was not admissible. *R. v. Buttle*, L. R. 1 C. C. R. 248; 11 Cox, C. C. 566. See also *R. v. Slator*, 8 Q. B. D. 267. The words however of 46 & 47 Vict. c. 51, s. 59 are "except in the case of any criminal proceeding for perjury" and this would seem to destroy the effect of the last named decision.

'Election court' means the judges presiding at the trial of an election petition or, if the matter comes before the High Court, that court.

'Person' includes an association or body of persons corporate or incorporate, and where any act is done by any such association or body, the members of such association or body who have taken part in the commission of such act shall be liable to any fine or punishment imposed for the same by this Act.

'Indictment' includes information.

'Costs' includes costs and charges and expenses.

Decisions on repealed statutes. — It may be well to notice the decisions on the repealed statute, 2 Geo. 2, c. 24, in this place.

It was held that, notwithstanding the 2 Geo. 2, c. 24, which made the offender liable to forfeit five hundred pounds, bribery in elections of members to serve in Parliament remained a crime at common law; that the Legislature never meant to take away the common-law crime, but to add a penal action; and that this appears by the words in the statute — 'or being otherwise lawfully convicted thereof.' (*n*)

There was a great difference between the two parts of sec. 7 of the 2 Geo. 2, c. 24. (*o*) The first part, which was applicable to the voter contained the word 'ask,' which was not repeated in the second. From this it might be taken that, in an action against the party tendering the bribe, proof should be required of more than a mere solicitation. Then, in the first part, the words went on thus, 'or agree or contract for any money,' the agreement, therefore, would subject the party to the penalty. (*p*) In the second part the words were 'corrupt or procure.' As to procuring, it was necessary that the vote should be actually given, but the corruption was complete by effecting an agreement amounting to corruption, although the vote was not given. If, therefore, A. gave money to B. to induce B. to vote for a candidate, and B. agreed to do so, in consideration of the gift, A. was liable to the penalty, for corrupting, although B. never gave the vote, (*q*) and two judges thought that A. was equally liable, if B. never intended to vote according to the agreement at all, as A. had done all that lay with him; (*r*) and this opinion was held to be correct by the Court of Exchequer. (*s*)

Where a friend of the candidate gave an elector five guineas to vote, and took from him a note for that sum, but at the same time gave a counter note to deliver up the first note when the elector had voted, it was held to be an absolute gift and bribery within the Act, although the elector voted for the opposite party. (*t*) And laying a wager with

(*n*) *R. v. Pitt*, 3 Burr. 1335, 1339. S. C. 1 Blac. R. 380. See *Coombe v. Pitt*, 1 Blac. R. 524; *R. v. Pitt*, 3 Burr. 1340; *R. v. Heydon*, 3 Burr. 1359; *R. v. Haydon*, 3 Burr. 1387. S. C. 1 Blac. R. 404; *Pugh v. Curgenvin*, 3 Wils. 35. And see the cases collected in 1 Hawk. P. C. c. 67, s. 13.

(*o*) The 2 Geo. 2, c. 24, s. 7, was, 'If any person shall ask, receive, or take any money or other reward, by way of gift, loan, or other device, or agree or contract for any money, gift, office, employment, or other reward whatsoever, to give his vote, or to refuse or forbear to give his vote in any such election; or if any person by himself or any person

employed by him shall by any gift or reward, or by any promise, agreement or security for any gift or reward, corrupt or procure any person or persons to give his or their vote or votes, or to forbear to give his or their vote or votes in any such election.'

(*p*) Per Patteson, J., *Henslow v. Faucett*, 3 A. & E. 51. 4 N. & M. 592. S. C.

(*q*) *Henslow v. Faucett*. See the form of declaration there.

(*r*) *Patteson and Coleridge, JJ.*, *ibid*.

(*s*) *Harding v. Stokes*, 2 M. & W. 233, S. C., T. & G. 599.

(*t*) *Sulston v. Norton*, 3 Burr. 1235. 1 Blac. Rep. 317. Orme, 296, note.

the voter that he did not vote for a particular candidate was also bribery within the Act. (*u*) In an action upon this statute it was held, that, before the time of election, any one was a candidate for whom a vote was asked; and that it was not competent to the defendant to dispute a man's right of voting when he had asked him for his vote; it being immaterial whether the voter bribed had a right to vote or not, if he claimed to have such right. (*v*) A declaration upon this statute must have stated what the bribe was, and specified that the defendant took money or some other particular species of reward; and where it stated generally 'that the defendant did receive *a gift or reward*,' in the disjunctive, it was held bad in arrest of judgment, the charge being of a criminal nature. (*w*) And where the person corrupting was sued the same rule applied. And as the means of corrupting must have been stated, so they must have been stated accurately according to the facts. Where those means rested in agreement only, the actual agreement must have been stated in order that the party might know what he had to answer, and might be able to plead the verdict, whatever it might be, in another action, though it might not be necessary to state the matter with the same precision as in an action on the agreement supposing it were legal. (*x*) Where therefore a count stated that the defendant corrupted a voter by promising him to pay a debt of 41*l.* and the evidence was a promise to pay the debt of 41*l.* and the expenses in respect of the pledge of a boat, the voter's property, for such debt, it was held that there was a fatal variance between the promise alleged and that proved by reason of the omission in the declaration of all mention of the expenses. (*y*) But where a count alleged that the defendant corrupted a voter by giving 10*l.* and promising to pay 31*l.* in addition, and the evidence proved the payment of the 10*l.* and the promise to pay 31*l.* and also the expenses of the pledge of the boat, it was held that the offence consisted in corrupting, which depends entirely on the means used in soliciting. The payment of 10*l.* was undoubtedly corruption, and was sufficient to support this count, and that the promise to pay 31*l.* more might be treated as surplusage, and, that being so, the omission to add 'and the expenses' was immaterial. (*z*)

The words of sec. 7 were all prospective, and they were construed as if they had been 'in order to give,' and 'in order to forbear to give,' and consequently they did not include a case where money was given to a voter after an election, for having voted for a candidate, there having been no agreement made before the election for giving such money. (*a*)

A declaration under the 2 Geo. 2, c. 24, s. 7, for corrupting a voter by corruptly *giving* the voter the sum of 10*l.* as a reward to him to give his vote, was supported by evidence that the defendant gave the voter a card in one room, which the voter presented to a person in

(*u*) 1 Hawk. P. C. c. 67, s. 10, note (4), citing Loft, 552, and referring also to Allen v. Hearne, 1 T. R. 56, where a wager between two voters, with respect to the event of an election, laid before the poll began, was held to be illegal.

(*v*) Coombe v. Pitt, 1 Blac. R. 523.

(*w*) Davy v. Baker, 5 Burr. 2471.

(*x*) Per curiam, Baker v. Rusk, 15 Q. B. 870.

(*y*) Baker v. Rusk, *supra*.

(*z*) Baker v. Rusk, *supra*; and see Coombe v. Pitt, 3 Burr. 1586.

(*a*) Lord Huntingtower v. Gardiner, 1 B. & C. 297. See *ante*, p. 446.

another room, who thereupon gave him the money. (b) And it was held, in the same case, that the plaintiff might prove that the defendant on the same day, and at the same place, gave cards to other persons, who also obtained money by presenting them to the person in the other room. (c)

It seems that an indictment against a voter under the 2 & 3 Will. 4, c. 45, s. 58, for giving a false answer at an election is insufficient if it merely state that the voter gave the answer at an election, and does not aver the writ for holding the election, or that the election was duly held. (d)

Ballot Act. — By the Ballot Act, 1872 (35 & 36 Vict. c. 33) entitled, 'An Act to amend the law relating to procedure at parliamentary and municipal elections,' s. 3, 'every person who

- (1.) Forges or fraudulently defaces or fraudulently destroys any nomination paper, or delivers to the returning officer any nomination paper, knowing the same to be forged; or
- (2.) Forges or counterfeits or fraudulently defaces or fraudulently destroys any ballot paper or the official mark on any ballot paper; or
- (3.) Without due authority supplies any ballot paper to any person; or
- (4.) Fraudulently puts into any ballot box any paper other than the ballot paper which he is authorised by law to put in; or
- (5.) Fraudulently takes out of the polling station any ballot paper; or
- (6.) Without due authority destroys, takes, opens, or otherwise interferes with any ballot box or packet of ballot papers then in use for the purposes of the election,

shall be guilty of a misdemeanor, and be liable, if he is a returning officer or an officer or clerk in attendance at a polling station, to imprisonment for any term not exceeding two years, with or without hard labour, and if he is any other person, to imprisonment for any term not exceeding six months, with or without hard labour. Any attempt to commit any offence specified in this section shall be punishable in the manner in which the offence itself is punishable.

'In any indictment or other prosecution for an offence in relation to the nomination papers, ballot boxes, ballot papers, and marking instruments at an election, the property in such papers, boxes, and instruments may be stated to be in the returning officer at such election, as well as the property in the counterfoils.'

On the trial of an indictment for fraudulently placing ballot papers in a ballot box at a municipal election contrary to 35 & 36 Vict. c. 33, s. 3, a sealed packet was produced under the order of a county court judge, obtained under 35 & 36 Vict. c. 33, sched. 1, rules 40, 41, part ii., r. 64, and the counterfoils and marked register and voting papers produced therefrom were given in evidence and the face of the voting papers inspected: Held, that the evidence was properly admitted. (e)

By sec. 20, the poll at every contested municipal election shall, so far

(b) *Webb v. Smith*, 4 Bing. N. C. 373.

(c) *Ibid.*

(d) *R. v. Bowler*, C. & M. 559. *R. v. Ellis*, C. & M. 564. See *ante*, p. 448, as to

the form of an indictment for bribery or undue influence.

(e) *R. v. Beardsall*, 1 Q. B. D. 452; 45 L. J. M. C. 157; 13 Cox, C. C. 193.

as circumstances admit, be conducted in the manner in which the poll is by this Act directed to be conducted at a contested parliamentary election, and, subject to the modifications expressed in the schedules annexed hereto, such provisions of this Act and of the said schedules as relate to or are concerned with a poll at a parliamentary election shall apply to a poll at a contested municipal election: Provided as follows:

- (1.) The term 'returning officer' shall mean the mayor or other officer who, under the law relating to municipal elections, presides at such elections.
- (2.) The term 'petition questioning the election or return' shall mean any proceeding in which a municipal election can be questioned.
- (3.) The mayor shall provide everything which in the case of a parliamentary election is required to be provided by the returning officer for the purpose of a poll.
- (4.) All expenses shall be defrayed in manner provided by law with respect to the expenses of a municipal election.
- (5.) No return shall be made to the Clerk of the Crown in Chancery.
- (6.) Nothing in this Act shall be deemed to authorize the appointment of any agent of a candidate in a municipal election, but if in the case of a municipal election any agent of a candidate is appointed, and a notice in writing of such appointment is given to the returning officer, the provisions of this Act with respect to agents of candidates shall, so far as respects such agent, apply in the case of that election.
- (7.) The provisions of this Act with respect to—
 - a. The voting of a returning officer; and
 - b. The use of a room for taking a poll; and
 - c. The right to vote of persons whose names are on the register of voters; shall not apply in the case of a municipal election.

A municipal election shall, except in so far as relates to the taking of the poll in the event of its being contested, be conducted in the manner in which it would have been conducted if this Act had not passed.

Personation. — By sec. 24 'the following enactments shall be made with respect to personation at parliamentary and municipal elections:—

'A person shall, for all purposes of the law relating to parliamentary and municipal elections, (*f*) be deemed to be guilty of the offence of personation who at an election for a county or borough, or at a municipal election, (*g*) applies for a ballot paper in the name of some other person, whether that name be that of a person living or dead, (*h*) or of

(*f*) See *R. v. Bent*, 1 Den. G. C. 157; 2 C. K. 179, a case decided before this Act. *R. v. Thompson*, 2 M. & Rob. 355.

(*g*) See *R. v. Turner*, 12 Cox, C. C. 313, where, on an indictment under this section for an offence at a municipal election, it was

ruled not to be necessary to produce the charter of the city.

(*h*) See *Whiteley v. Chapell*, 11 Cox, C. C. 307. It is not necessary in an indictment under the section to prove the appointment of the presiding officer. *R. v. Garvey*, 16 Cox, C. C. 252.

a fictitious person, (i) or who, having voted once at any such election, applies at the same election for a ballot paper in his own name.' (j)

It shall be the duty of the returning officer to institute a prosecution against any person whom he may believe to have been guilty of personation, or of aiding, abetting, counselling, or procuring the commission of the offence of personation by any person, at the election for which he is returning officer, and the costs and expenses of the prosecutor and the witnesses in such case, together with compensation for their trouble and loss of time, shall be allowed by the Court in the same manner in which Courts are empowered to allow the same in cases of felony.

'The Provisions of the Registration Acts, (k) specified in the third schedule to this Act, shall in England and Ireland respectively apply to personation under this Act in the same manner as they apply to a person who knowingly personates and falsely assumes to vote in the name of another person as mentioned in the said Acts.'

In a case before this Act the first count recited at length a writ to the sheriff of Gloucester to hold an election for a member of Parliament for that city, and alleged that an election was held by virtue of that writ, and that the prisoner at that election unlawfully personated another person; the second count alleged that 'at the said election' the prisoner falsely answered a question; the third count alleged that at a certain election of a member to serve in Parliament for the city of Gloucester, the prisoner unlawfully personated another person; and the last count alleged that 'at the election last aforesaid' the prisoner falsely answered a question; and Crompton, J., held that the writ to the sheriff, or an examined copy of it, must be produced. (l)

By the 22 Vict. c. 35, s. 9, 'If, pending or after any election of councillors, auditors, or assessors, any person shall personate, or induce any other person to personate, any person entitled to vote at such election, &c., he may be summarily convicted by two justices. T. Hague, pending the annual election of councillors for a ward in Sheffield, gave a nomination paper signed by one G. Bamford to J. Fogle, and asked him to take it to a school-room and vote. Fogle said it was not his name that was on it. Hague told him to vote for Wood and Trickett, and said he was to take the paper and put it down before a gentleman he would see sitting, and that they would not say anything to him. Fogle took the paper, and put it into the hands of the presiding officer at the school-room for the reception of votes for the said ward; and the officer, being so required, asked Fogle, 'Are you the person whose name is signed as G. Bamford to the voting paper now delivered by you?' and Fogle answered, 'No.' Bamford's name was at the time on the Burgess roll. The voting paper was not filed, nor was the vote of G. Bamford recorded in consequence of the paper being so handed

(i) A person may have two names and may vote in that name by which he is described on the register. *R. v. Fox*, 16 Cox, C. C. 166.

(j) The section is made applicable to a poll for ascertaining the wishes of ratepayers as to a free library, see 53 & 54 Vict. c. 68, Sched. I. s. 12, but not apparently to a reso-

lution for application for a school board. *R. v. Sankey*, 3 Q. B. D. 379.

(k) 6 & 7 Vict. c. 18, ss. 85 to 89; 13 & 14 Vict. c. 69, ss. 92 to 96, both inclusive. These enactments provide for taking the offender into custody and taking him before a magistrate.

(l) *R. v. Vaile*, 6 Cox, C. C. 470; see 26 & 27 Vict. c. 29, s. 6, *ante*, p. 448.

in. Two justices convicted Hague for inducing Fogle to personate Bamford at the said election, and the sessions, on appeal, confirmed the conviction, subject to the opinion of the Court of Queen's Bench, whether Hague had, under the above facts, committed the alleged offence; and it was urged that, as Fogle did not vote, and on being asked, at once declared that he was not Bamford, he had not been guilty of personation, and therefore Hague had not been guilty of inciting him to commit it. But it was held that if a man goes up to a voting place and represents himself as another person, it is a false personation. Here Fogle gave in a voting paper, and so represented himself to be another person, and thereby the personation was complete. (*m*)

Definition of words. — By 35 & 36 Vict. c. 33, sec. 29, the expression 'municipal borough' means any place for the time being subject to the Municipal Corporation Acts, or any of them. The expression 'Municipal Corporation Acts' means, as regards England, the Act of 5 & 6 Will. 4, c. 76, and the Acts amending the same. The expression 'municipal election' means, as regards England, an election of any person to serve the office of councillor, auditor, or assessor of any municipal borough, or of councillor for a ward of a municipal borough.

By sec. 30, this Act shall apply to any parliamentary or municipal election which may be held after the passing thereof.

By sec. 31, nothing in this Act, except part III. [ss. 24 to 27] thereof, shall apply to any election for a university or combination of universities.

Corrupt practices at municipal elections. — By the Municipal Corporations Act, 1882, (*n*) s. 77, 'bribery,' 'treating,' 'undue influence,' and 'personation' include respectively anything done before, at, after, or with respect to a municipal election which if done before, at, after, or with respect to a Parliamentary election would make the person doing the same liable to any penalty, punishment, or disqualification for bribery, treating, undue influence, or personation, as the case may be, under any Act for the time being in force with respect to Parliamentary elections.

By sec. 86, 'The enactments for the time being in force for the detection of personation and for the apprehension of persons charged with personation at a Parliamentary election, shall apply in the case of a municipal election.'

By sec. 59, at an election of councillors the presiding officer shall, if required by two burgesses, or by a candidate or his agent, make enquiry of voters whether they are the persons enrolled on the roll, and whether they have already voted, and 'if any person wilfully make a false answer thereto, he shall be guilty of a misdemeanor.'

By sec. 74, 'If any person forges or fraudulently defaces or fraudulently destroys any nomination paper, or delivers to the town clerk any forged nomination paper, knowing it to be forged, he shall be guilty of a misdemeanor, and shall be liable to imprisonment for any term not exceeding six months, with or without hard labour.'

'Any attempt to commit any such offence shall be punishable as the offence is punishable.'

(*m*) *R. v. Hague*, 9 Cox, C. C. 412. The conviction merely alleged that Hague 'unlawfully and knowingly did induce Fogle to personate Bamford:' and it was held that

it was good, and that it was not necessary to state the means of the inducement.

(*n*) 45 & 46 Vict. c. 50.

By the Municipal Elections (Corrupt and Illegal Practices Act, 1884), 47 & 48 Vict. c. 70, s. 2 (o) (1.), the expression 'corrupt practice' is defined in similar terms to those in 46 & 47 Vict. c. 51, s. 3 (see *ante*, p. 449), and is made to include treating and undue influence as defined by 46 & 47 Vict. c. 51, ss. 1 and 2. See *ante*, p. 449, and also 45 & 46 Vict. c. 50, s. 77.

(2.) 'A person who commits any corrupt practice in reference to a municipal election shall be guilty of the like offence, and, on conviction, shall be liable to the like punishment, and subject to the like incapacities as if the corrupt practice had been committed in reference to a parliamentary election.'

Secs. 4-8 deal with illegal practices and their punishment on summary conviction; and secs. 9-18 have reference to illegal employment, hiring, &c.

Sec. 26, which regulates the proceedings or the withdrawal of an election petition, is in the same terms as sec. 41 of 46 & 47 Vict. c. 51 (see *ante*, p. 450).

Sec. 28, which has reference to the attendance of the Director of Public Prosecutions at the trial of election petitions, is identical with sec. 43 of 46 & 47 Vict. c. 51 (see *ante*, p. 451).

By sec. 30, 'Subject to the other provisions of this Act, the procedure for the prosecution of a corrupt or illegal practice, or any illegal payment, employment, or hiring, committed in reference to a municipal election, and the removal of any incapacity incurred by reason of a conviction or report relating to any such offence, and the duties of the Director of Public Prosecutions in relation to any such offence, and all other proceedings in relation thereto (including the grant to a witness of a certificate of indemnity), shall be the same as if such offence had been committed in reference to a parliamentary election; and secs. 45 & 46 and secs. 50-57, both inclusive, and secs. 59 and 60 of the 46 and 47 Vict. c. 51, shall apply accordingly as if they were re-enacted in this Act, with the necessary modifications, and with the following additions:—

a. Where the Director of Public Prosecutions considers that the circumstances of any case require him to institute a prosecution before any Court other than an election Court, for any offence other than a corrupt practice committed in reference to a municipal election in any borough, he may, by himself or his assistant, institute such prosecution before any Court of summary jurisdiction in the county in which the said borough is situate, or to which it adjoins, and the offence shall be deemed for all purposes to have been committed within the jurisdiction of such Court;

b. General rules for the purposes of part 4 of the Municipal Corporations Act, 1882, shall be made by the same authority as rules of court under the said section; and

c. The giving or refusal to give a certificate of indemnity to a witness by the election Court shall be final and conclusive.'

By sec. 35 the Act is made applicable to the city of London, and by sec. 36 to elections for local boards, guardians, improvement commissioners, and school-boards.

(o) The Act applies to the election of County Councillors, 51 & 52 Vict. c. 41, s. 75.

CHAPTER THE EIGHTEENTH.

OF NEGLECTING OR DELAYING TO DELIVER ELECTION WRITS.

THE 53 Geo. 3, c. 89, was passed for the purpose of effecting the more expeditious and regular conveyance of writs for the election of members to serve in Parliament. It enacts that the messenger, or pursuivant of the great seal, or his deputy, shall, after the receipt of such writs, forthwith carry such of them as shall be directed to the sheriffs of London or Middlesex, to the respective officers of such sheriffs, and the other writs to the general post-office in London, and there deliver them to the postmaster-general for the time being, or to such other person as the postmaster shall depute to receive the same (which deputation the postmaster is thereby required to make), who, on receipt thereof, shall give an acknowledgment in writing, expressing therein the time of delivery, and shall keep a duplicate of such acknowledgment signed by the parties respectively to whom and by whom the same shall be so delivered; and that the postmaster or his deputy shall despatch all such writs free of postage, by the first post or mail, after the receipt thereof, under covers directed to the proper officers, to whom the said writs shall be respectively directed, accompanied with proper directions to the postmaster or deputy postmaster of the place, or nearest to the place where such officers shall hold their office, requiring such postmaster or deputy forthwith to carry such writs respectively to such office, and to deliver them there to the officers to whom they shall be respectively directed, or their deputies, who are required to give to such postmaster or deputy a memorandum in writing, acknowledging the receipt of every such writ, and setting forth the day and the hour the same was delivered by such postmaster or deputy, and which memorandum shall also be signed by such postmaster or deputy, who is required to transmit the same by the first or second post afterwards to the postmaster-general or his deputy at the general post-office in London, who are required to make an entry thereof in a proper book for that purpose, and to file the memorandum along with the duplicate of the said acknowledgment, signed by the messenger, to the intent that the same may be inspected or produced upon all proper occasions by any person interested in such elections. (a)

The statute, after directing that all persons to whom the writs for the election of members to Parliament ought to be and are usually directed, shall, within a month, send to the postmaster-general an account of the places where they shall hold their offices, and so from time to time, as often as such places shall be changed; and of the

post town nearest to such offices; or in case any such office shall be in London, Westminster, or Southwark, or within five miles thereof, shall send such account to the messenger of the great seal; (b) proceeds to enact, that after the death of the then messenger of the great seal the allowances of *mileage* shall cease, except an allowance of two guineas on each writ for the election of a member on any vacancy, and of fifty pounds on the calling of a new Parliament. (c) And it further enacts, that whereas the messenger of the great seal and his deputy have from time to time received certain other fees for the conveyance and upon the delivery of these writs, such fees shall cease from the passing of the Act; and that neither the messenger nor his deputy, nor any other person, shall receive or take any fee, reward, or gratuity whatsoever, for the conveyance or delivery of any such writ. (d)

The sixth section enacts, 'that every person concerned in the transmitting or delivery of any such writ as aforesaid who shall wilfully neglect or delay to deliver or transmit any such writ, or accept any fee, or do any other matter or thing in violation of this Act, shall be guilty of a misdemeanor, and may upon any conviction upon any indictment or information in his Majesty's Court of King's Bench be fined and imprisoned at the discretion of the Court for such misdemeanor.'

(b) 53 Geo. 3, c. 89, ss. 2, 3. By 36 & 37 Vict. c. 91, s. 2, from "the chancellor" to "Cinque Port," is repealed.

(c) Id. sec. 4.

(d) Id. sec. 5. And the section further

proceeds to give to the then messenger an annual allowance for his life of £520 in compensation for these fees. This part of the section is repealed by 36 & 37 Vict. c. 91.

CHAPTER THE NINETEENTH.

OF DEALING IN SLAVES.¹

THE 5 Geo. 4, c. 113 (*a*) (which is incorporated in the 'Slave Trade Act, 1873,') (*b*) repeals all the Acts and enactments relating to the slave trade, and the abolition thereof, and the exportation or importation of slaves, except so far as they have repealed any prior Acts or enactments, or may have been acted upon, or may be expressly confirmed by the present Act. It then enacts, that it shall not be lawful (except in such special cases as are hereinafter mentioned) to deal in slaves, or to remove, import, ship, trans-ship, &c., any persons as slaves, or to fit out, employ, &c., any vessels in order to accomplish such unlawful objects, or to lend money, &c., or to become guarantee, &c., for agents in relation to such objects, or in any other manner to engage, directly or indirectly, therein, as a partner, agent, or otherwise; or to ship, &c., any money, goods, or effects, to be employed in accomplishing any of these unlawful objects; or to command, or embark on board, or contract for commanding, or embarking on board, any vessel, &c., in any capacity, knowing that such vessel, &c., is employed, or intended to be employed, in such unlawful objects; or to insure, or contract for insuring, any slaves, or other property, employed, or intended to be employed, in accomplishing any of these unlawful objects. (*c*) Pecuniary penalties and forfeitures are then imposed upon persons offending, by engaging in such unlawful objects. (*d*) And the statute then proceeds to subject certain offenders to punishments of a more serious nature.

By sec. 9, 'If any subject or subjects of his Majesty, or any person or persons residing, or being within any of the dominions, forts, settlements, factories, or territories, now or hereafter belonging to his Majesty or being in his Majesty's occupation or possession, or under the government of the united company of merchants of England trading to the East Indies, shall, except in such cases as are in and by this Act permitted, (*e*) after the first day of January, one thousand eight hundred and twenty-five, upon the high seas, or in any haven, river, creek, or

(*a*) This Act is repealed except ss. 2 to 11, sec. 12 down to 'taken to be in full force,' ss. 39, 40, and 47. See 36 & 37 Vict. c. 88, s. 30.

(*b*) See *infra*.

(*c*) Sec. 2.

(*d*) Secs. 3, 4, 5, 6, 7, 8.

(*e*) These excepted cases are repealed by the 3 & 4 Will. 4, c. 78, s. 12, which abolishes slavery in the British colonies, plantations, and possessions abroad.

AMERICAN NOTE.

¹ For the Acts of Congress relating to slave trade, see Revised Statutes of the United States.

place, where the admiral has jurisdiction, knowingly and wilfully carry away, convey, or remove, or aid or assist in carrying away, conveying, or removing, any person or persons as a slave or slaves, or for the purpose of his, her, or their being imported, or brought as a slave or slaves, into any island, colony, country, territory, or place whatsoever, or for the purpose of his, her, or their being sold, transferred, used, or dealt with, as a slave or slaves; or shall, after the said first day of January, one thousand eight hundred and twenty-five, except in such cases as are in and by this Act permitted, (*f*) upon the high seas, or within the jurisdiction aforesaid, knowingly and wilfully ship, embark, receive, detain, or confine, or assist in shipping, embarking, receiving, detaining, or confining on board any ship, vessel, or boat, any person or persons, for the purpose of his, her, or their being carried away, conveyed, or removed, as a slave or slaves, or for the purpose of his, her, or their being imported or brought, as a slave or slaves, into any island, colony, country, territory, or place whatsoever, or for the purpose of his, her, or their being sold, transferred, used, or dealt with, as a slave or slaves, then, and in every such case, the person or persons so offending shall be deemed and adjudged guilty of piracy, felony, and robbery, and being convicted thereof shall suffer death, without benefit of clergy, and loss of lands, goods, and chattels, as pirates, felons, and robbers upon the seas, ought to suffer.'

The 1 Vict. c. 91, sec. 1, recites the preceding section, and provides that, after the 1st of October, 1837, no person convicted of any such offence shall suffer death, but instead thereof shall be liable to transportation (*g*) for life, or for any term not less than fifteen (*h*) years, or imprisonment, with or without hard labour, in the common gaol or house of correction, for any term not exceeding three years, and the offender may be directed to be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the Court in its discretion shall seem meet. (*i*)

By the 5 Geo. 4, c. 113, s. 10, '(Except in such special cases as are in and by this Act permitted, or otherwise provided for), (*j*) if any persons shall deal or trade in, purchase, sell, barter, or transfer, or contract for the dealing, or trading in, purchase, sale, barter, or transfer, of slaves, or persons intended to be dealt with as slaves, or shall otherwise than as aforesaid carry away or remove, or contract for the carrying away or removing of slaves or other persons, as or in order to their being dealt with as slaves, or shall import or bring, contract for the importing or bringing, into any place whatsoever, slaves or other persons, as or in order to their being dealt with as slaves; or shall, otherwise than as aforesaid, (*j*) ship, trans-ship, embark, receive, detain, or confine on board, or contract for the shipping, trans-shipping, embarking, receiving, detaining, or confining on board of any ship, vessel, or boat, slaves or other persons, for the purpose of their being carried away or removed, as or in order to their being dealt with as slaves,

(*f*) See note (*e*) *ante*, p. 464.

(*i*) See ss. 1 & 2 of the 1 Vict. c. 91,

(*g*) Penal servitude by the 20 & 21 Vict. *ante*, p. 258.

c. 3, s. 2.

(*j*) See note (*e*) *ante*, p. 464.

(*h*) As to the length of sentences of penal servitude, see *ante*, p. 79.

or shall ship, trans-ship, embark, receive, detain, or confine on board, or contract for the shipping, trans-shipping, embarking, receiving, detaining, or confining on board of any ship, vessel, or boat, slaves, or other persons, for the purpose of their being imported, or brought into any place whatsoever, as or in order to their being dealt with as slaves; or shall fit out, man, navigate, equip, despatch, use, employ, let, or take to freight, or on hire, or contract for the fitting out, manning, navigating, equipping, despatching, using, employing, letting, or taking to freight, or on hire, any ship, vessel, or boat, in order to accomplish any of the objects, or the contracts in relation to the objects, which objects and contracts have hereinbefore been declared unlawful; or shall knowingly and wilfully lend or advance, or become security for the loan or advance, or contract for the lending or advancing, or becoming security for the loan or advance of money, goods, or effects, employed or to be employed, in accomplishing any of the objects, or the contracts in relation to the objects, which objects and contracts have hereinbefore been declared unlawful; or shall knowingly and wilfully become guarantee or security, or contract for the becoming guarantee or security for agents employed, or to be employed, in accomplishing any of the objects, or the contracts in relation to the objects, which objects and contracts have hereinbefore been declared unlawful, or in any other manner to engage, or to contract to engage, directly or indirectly therein, as a partner, agent, or otherwise, or shall knowingly and wilfully ship, trans-ship, lade, receive, or put on board, or contract for the shipping, trans-shipping, lading, receiving, or putting on board of any ship, vessel, or boat, money, goods, or effects, to be employed in accomplishing any of the objects, or the contracts in relation to the objects, which objects and contracts have hereinbefore been declared unlawful; or shall take the charge or command, or navigate, or enter and embark on board, or contract for the taking the charge or command, or for the navigating, or entering and embarking on board of any ship, vessel, or boat, as captain, master, mate, surgeon, or supercargo, knowing that such ship, vessel, or boat, is actually employed, or is in the same voyage, or upon the same occasion, in respect of which they shall so take the charge or command, or navigate, or enter and embark, or contract so to do as aforesaid, intended to be employed in accomplishing any of the objects, or the contracts in relation to the objects, which objects and contracts have hereinbefore been declared unlawful; or shall knowingly and wilfully insure, or contract for the insuring of any slaves, or any property, or other subject-matter engaged or employed in accomplishing any of the objects, or the contracts in relation to the objects, which objects and contracts have hereinbefore been declared unlawful; or shall wilfully and fraudulently forge or counterfeit any certificate, certificate of valuation, sentence or decree of condemnation or restitution, copy of sentence or decree of condemnation or restitution, or any receipt (such receipts being required by this Act), or any part of such certificate, certificate of valuation, sentence or decree of condemnation or restitution, copy of sentence, or decree of condemnation or restitution, or receipt as aforesaid; or shall knowingly and wilfully utter or publish the same, knowing it to be forged or counterfeited, with intent to defraud his Majesty, his heirs, or successors, or any other person or persons what-

soever, or any body politic or corporate; then and in every such case the person or persons so offending, and their procurers, counsellors, aiders, and abettors, shall be, and are hereby declared to be felons, and shall be transported (*k*) beyond seas for a term not exceeding fourteen (*l*) years, or shall be confined and kept to hard labour for a term not exceeding five years, nor less than three (*m*) years, at the discretion of the Court before whom such offender or offenders shall be tried and convicted.'

Sec. 11. '(Except in such special cases, or for such special purposes as are in and by this Act expressly permitted), (*n*) if any person shall enter and embark on board, or contract for the entering and embarking on board of any ship, vessel, or boat, as petty officer, seaman, marine or servant, or in any other capacity not hereinbefore specially mentioned, knowing that such ship, vessel, or boat, is actually employed, or is in the same voyage, or upon the same occasion, in respect of which they shall so enter and embark on board, or contract so to do as aforesaid, intended to be employed in accomplishing any of the objects, or the contracts in relation to the objects, which objects and contracts have hereinbefore been declared unlawful; then and in every such case the persons so offending, and their procurers, counsellors, aiders, and abettors, shall be, and they are hereby declared to be, guilty of a misdemeanor only, and shall be punished by imprisonment for a term not exceeding two years.'

Sec. 12. 'Nothing in this Act contained, making piracies, felonies, robberies, and misdemeanors, of the several offences aforesaid, shall be construed to repeal, annul, or alter the provisions and enactments in this Act also contained, imposing forfeitures and penalties, or either of them upon the same offences, or to repeal, annul, or alter, the remedies given for the recovery thereof: but that the said provisions and enactments, imposing forfeitures and penalties, shall in all respects be deemed and taken to be in full force.' (*o*)

Sec. 40. 'If any person offending as a petty officer, seaman, marine, or servant, against any of the provisions of the Act, shall within two years after the offence committed, give information on oath before any competent magistrate, against any owner or part-owner, or any captain, master, mate, surgeon, or supercargo, of any ship or vessel, who shall have committed any offence against this Act, and shall give evidence on oath against such owner, &c., before any magistrate or Court before whom such offender may be tried; or if such person so offending shall give information to any of his Majesty's ambassadors, ministers, &c., or other agents, so that any person owning such ship or vessel, or navigating or taking charge of the same, as captain, master, mate, surgeon, or supercargo, may be apprehended, such person so giving information and evidence shall not be liable to any of the pains or penalties under the Act incurred in respect of his offence; and his Majesty's ambassadors, ministers, &c., are required to receive any such information, and to transmit the particulars thereof without delay, to

(*k*) Penal servitude by the 20 & 21 Vict. c. 3, s. 2.

(*l*) As to the length of sentence of penal servitude, see *ante*, p. 79.

(*m*) See 9 & 10 Vict. c. 24, s. 1, *ante*,

p. 73, and *semble*, that the imprisonment may be for any time less than five years.

(*n*) See note (*e*) *ante*, p. 464.

(*o*) The remainder of this section is repealed by 36 & 37 Vict. c. 88.

one of his Majesty's principal secretaries of state, and to transmit copies of the same to the commanders of his Majesty's ships or vessels, then being in such port or place.'

In February, 1845, the *Felicidade*, a Brazilian schooner, bound on a voyage from the Brazils to Africa for the purpose of bringing back a cargo of slaves, arrived off the African coast, and while she was hovering within sixteen miles of the shore, and within six degrees of north latitude, was observed by Her Majesty's ship of war *Wasp*, stationed off the slave coast for the prevention of the slave trade, and then under the command of Captain Usher, who, upon approaching the *Felicidade*, manned two boats, and gave the command of them to Lieutenant Stupart, one of his officers, with orders to board the *Felicidade*, and if she appeared to be fitted up for the slave trade to capture her. Lieutenant Stupart, in obedience to these orders, went with the two boats to the *Felicidade*. Cerquiera, the captain, immediately surrendered, and he and all his crew, except Majavel and three others, were conveyed on board the *Wasp*. At the time of her capture the *Felicidade* was fitted up for the reception of a cargo of slaves, and was within sixteen miles of the shore. The next day Captain Usher, having removed from the *Felicidade* the three men who had been left with Majavel, sent back Cerquiera to the *Felicidade*, manned her with sixteen British seamen, and placed her under the command of Lieutenant Stupart, and directed him to steer a particular course in pursuit of a vessel capable of being seen from the *Wasp*, although then invisible from the *Felicidade*. Lieutenant Stupart accordingly steered that course, and the next morning he descried the *Echo*, a Brazilian brigantine, commanded by Serva. He chased her, and on coming up with her the following night fired a pistol as a signal to bring to, got into the jolly-boat, and hoisted British colours. The captain of the *Echo* hailed the men in the boat, and asked who they were, and, upon being informed that they were English, immediately set sail. Lieutenant Stupart continued the chase, and overtook the *Echo* the next night within ten miles of the African coast, when and where she surrendered. The lieutenant had at that time under his command Mr. Palmer, a midshipman, and sixteen British seamen; he ordered Mr. Palmer and eight of the seamen to take charge of the *Echo* during the night. On Mr. Palmer going on board the *Echo*, he found in her Serva, Serva's nephew, twenty-five men, and a cargo of four hundred and thirty-four slaves, and by the direction of Lieutenant Stupart, the vessels being at that time close together, sent Serva, his nephew, and eleven of the crew to the *Felicidade*, where they remained during the night in the custody of Lieutenant Stupart. During the chase and at the time of the surrender, Lieutenant Stupart wore his uniform, and at the time of the surrender and capture told Serva he was going to take them to Her Majesty's ship the *Wasp*, for being engaged in the slave trade. The *Wasp* had printed instructions on board. Lieutenant Stupart had not any printed instructions on board the *Felicidade*, and did not show any other authority than his uniform and the British ensign. He had, however, boarded the *Echo* several times before, and to Serva was well known as an officer in Her Majesty's navy. The slaves had been shipped on board the *Echo* at Lagos. The next morning after the capture Lieutenant Stupart took with him Serva's nephew to the

Echo, and placed Mr. Palmer and nine British seamen under his command on board the *Felicidade*, in order that he might take charge of her and of *Serva*, *Cerquiera*, *Majavel*, and several others of the *Echo*'s crew. Within an hour afterwards *Serva*, *Majavel*, and some of the rest conspired together to kill all the English on board the *Felicidade*, and take her; and in pursuance of that conspiracy rose upon Mr. Palmer and his men, and after a short conflict succeeded in killing them, *Majavel* having in the course of that conflict stabbed and thrown overboard Mr. Palmer. *Cerquiera*, though solicited by *Serva* to join in the plot, refused to do so, and endeavoured to dissuade him from carrying it into execution; and on the trial of an indictment against *Serva* and others engaged with him in the transaction for the murder of Mr. Palmer, at Exeter Assizes, Platt, B., held that the *Felicidade* was in the lawful custody of Her Majesty's officers, that all on board that vessel were within Her Majesty's Admiralty jurisdiction, and that if the prisoners plotted together to slay all the English on board and run away with the vessel, and in carrying their design into execution *Majavel* slew Mr. Palmer, and the others were aiding and assisting in the commission of that act, they should be found guilty of murder; and upon a case reserved it was contended on the part of the prisoners that both the *Felicidade* and *Echo* were wrongfully taken, and that the prisoners had a right to regain their freedom by any means in their power, and consequently that no felony had been committed. It was answered on the part of the prosecution, that the *Felicidade* and *Echo* were lawfully taken under the 5 Geo. 4, c. 113, and 7 & 8 Geo. 4, c. 74, and the Portuguese and Brazilian treaties as to slave trading; and that the prisoners were in lawful custody, and the *Felicidade* in the lawful custody of the Queen's officers; but it was held that there was a want of jurisdiction in an English Court to try the murder committed on board the *Felicidade*; and if the lawful possession of that vessel by the British Crown, through its officers, would be sufficient to give jurisdiction, there was no evidence brought before the court to show that the possession was lawful. (p)

Where some counts of an indictment on the 5 Geo. 4, c. 113, s. 10, omitted the words 'knowingly and wilfully,' which are used in that section in describing the offences charged in those counts, it was admitted that these counts were bad. (q)

Where a count stated that the prisoner in the fourth year of Queen Victoria, at London, and within the jurisdiction of the Central Criminal Court, did illegally and feloniously man, navigate, equip, despatch, use and employ a certain ship called the *Augusta*, in order to accomplish a certain object, which (by the 5 Geo. 4, c. 113) was declared unlawful, viz. to deal and trade in slaves; and the three following counts only varied from the first in describing the object of the several acts charged to have been done by the prisoner differently, as in the statute; and it was objected that each count was bad as charging distinct felonies, the statute making it a felony to fit out, man, navi-

(p) *R. v. Serva*, 2 C. & K. 53. 1 D. C. C. 104. Lord Denman, C. J., and Platt, B., *dissentientibus*. See also the *Life of Alderson*, B., p. 99.

(q) *R. v. Jennings*, 1 Cox, C. C. 115. Wightman and Cresswell, JJ.

gate, equip, despatch, use or employ any ship in order to accomplish any of the objects thereby declared unlawful, and each count charging the prisoner with having done all the acts before mentioned, each of which would have been of itself a felony, if done with the object stated in the Act; it was held that each count contained a charge of one felony only, the whole being alleged to have been done to accomplish one and the same single object, the essence of the felony consisting in using the means described in the Act to accomplish that object. It was also contended, that these counts were bad for not negating the exceptions in the Act of circumstances, which might render the transaction lawful; but it was held that these exceptions are virtually repealed by the 3 & 4 Will. 4, c. 73, s. 12, and that for this purpose the 5 Geo. 4, c. 113, s. 10, must be considered as if they had never existed; and as the offences in the indictment are charged to have been committed in the reign of her present Majesty, they must necessarily have been after the passing of the repealing Act. It was further objected, that the indictment did not allege that the prisoner was a British subject, or that the offence was committed within Her Majesty's dominions; but it was held that, as the offence was stated in each count to have been committed at London, within the jurisdiction of the Central Criminal Court, and therefore *prima facie* at least within the district mentioned in the 3 & 4 Will. 4, c. 36, s. 2, the indictment did in substance allege the offence to have been committed within Her Majesty's dominions. (r)

Upon an indictment under sec. 10 for feloniously fitting out a vessel for the purpose of dealing in slaves, it was held that the provisions of the Act are not confined to acts done by British subjects in furtherance of the slave trade in England or the British colonies, but apply to acts done by British subjects in furtherance of that trade in places not part of the British dominions. And in order to convict a party who is charged with having employed and loaded a vessel for the purpose of slave trading, it is not necessary to show that the vessel which carried out the goods was intended to be used for bringing back slaves in return; but it was sufficient if there was a slave adventure, and the vessel was in any way engaged in that adventure. (s)

Where a party residing in London was charged with having chartered a vessel and loaded goods on board, for the purpose of slave trading, it was held that slave trading papers found on board the vessel when she was seized off the coast of Africa, but not traced in any way to the knowledge of the prisoner, were not admissible in evidence against him. (t)

The 6 & 7 Vict. c. 98, s. 1, recites sec. 2 of the 5 Geo. 4, c. 113, and enacts 'that all the provisions of the said consolidated Slave Trade Act hereinbefore recited and of this present Act shall, from and after the coming into operation of this Act, be deemed to extend and apply to British subjects wheresoever residing or being, and whether within the dominions of the British Crown or of any foreign country; and all the several matters and things prohibited by the said consolidated Slave Trade Act or by this present Act when committed by British

(r) *R. v. Jennings, supra.*

(t) *Ibid.*

(s) *R. v. Zulueta*, 1 C. & K. 215.
Maule, J., and Wightman, J.

subjects, whether within the dominions of the British Crown or in any foreign country, except only as is hereinafter excepted, shall be deemed and taken to be offences committed against the said several Acts respectively, and shall be dealt with and punished accordingly: provided nevertheless, that nothing herein contained shall repeal or alter any of the provisions of the said Act.

Sec. 2. 'All persons holden in servitude as pledges for debt, and commonly called "pawns," or by whatsoever other name they may be called or known, shall for the purposes of the said consolidated Slave Trade Act,' and the 3 & 4 Will. 4, c. 73, 'and of this present Act, be deemed and construed to be slaves or persons intended to be dealt with as slaves.'

Sec. 5. 'In all the cases in which the holding or taking of slaves shall not be prohibited by this or any other Act of Parliament, it shall be lawful to sell or transfer such slaves, anything in this or any other Act contained notwithstanding.'

Sec. 6. 'Nothing in this Act contained shall be taken to subject to any forfeiture, punishment, or penalty any person for transferring or receiving any share in any joint-stock company established before the passing of this Act in respect of any slave or slaves in the possession of such company before such time, or for selling any slave or slaves which were lawfully in his possession at the time of passing this Act, or which such persons shall or may have become possessed of or entitled unto *bona fide* prior to such sale, by inheritance, devise, bequest, marriage, or otherwise by operation of law.'

Sec. 4 provides for issuing a mandamus for the examination of witnesses, and the receiving other proofs concerning matters charged in any indictment of information in the Queen's Bench for offences against the Acts committed in any British colony, settlement, plantation, or territory.

There is nothing in the statutes to prohibit a contract by a British subject for the sale of slaves lawfully held by him in a foreign country, where the possession and sale of slaves is legal. Where, therefore the defendants, British subjects, resident and domiciled in Great Britain, being possessed of certain slaves in the Brazils, where the purchase and holding of slaves is lawful, contracted with the plaintiff, a Brazilian subject, domiciled in the Brazils, to sell them to him, to be used and employed there, and some of the slaves had been purchased by the defendants in the Brazils after the passing of the 5 Geo. 4, c. 113, but before the 6 & 7 Vict. c. 98, for the purpose of being employed, and they were employed, in certain mines there, of which the defendants were the proprietors; and the rest of the slaves were their offspring, and were in the possession of the defendants before the passing of the latter Act; it was held that the contract was valid. (*u*)

The 'Slave Trade Act, 1873,' (*v*) consolidates the laws for the suppression of the slave trade, and incorporates the above provisions of the 5 Geo. 4, c. 113.

Sec. 2. 'In this Act the term "vessel" means any vessel used in

(*u*) *Santos v. Illidge*, 8 C. B. (N. S.) 861,
in error: reversing the judgment of the
Common Pleas in 6 C. B. (N. S.) 841.

(*v*) 36 & 37 Vict. c. 88.

navigation. The term "British possession" means any plantation, territory, settlement, or place situate within her Majesty's dominions, and not forming part of the United Kingdom. The term "Governor" includes the officer for the time being administering the government of any colony, and where there is a local governor or lieutenant-governor under a governor-general, means the local governor or lieutenant-governor. The term "foreign state" includes any foreign nation, people, tribe, sovereign, prince, chief, or headman. The term "vessel of a foreign state" means a vessel which is justly entitled to claim the protection of the flag of a foreign state, or which would be so entitled if she did not lose such protection by being engaged in the slave trade. The term "treaty" includes any convention, agreement, engagement, or arrangement. The term "slave trade," when used in relation to any particular treaty, does not include anything declared by such treaty not to be comprised in the term or in such treaty. The term "Vice-Admiralty Court" does not include any Vice-Admiralty Court which for the time being has under its commission a limited jurisdiction only in matters relating to the slave trade. The term "British slave court" means the High Court of Admiralty of England, every Vice-Admiralty Court in her Majesty's dominion out of the United Kingdom, and every East African Court for the time being within the meaning of the Slave Trade (East African Courts) Act, 1873. The term "slave court" means every British slave court, every mixed commission or court established under any existing slave trade treaty, and the court of any foreign state having jurisdiction to try and condemn a vessel engaged in the slave trade. The term "existing slave trade treaty" means a treaty made by or on behalf of her Majesty or her royal predecessors with any foreign state for the more effectual suppression of the slave trade and in force at the passing of this Act.'

The third and fourth sections provide for the seizure of ships suspected (*w*) of being engaged in or fitted out for the slave trade, and for the seizure of vessels, slaves, persons, goods, and effects which may be forfeited under the above provisions. Sections 5-8 provide the tribunal which is to try the right of seizure. Sections 9 and 10 provide for the disposal of vessels and slaves which have been seized. Sections 11-16 relate to bounties. By section 17 persons authorized to make seizures are to have the benefit of the protection granted to persons acting under her Majesty's customs. By section 18 the pendency of proceedings under the Act in certain cases is made a bar to other legal proceedings. Sections 19-21 apply to proceedings in the Court of Admiralty with respect to costs.

By sec. 22 any person who wilfully gives false evidence in any proceeding taken in pursuance of this Act in any slave court shall be guilty of an offence against this Act, and shall be liable to the like penalty as if he had been guilty of perjury, or in a British possession of the offence by whatever name called which if committed in England would be perjury.

By sec. 23 the registrar of a slave court is to make returns of cases adjudged in such court.

By sec. 24, 'This Act shall be construed as one with the enactments

(*w*) As to reasonable suspicion see *R. v. Casaca*, 5 Ap. Cas. s. 48.

of the Slave Trade Act, 1824 (5 Geo. 4, c. 113, *ante*, p. 464), and any enactments amending the same so far as they are in force at the time of the passing of this Act, and are not repealed by this Act. And the expression "this Act," when used in this Act, shall include those enactments.'

By sec. 25, 'All pecuniary forfeitures and penalties imposed by the said enactments with which this Act is to be construed as one, may be sued for, prosecuted, and recovered in any court of record or of Vice-Admiralty in any part of her Majesty's dominions wherein the offence was committed, or where the offender may be, in like manner, as any penalty or forfeiture incurred in the United Kingdom, under any Act for the time being in force relating to her Majesty's customs, or (in the case of the High Court of Admiralty, or of a court of Vice-Admiralty), in like manner as any vessel seized in pursuance of this Act. Such pecuniary penalties and forfeitures shall, subject to the express provisions of the said enactments, be paid and applied in like manner as the net proceeds of a vessel seized otherwise than by the commander or officer of one of her Majesty's ships, or of the cruiser of a foreign state.'

Trial of offences against the Act. — By sec. 26, 'Any offence against this Act, or the said enactments with which this Act is to be construed as one, or otherwise in connection with the slave trade, shall, for all purposes of and incidental to the trial and punishment of a person guilty of such offence, and all proceedings and matters preliminary and incidental to and consequential on such trial and punishment, and for all purposes of and incidental to the jurisdiction of any Court, constable, and officer with reference to such offence, be deemed to have been committed, either in the place in which the offence was committed or in the county of Middlesex, or in any place in which the person guilty of the offence may for the time being be either in her Majesty's dominions, or in any foreign port or place in which her Majesty has jurisdiction, and the offence may be described in any indictment or other document relating thereto, as having been committed at the place where it was wholly or partly committed; or as having been committed on the high seas, or out of her Majesty's dominions, and the venue or local description in the margin may be that of the place in which the trial is held.'

Where any such offence is commenced at one place and completed at another, the place at which such offence is to be deemed to have been committed shall be either the place where the offence was commenced or the place where the offence was completed.

Where a person being in one place is accessory to or aids or abets in any such offence committed in another place, the place at which such offence is to be deemed to have been committed shall be either the place in which the offence was actually committed or the place where the offender was at the time of his being so accessory aiding or abetting.

Where it appears to any Court, or the judge of any Court having jurisdiction to try any such offence, that the removal of an offender charged with such offence to some other place in her Majesty's dominions for trial would be conducive to the interest of justice, such Court or judge may, by warrant or instrument in the nature of a warrant,

direct such removal, and such offender may be removed and tried accordingly. And sec. 268 of the Merchant Shipping Act, 1854, shall apply to the removal of an offender under this section in the same manner as if the term 'consular officer' in that section included the Court or judge making such warrant or instrument.

By sec. 28 the Act applies to all cases of vessels, slaves, goods, and effects seized and adjudicated upon by any slave court, whether before or after the passing of the Act. Sec. 29 extends the Act to future treaties with any foreign state in relation to the slave trade if an order in council be obtained for that purpose.

CHAPTER THE TWENTIETH.

OF FORESTALLING, REGRATING, AND INGROSSING, AND OF MONOPOLIES.

EVERY practice or device by act, conspiracy, words, or news, to enhance the price of victuals or other merchandize, has been held to be unlawful; as being prejudicial to trade and commerce, and injurious to the public in general. (a) Practices of this kind came under the notion of forestalling; which anciently comprehended, in its signification, regrating and ingrossing, and all other offences of the like nature. (b) Spreading false rumours, buying things in the market before the accustomed hour, or buying and selling again the same thing in the same market, are offences of this kind. (c) Also if a person within the realm bought any merchandize in gross, and sold the same again in gross, it was considered an offence of this nature, on the ground that the price must be thereby enhanced, as each person through whose hands it passed would endeavour to make his profit of it. (d) So the bare ingrossing of a whole commodity, with an intent to sell it at an unreasonable price, was an offence at the common law; for if such practices were allowed, a rich man might ingross into his hands a whole commodity, and then sell it at what price he should think fit. (e)

The offences of forestalling, regrating, and ingrossing were for a considerable period prohibited by statutes; but the beneficial tendency of such statutes was doubted; and at length by the 12 Geo. 3, c. 71, they were repealed, as being detrimental to the supply of the labouring and manufacturing poor of the kingdom. But forestalling, regrating, and ingrossing continued offences at common law until the 7 & 8 Vict. c. 24, s. 1, which enacts that 'the several offences of badgering, engrossing, forestalling, and regrating be utterly taken away and abolished, and that no information, indictment, suit, or prosecution, shall lie either at common law or by virtue of any statute, or be commenced or prosecuted against any person for or by reason of any of the said offences or supposed offences.'¹

(a) 3 Inst. 196. Bac. Abr. tit. *Forestalling*.

(b) 3 Inst. 195. Bac. Abr. tit. *Forestalling* (A).

(c) 1 Hawk. P. C. c. 80, s. 1.

(d) 3 Inst. 196. Bac. Abr. tit. *Forestalling* (A). 1 Hawk. P. C. c. 80, s. 3. But

it was held that any merchant, whether subject or foreigner, bringing victuals or any other merchandize into the realm, may sell it in gross. 3 Inst. 196.

(e) 1 Hawk. P. C. c. 80, s. 3. 3 Inst. 196.

AMERICAN NOTE.

¹ In America it would seem that there have been no statutes forbidding these offences, and no statute abolishing the common-law offences, and therefore such offences may be committed in states recog-

nizing common law. It appears that English statutes before the Declaration of Independence are considered as common law generally in America. Bishop i. s. 520.

Sec. 4. 'Nothing in this Act contained shall be construed to apply to the offence of knowingly and fraudulently spreading, or conspiring to spread, any false rumour, with intent to enhance or decry the price of any goods or merchandize, or to the offence of preventing, or endeavouring to prevent, by force or threats, any goods, wares, or merchandize being brought to any fair or market, but that every such offence may be inquired of, tried, and punished as if this Act had not been made.'

The attempt by false reports to enhance or abate the price of our native commodities is punishable by fine and ransom at common law. (*f*) And where certain persons came to Coteswold, and said, in deceit of the people, that there were such wars beyond the seas that wool could not pass or be carried beyond sea, whereby the price of wools was abated; and presentment thereof being made, the defendants, having appeared, were, upon their confession, put to fine and ransom. (*g*) And there can be no doubt that the offences excepted by sec. 4 of the 7 & 8 Vict. c. 24, are punishable like other common-law misdemeanors. (*h*)

Monopolies are much the same offence in other branches of trade that ingrossing is in provisions: being a licence or privilege allowed by the King for the sole buying and selling, making, working, or using of anything whatsoever; whereby the subject in general is restrained from that liberty of manufacturing or trading which he had before. (*i*) They are said to differ only in this,—that monopoly is by patent from the King, ingrossing by the act of the subject, between party and party; and have been considered as both equally injurious to trades and the freedom of the subject, and therefore equally restrained by the common law. (*j*) By the common law, therefore, those who are guilty of this offence are subject to fine and imprisonment, the offence being *malum in se*, and contrary to the ancient and fundamental laws of the kingdom; and it is said that there are precedents of prosecutions of this kind in former days. (*k*) And all grants of this kind, relating to any known trade, are void by the common law. (*l*)

But, notwithstanding their illegality, monopolies had been carried to an enormous height during the reign of Queen Elizabeth; the evil was, however, in a great measure remedied by the 21 Jac. 1, c. 3, which declares them to be contrary to law, and void (except as to patents not exceeding the grant of fourteen years to the authors of new inventions; and except also patents concerning printing, salt-petre, gunpowder, great ordnance, and shot); and monopolists are punished with the forfeiture of treble damages and double costs to those whom they attempt to disturb. (*m*)

(*f*) 3 Inst. 196, referring to 23 Ed. 3, c. 6. 13 Rich. 2, c. 8, *Inter leges Ethelstani*, c. 12.

(*g*) 48 Ass. pl. 38. 3 Inst. 196.

(*h*) *Ante*, p. 475.

(*i*) 4 Blac. Com. 158. 3 Inst. 181.

(*j*) Skin. 169.

(*k*) 3 Inst. 181. 2 Inst. 47, 61. Bac. Abr. tit. *Monopoly* (A), note (b).

(*l*) 1 Hawk. P. C. c. 79, s. 1.

(*m*) Sec. 4. And see further upon the subject of monopolies, 1 Hawk. P. C. c. 79. Bac. Abr. tit. *Monopoly*.

CHAPTER THE TWENTY-FIRST.

OF MAINTENANCE AND CHAMPERTY, AND OF BUYING AND SELLING PRETENDED TITLES.¹

MAINTENANCE seems to signify an unlawful taking in hand or upholding of quarrels or sides, to the disturbance or hindrance of common right. This may be where a person assists another in his pretensions to lands, by taking or holding the possession of them for him by force or subtlety, or where a person stirs up quarrels and suits in relation to matters wherein he is in no way concerned; (a) or it may be where a person officiously intermeddles in a suit depending in a court of justice, and in no way belonging to him, by assisting either party with money, or otherwise, in the prosecution or defence of such suit. (b) Where there is no contract to have part of the thing in suit, the party so intermeddling is said to be guilty of *maintenance* generally; but if the party stipulate to have part of the thing in suit, his offence is called *champerty*. (c)

As to *maintenance*, it is laid down that whoever assists another with money to carry on his cause, as by retaining one to be of counsel for him, or otherwise bearing him out in the whole or part of the expense of the suit, may properly be said to be guilty of an act of maintenance. (d) It has been said that no one can be guilty of maintenance in respect of any money given by him to another for the purposes of an intended suit, *before* any suit is actually commenced; but it should seem that this, if not strictly maintenance, must be equally criminal at common law. (e) And a person may be as much

(a) Co. Lit. 368 b. Inst. 208, 212, 213. 1 Hawk. P. C. c. 83, ss. 1, 2. Bac. Abr. tit. *Maintenance*. This kind of maintenance is called in the books *ruralis*, in distinction to another carried on in courts of justice, and therefore called *curialis*. It is punishable at the King's suit by fine and imprisonment, whether the matter in dispute any way depended in plea or not; but is said not to be actionable.

(b) 1 Hawk. P. C. c. 83, s. 3. Bac. Abr. tit. *Maintenance*. 4 Blac. Com. 134. This kind of maintenance is called *curialis*. See *ante* note (a).

(c) Co. Lit. 368. 1 Hawk. P. C. c. 83,

s. 3. The abuse of legal proceedings by oppressive combinations to carry them into effect is observed by Mr. Hume to have speedily appeared upon the establishment of the laws in the time of Edward I. He says, 'instead of their former associations for robbery and violence, men entered into formal combinations to support each other in law suits; and it was found requisite to check this iniquity by Act of Parliament.' 2 Hume, 320, referring to the statute of conspirators, — Edw. I.

(d) 1 Hawk. P. C. c. 83, s. 4, and the numerous authorities cited in the margin.

(e) Bac. Abr. tit. *Maintenance* (A). 1

AMERICAN NOTE.

¹ The offences of maintenance, champerty, and the buying and selling of pretended titles appear not to be offences at common law in some of the American States. In some States there is no common law at all, and therefore of course there is no mainte-

nance or champerty as such; but in some other States the Courts do not think the English law is applicable to America. In most States it would seem that the English law is in substance followed. See Bishop, Vol. ii. s. 130, 131, and note 2, s. 136-138.

guilty of maintenance for supporting another after judgment, as for doing it while the plea is pending, because the party grieved may be thereby discouraged from bringing a writ of error or attain. (*f*)

It has also been said, that he who by his *friendship* or *interest* saves a person that expense in his cause which he might otherwise be put to, or gives, or but endeavours to give, any other kind of assistance to a party in the management of his suit, is guilty of maintenance. (*g*) And it has been said also, that he who gives any *public countenance* to another in relation to such suit will come under the like notion; as if a person of great power and interest says publicly that he will spend a sum of money on one side, or that he will give a sum of money to labour the jury, whether in truth he spend anything or not; or where such a person comes to the bar with one of the parties, and stands by him while his cause is tried, whether he says anything or not; for such practices not only tend to discourage the other party from going on with his cause, but also to intimidate juries from doing their duty. (*h*) But it seems that a bare promise to maintain another is not in itself maintenance, unless it be either in respect of the power of the person who makes it, or of the public manner in which it is made. (*i*) A man is not guilty of an act of maintenance, by giving another friendly advice as to his proper remedy at law, or as to the counsellor or attorney likely to do his business most effectually. (*j*) Where a member of Parliament procured an informer to sue another member of Parliament for penalties, having sat and voted without being duly qualified, and gave him an indemnity against all costs and expenses, it was held that the member and the informer had no such common interest in the penalty sued for as to be a defence in an action for maintenance. (*k*)

Hawk. P. C. c. 83, s. 12, where it is said, that if it plainly appear that the money was given merely with a design to assist in the prosecution or defence of an intended suit, which afterwards is actually brought, surely it cannot but be as great a misdemeanor in the nature of the thing and equally criminal at common law as if the money were given after the commencement of the suit; though perhaps it may not in strictness come under the notion of maintenance.

(*f*) 1 Hawk. P. C. c. 83, s. 13. Bac. Abr. tit. *Maintenance* (A). Where a declaration alleged that the defendant unlawfully, maliciously, and without reasonable or probable cause, and without having any interest in the suit therein mentioned, instigated and stirred up a pauper to commence and prosecute an action against the plaintiff, by reason whereof the pauper did commence and prosecute such action, whereby the plaintiff was put to great trouble and vexation, and obliged to lay out a large sum in the defence of such action; the Court of Exchequer held that the declaration was good. *Pechell v. Watson*, 8 M. & W. 691. But where a declaration alleged that the defendant unlawfully and maliciously did procure, instigate, and stir up one Thomas to commence and prosecute an action against the plaintiff, wherein certain issues were joined

as to which the plaintiff was acquitted; the Court of Queen's Bench held that no cause of action appeared, the declaration not showing maintenance (as the action appeared not to have been commenced when the defendant interfered), and not alleging want of reasonable and probable cause for the action. *Flight v. Leman*, 4 Q. B. 883. A declaration for maintenance need not charge the maintenance to have been committed against the form of the statute — it being a wrongful act at common law, and the statutes relating to maintenance being only declaratory of the common law with additional penalties. Nor need the declaration allege that the defendant was not interested in the action maintained; for if he was that is matter to be pleaded by him. *Pechell v. Watson*, *supra*.

(*g*) Bro. tit. *Maintenance*, 7, 14, 17, &c. 1 Hawk. P. C. c. 83, ss. 5, 6. But this would not be acted upon at the present day: See per Buller, J., in *Master v. Miller*, 4 T. R. 340.

(*h*) 1 Hawk. P. C. c. 83, s. 7. Bac. Abr. tit. *Maintenance* (A).

(*i*) 1 Hawk. P. C. c. 83, s. 8.

(*j*) *Ibid.* s. 9. Bac. Abr. tit. *Maintenance* (A).

(*k*) *Bradlaugh v. Newdegate*, 11 Q. B. D. 1.

But there are many acts, in the nature of maintenance, which become justifiable from the circumstances under which they are done. They may be justifiable — 1, in respect of an interest in the thing in variance; 2, in respect of kindred or affinity; 3, in respect of other relations, as that of lord and tenant, master and servant; 4, in respect of charity; 5, in respect of the profession of the law.

It seems clear that not only those who have an actual interest in the thing in variance, as those who have a reversion expectant on an estate-tail, or a lease for life or years, &c., but also those who have a bare contingency of an interest in the lands in question, which possibly may never come *in esse*, and even those who by the act of God have the immediate possibility of such an interest, as heirs apparent, or the husbands of such heirs, though it be in the power of others to bar them, may lawfully maintain another in an action concerning such lands: and if a plaintiff in an action of trespass alien the lands, the alienee may produce evidence to prove that the inheritance at the time of the action was in the plaintiff, because the title is now become his own. (*l*) Also he who is bound to warrant lands may lawfully maintain the tenant in the defence of his title, because he is bound to render other lands to the value of those that shall be evicted. And he who has an equitable interest in lands or goods, or even in a chose in action, as a *cestui que trust*, or a vendee of lands, &c., or an assignee of a bond for a good consideration, may lawfully maintain a suit concerning the thing in which he has such an equity. (*m*) And wherever any persons claim a common interest in the same thing, as in a way, churchyard, or common, &c., by the same title, they may maintain one another in a suit concerning such thing. (*n*)

Where, on the trial of an action brought to recover the amount of an attorney's bill, in which there was a plea of maintenance, it appeared that Jesus College, Oxford, had given notice to set out tithes in kind to all the owners of old inclosures in the parish of Tredington, who had, as far as living memory went, paid certain sums of money in lieu of tithes for the old inclosures, and that, at a meeting of the owners of such old inclosures, it was agreed by them that they should defend any suit or suits, which should be instituted by Jesus College, to enforce the payment of tithes, and that the expenses of such defence should be paid by the owners in proportion to their interests, as ascertained by the poor rate; the owners considering that if Jesus College should succeed in one suit as to any part of the old inclosures, that would invalidate the payments as to all; and Jesus College afterwards filed seven bills in the Exchequer, and commissions were issued for the examination of witnesses in each suit, and depositions taken in all the suits; but in one suit a greater number of depositions than in any other, and which related to there having been no payment of any tithe for the old inclosures, and there being a distinction in this respect as far as living memory went, between the old and the new inclosures; and these depositions by consent had been

(*l*) Bac. Abr. tit. *Maintenance* (B). 1 Hawk. P. C. c. 83, ss. 14, 15, &c.

(*m*) *Id.* *ibid.*, and see the judgment of

Buller, J., in *Master v. Miller*, 4 T. R. 340, *et seq.*

(*n*) 1 Hawk. P. C. c. 83, ss. 24, 25. Bac. Abr. tit. *Maintenance* (B).

used in all the suits; and nine issues having been directed to be tried, and the jury having retired to consider their verdict in the first, it was agreed that the verdicts in the other issues should be entered according to the finding of the jury in the first; but such jury was discharged without finding any verdict, and decrees were afterwards made, establishing some of the moduses and quashing others; it was held that the agreement to defend the suits was not maintenance; for, although the payments were not the same per acre, and although the interest in each payment was separate, yet all the owners of the old inclosures had an interest in supporting the moduses over all the old inclosures, and consequently the agreement was not *officially* entered into in order to defend the suits. (o)

Where a count stated that Yeoman had deposited certain money in the hands of the plaintiff, which the plaintiff had delivered to the defendant at his request, and that Yeoman threatening to bring an action against the plaintiff to recover the money, and thereupon, in consideration that the plaintiff, at the request of the defendant, would defend any action Yeoman should commence, the defendant undertook to save the plaintiff harmless; that Yeoman brought an action to recover the money, and that the plaintiff defended it with the privity and consent of the defendant; it was held that this was not maintenance. (p)

Whoever is of kin, or godfather to either of the parties, or related by any kind of affinity still continuing, may lawfully stand by at the bar and counsel him, and pray another to be of counsel for him; but cannot lawfully lay out his money in the cause, unless he be either father, or son, or heir-apparent, to the party, or husband of such an heiress. (q)

Much of the law relating to the maintenance which a lord may give to his tenant would hardly be applicable at the present time. It seems to have been the better opinion that the lord might justify laying out his own money in defence of his tenant's title, where the lands were originally derived from the lord, but that he could not maintain the tenant in respect of lands not holden of himself. (r)

With respect to the maintenance which a master may give to his servant, it has been held that he may pray one to be of counsel for him, and may go with him, and stand with him, and aid him at the trial: also it is said, that if the servant be arrested, the master may assist him with money to keep him from prison, that he may have the benefit of his service; but he cannot safely lay out money for the servant in a real action, unless he have some of his wages in his hands; but those, with the servant's consent, he may safely disburse. (s) And a servant cannot lawfully lay out any of his own money to assist the master in his suit. (t)

Any one may lawfully give money to a poor man to enable him to carry on his suit: and any one may safely go with a foreigner, who cannot speak English, to a counsellor and inform him of his case. (u)¹

(o) Findon v. Parker, 11 M. & W. 675, and MSS. C. S. G.

(p) Williamson v. Henley, 6 Bing. 299.

(q) Bac. Abr. tit. Maintenance (B). 1 Hawk. P. C. c. 83, s. 26.

(r) 1 Hawk. P. C. c. 83, s. 29.

(s) Bro. tit. Maintenance, 44, 52. 1

Hawk. P. C. c. 83, ss. 31, 32, 33.

(t) 1 Hawk. id. s. 34.

(u) Bro. tit. Maintenance, 14. Bac. Abr.

AMERICAN NOTE.

¹ This is so also in America. S. v. Chitty, 1 Bailey, 401.

A *counsellor* may lawfully set forth his client's cause to the best advantage; but can no more justify giving him money to maintain his suit, or threatening a juror, than any other person. An *attorney*, also, when specially retained, may lawfully prosecute or defend an action, and lay out his own money in the suit. (*v*)

Where there was one attorney on the record, and another attorney became before the trial really and substantially the attorney for the client in the conduct of the suit, and the latter, after verdict, but before judgment, *bonâ fide* purchased from his client the benefit of his verdict, it was held that the transaction being a purchase of the subject-matter of the suit by the attorney, was void; for the attorney was to be considered as the attorney having the management of the cause, and the purchase was in effect a purchase by the attorney in the cause of the subject-matter of it *pendente lite*, not for the purpose of enabling them to carry on the suit, but because they wanted money; and independently of the statutes restraining the purchase of property in suit, it had been held, in several cases, that no attorney can be permitted to purchase anything in litigation, of which litigation he has the management. (*w*)

A contract whereby an attorney stipulates with a client to receive, in consideration of the large advances requisite to conducting the proceedings to a successful issue, over and above his legal costs, a sum which should be commensurate with his outlay and exertions and with the benefit resulting to the client, is unlawful. The contract would have been directly in violation of the laws against maintenance, if the stipulation had been that the plaintiff, as attorney in the suit, in consideration of his advancing the funds necessary for carrying on the litigation, should receive a portion of the proceeds or property to be recovered; and the only difference between the two cases is that, in the former, the party would have the security of the property; whereas here he has only the personal security of the client. But if he be a solvent man, he gets a share of the property by another mode, viz., by suing him, and obtaining judgment. (*x*) An agreement to be carried into effect in this country, which would be void on the ground of champerty if made here, is not the less void because it is made in a foreign country, where such a contract would be legal. Where, therefore, an attorney entered into an agreement in France with a French subject to sue for a debt due to the latter from a person residing here, whereby the attorney was to receive by way of recompense a moiety of the amount recovered; it was held that this agreement was void for champerty. (*y*) If any act were done under such an agreement in England, the party doing it would be indictable here. (*z*)

But there is a clear distinction between the assignment by a client to an attorney of the subject-matter of a suit by way of security, and an absolute sale of the subject-matter of the suit. In the latter case

tit. *Maintenance* (B) 4. 1 Hawk. P. C. c. 83, ss. 36, 37. The charity need not apparently be exercised on reasonable grounds. *Harris v. Brisco*, 17 Q. B. D. 504.

(*v*) 2 Inst. 564. Bac. Abr. tit. *Maintenance* (B) 5. 1 Hawk. P. C. c. 83, ss. 28, 29, 30.

(*w*) *Simpson v. Lamb*, 7 E. & B. 84.

(*x*) *Earle v. Hopwood*, 9 C. B. (N. S.) 566; 30 L. J. C. P. 217. See *Price v. Beattie*, 32 L. J. Ch. 734.

(*y*) *Grell v. Levy*, 16 C. B. (N. S.) 73.

(*z*) *R. v. Brisco*, 4 East, R. 163.

the attorney might have an opportunity of imposing on his client, from his superior knowledge of the value of that subject-matter, and might after the purchase take improper means to increase the value. But a mere assignment, by way of security, is open to no such danger, and may be very advantageous to the client. (a) Where, therefore, a client having recovered a verdict in an ejectment, by an indenture, reciting that he was indebted to his attorney in 100*l.* for money lent and for work done as an attorney, and was unable to pay it, and had agreed to secure it, granted the crop of potatoes then growing upon the close, which was the subject of the action, and all other effects thereon, until payment of the 100*l.* and interest, with a proviso that if the client paid the 100*l.* and the interest on a certain day, the indenture should be void; and the indenture also contained a power to the attorney, on default of payment, to enter, carry away, and dispose of the effects assigned; provided that, if he sold the property, he should hold the surplus, after paying the expenses and reimbursing himself, in trust for the client; it was held that this deed could not be impeached on the ground of either champerty or maintenance. (b)

But no counsellor or attorney can justify using any deceitful practice in maintenance of a client's clause: and they will be liable to be punished for misdemeanors in this respect by the common law, and also by the statute of Westm. 1, c. 29. (c) In the construction of this statute it has been holden that all fraud and falsehood, tending to impose upon or abuse the justice of the King's courts, are within the purview of it.

Champerty. — *Champerty* is a species of maintenance, being a bargain with a plaintiff or defendant *campum partire*, to divide the land or other matter sued for between them, if they prevail at law; whereupon the champertor is to carry on the party's suit at his own expense. (d) It is defined in the old books to be, the unlawful maintenance of a suit, in consideration of some bargain to have part of the thing in dispute, or some profit out of it. (e)

The statute of Westminster 1 (3 Edw. 1), c. 25, enacts, that 'no officers of the King, by themselves nor by others, shall maintain pleas, suits, or matters, hanging in the King's courts, for lands, tenements, or other things, for to have part or profit thereof, by covenant made between them; and he that doth shall be punished at the King's pleasure.' By the Courts mentioned in this statute it has been held that courts of record only are intended; and it has also been held that under the word *covenant* all kinds of promises and contracts of this kind are included; that maintenance in personal actions, to have part of the debt or damages, is as much within the statute as maintenance in real

(a) Per Lord Campbell, C. J., *Anderson v. Radcliffe*, E. B. & E. 806, 29 L. J. Q. B. 128, citing *Wood v. Downes*, 18 Ves. 120.

(b) *Anderson v. Radcliffe*, *supra*, affirmed in error, E. B. & E. 119, upon the ground that the contract was confined to the payment of a debt already due for costs subject to taxation, and therefore the attorney got nothing but a security for a just debt. See also *Cook v. Field*, 15 Q. B. 460, where an agreement to sell the possibility and expect-

ancy of an estate, in case the vendor became devisee of it, was held lawful.

(c) 2 Inst. 215. Bac. Abr. and Hawk. *supra* (u). The statute enacts that the offender shall be imprisoned for a year and a day, and shall not plead again if he be a pleader. Dy. 362. 1 Hawk. P. C. c. 83, s. 33, *et seq.* Bac. Abr. tit. *Maintenance*, in the margin.

(d) 4 Black. Com. 135.

(e) Per Tindal, C. J., *Stanley v. Jones*, 7 Bing. 377. 5 M. & P. 193.

actions for a part of the land; and that though a grant of rent out of other lands is not within the statute, yet the statute applies to a grant of rent out of the lands in question; but that a grant of part of a thing in suit, made in consideration of a precedent debt, is not within its meaning. (f) The maintenance of a tenant or defendant is as much within the meaning of the statute as the maintenance of a demandant or plaintiff. And it has been holden not to be material whether he who brings a writ of champerty did in truth suffer any damage by it, or whether the plea wherein it is alleged be determined or not. (g)

The statute of Westminster 2 (13 Edw. 1), c. 49, enacts, that 'the chancellor, treasurer, justices, nor any of the King's council, no clerk of the chancery, nor of the exchequer, nor of any justice or other officer, nor any of the King's house, clerk ne lay, shall not receive any church, nor advowson of a church, land, nor tenement, in fee, by gift, nor by purchase, nor to farm, nor by champerty, nor otherwise, so long as the thing is in plea before us, or before any of our officers; nor shall take no reward thereof. And he that doth contrary to this Act, either himself or by another, or make any bargain, shall be punished at the King's pleasure, as well he that purchaseth as he that doth sell.' This statute extends only to the officers therein named, and not to any other person. (h) But it so strictly restrains all such officers from purchasing any land, pending a plea, that they cannot be excused by a consideration of kindred or affinity, and they are within the meaning of the statute by barely making such a purchase, whether they maintain the party in his suit or not; whereas such a purchase for good consideration made by any other person, of any terre-tenant, is no offence, unless it appear that he did it to maintain the party. (i)

The 28 Edw. 1, c. 11, reciting that the King had theretofore ordained by statute that none of his ministers should take no plea for maintenance, by which statute other officers were not bounded, enacts, that 'the King will that no officer, nor any other (for to have part of the thing in plea) shall not take upon him the business that is in suit; nor none upon any such covenant shall give up his right to another; and if any do, and he be attainted thereof, the taker shall forfeit unto the King so much of his lands and goods as doth amount to the value of the part that he hath purchased for such maintenance. And for this *atteindre*, whosoever will shall be received to sue for the King before the justices before whom the plea hangeth, and the judgment shall be given by them. But it may not be understood hereby, that any person shall be prohibit to have counsel of pleaders, or of learned men in the law for his fee, or of his parents or next friends.' Upon this statute it seems to be agreed that champerty in any action at law is within it; and a purchase of land, pending a suit in equity concerning it, has also been holden to be within the statute; also a lease for life or years, or a voluntary gift of land, pending a plea, is as much within the statute as a purchase for money. But neither a conveyance executed, pending a plea, in pursuance of a precedent bargain, nor any surrender by a lessee to his lessor, nor any conveyance or promise

(f) See the authorities collected in 1 Hawk. P. C. c. 84, s. 3, *et seq.* Bac. Abr. tit. *Champerty*.

(g) Id. *ibid.*

(h) 2 Inst. 484, 485.

(i) 1 Hawk. P. C. c. 84, s. 12.

thereof made by a father to his son, or by any ancestor to his heir-apparent, nor a gift of land in suit, after the end of it, to a counsellor, for his fee or wages, without any kind of precedent bargain relating to such gift, are within the meaning of the statute. (j) A bargain by a man, who has evidence in his own possession respecting a matter in dispute between third persons, and who at the time professes to have the means of procuring more evidence, to purchase from one of the contending parties, as the price of the evidence which he so possesses or can procure, an eighth part or share of the sum of money, which shall be recovered by means of the production of that evidence, is an illegal agreement; and if there be any difference between such a contract, and direct champerty, it is strongly against the legality of such contract; as besides the ordinary objection, that a stranger to the controversy has acquired an interest to carry on the litigation to the utmost extent, by every influence and means in his power, the bargain to furnish and to procure evidence for the consideration of a money payment in proportion to the effect produced by such evidence, has a direct tendency to pervert the course of justice. (k) So where a bill was filed for the purpose, amongst other things, of declaring an agreement void, which had been made by a seaman for the sale of his chance of prize money to his prize agents, who were to carry on the suit, Sir W. Grant, M. R., expressed an opinion that the agreement was void, as amounting to champerty. (l)

Where to a declaration upon an agreement the defendant pleaded that one Townley died possessed of personal property, intestate and without any known relation, and that administration had been granted to the Solicitor to the Treasury for the use of the Queen, and that the defendant was ignorant of his being related to Townley, or in any way entitled to the property, and that the plaintiff and one Rosaz represented to the defendant that they would supply and give such information and evidence, in case it should be necessary that proceedings should be taken by the defendant at law or in equity for the recovery of the property, that, by means of such information and evidence, the defendant should and might recover the property, provided the defendant would enter into an agreement with the plaintiff and Rosaz to pay each of them one-fifth of the property so recovered; and that it was thereupon unlawfully agreed between the parties that the plaintiff and Rosaz should give and supply such information and evidence in case of proceedings being taken at law or in equity for recovery of the property, that, by means of such information and evidence, the defendant should successfully recover the property; and that if by means of such information and evidence the defendant should actually recover the property, he would pay each of them one-fifth of the amount; and that for the purpose of carrying this illegal agreement into effect the parties entered into the agreement set out in the declaration, and that it was under the illegal agreement that the property was actually recovered;

(j) Bac. Abr. tit. *Champerty*. 1 Hawk. P. C. c. 84, s. 14, *et seq.* But with respect to the counsellor it is said that it seems dangerous for him to meddle with any such gift, since it cannot but carry with it a strong presumption of champerty. 2 Inst. 564.

(k) *Stanley v. Jones*, 7 Bing. 369. 5 M. & P. 193. *Potts v. Sparrow*, 6 C. & P. 749.

(l) *Stevens v. Bagwell*, 15 Ves. 139.

it was held that this was maintenance in its worst aspect. The plaintiff and Rosaz, entire strangers to the property, which they said the defendant had a title to, but which was in the possession of another claiming title to it, agreed with the defendant that legal proceedings should be instituted in his name for the recovery of it, and that they would supply him, not with any specified or definite documents or information, but with evidence that should be sufficient to enable him successfully to recover the property; each of them was to have one-fifth of the property when so recovered; and unless the evidence with which they supplied him was sufficient for this purpose, they were to have nothing. They were not to employ the attorney or to advance money to carry on the litigation; but they were to supply that upon which the event of the suit must depend, *evidence*; and they were to supply it of such a nature and in such quantity as to secure success. The plaintiff purchased an interest in the property in dispute, bargained for litigation to recover it, and undertook to maintain the defendant in the suit in a manner of all others the most likely to lead to perjury and to a perversion of justice. Upon principle such an agreement is clearly illegal, and *Stanley v. Jones* (m) is an express authority to that effect. (n)

3. Another species of maintenance appears to be the offence of *buying or selling a pretended title*; of which it is said in the books that it seems to be a high offence at common law, as plainly tending to oppression, for a man to buy or sell at an under rate a doubtful title to lands known to be disputed, to the intent that the buyer may carry on the suit, which the seller does not think it worth his while to do. And it seems not to be material whether the title be good or bad; or whether the seller were in possession or not, unless the possession were lawful and uncontested. (o) Offences of this kind are also restrained by several statutes. By the 13 Edw. 1, c. 49, no person of the King's house shall buy any title whilst the thing is in dispute, on pain of both the buyer and seller being punished at the King's pleasure. See also 32 Hen. 8, c. 9. (p)

By the common law all unlawful maintainers are not only liable to render damages in an action at the suit of the party grieved, but may also be indicted and fined, and imprisoned, &c.; and it seems that a court of record may commit a man for an act of maintenance in the face of the Court. (q)

The 1 Rich. 2, c. 4, enacts, that no person whatsoever shall take or sustain any quarrel by maintenance, in the country or elsewhere, on grievous pain; that is to say, the King's counsellors and great officers, on a pain that shall be ordained by the King himself, by the advice of the lords of this realm; and other officers of the King, on pain to lose their offices and to be imprisoned and ransomed, &c.; and all other persons, on pain of imprisonment and ransom. (r)

(m) *Supra*.

(n) *Sprye v. Porter*, 7 E. & B. 58.

(o) *Bac. Abr., Maintenance* (E). 1 Hawk. P. C. c. 86, s. 1. *Moore*, 751. *Hob.* 115. *Plowd.* 80.

(p) For the construction of this statute, see 1 Hawk. P. C. c. 86, s. 7, *et seq.*

(q) 2 Roll. Abr. 114. 2 Inst. 208. *Hetl.* 79. 1 Hawk. P. C. c. 83, s. 38. *Bac. Abr. tit. Maintenance* (C).

(r) See 1 Hawk. P. C. c. 80, s. 43, *et seq.*

CHAPTER THE TWENTY-SECOND.

OF EMBRACERY AND DISSUADING A WITNESS FROM GIVING EVIDENCE.

EMBRACERY is another species of maintenance, and consists in such practices as tend to affect the administration of justice by improperly working upon the minds of jurors. It seems clear that any attempt whatsoever to corrupt or influence or instruct a jury in the cause beforehand, or in any way to incline them to be more favourable to the one side than to the other, by money, promises, letters, threats, or persuasions, except only by the strength of the evidence and the arguments of the counsel in open Court, at the trial of the cause, is a proper act of embracery, whether the jurors on whom such attempt is made give any verdict or not, or whether the verdict given be true or false. (a) And it has been adjudged that the bare giving of money to another, to be distributed among jurors, is an offence of the nature of embracery, whether any of it be afterwards actually so distributed or not. It is also clear that it is as criminal in a juror as in any other person to endeavour to prevail with his companions to give a verdict for one side by any practices whatsoever; except only by arguments from the evidence which may have been produced, and exhortations from the general obligations of conscience to give a true verdict. And there can be no doubt but that all fraudulent contrivances whatsoever to secure a verdict are high offences of this nature; as where persons by indirect means procure themselves or others to be sworn on a *tales* in order to serve one side. (b)

The law will not suffer a mere stranger so much as to labour a juror to appear, and act according to his conscience: but it seems clear that a person who may justify any other act of maintenance (c) may safely labour a juror to appear and give a verdict according to his conscience; but that no other person can justify intermeddling so far. And no one else whatsoever can justify the labouring a juror not to appear. (d)

Offences of this kind subject the offender to be indicted and punished by fine and imprisonment in the same manner as all other kinds of unlawful maintenance do by the common law. (e) They are also restrained by statutes; the 5 Edw. 3, c. 10, enacting that any juror taking of the one party or the other, and being duly attainted, shall not be put in any assizes, juries, or inquests, and shall be commanded to prison, and further ransomed at the King's will; and the 34 Edw.

(a) 1 Hawk. P. C. c. 86, s. 1, 5, 4 Black. Com. 140.

(b) 1 Hawk. P. C. c. 85, s. 4. R. v. Opie, 1 Saund. 301. As to giving money to

a juror after the verdict, see 1 Hawk. P. C. c. 85, s. 3.

(c) *Ante*, 478, *et seq.*

(d) 1 Hawk. P. C. c. 85, s. 6.

(e) *Id.* s. 7. 4 Black. Com. 140.

3, c. 8, enacting, that a juror attainted of such offence shall be imprisoned for a year. The 32 Hen. 8, c. 9, enacts that no person shall embrace any freeholders or jurors upon pain of forfeiting ten pounds, half to the King, and half to him that shall sue within a year. (*f*)

The 6 Geo. 4, c. 50, s. 62, repeals so much of the 5 Edw. 3, c. 10, 'as relates to the punishment of a corrupt juror,' and so much of the 34 Edw. 3, c. 8, 'as directs the proceedings against jurors taking a reward to give their verdict;' and enacts and declares, by sec. 61, that 'notwithstanding anything herein contained, every person who shall be guilty of the offence of embracery, and every juror who shall wilfully or corruptly consent thereto, shall and may be respectively proceeded against by indictment or information, and be punished by fine and imprisonment, in like manner as every such person might have been before the passing of this Act.'

All who endeavour to stifle the truth, and prevent the due execution of justice, are highly punishable; and therefore the dissuading or endeavouring to dissuade a witness from giving evidence against a person indicted is an offence at common law, though the persuasion should not succeed. (*g*)¹

By the Witnesses Protection Act, 1892 (55 & 56 Vic. c. 64),—Sec. 1. 'In this Act the word "inquiry" shall mean any inquiry held under the authority of any Royal Commission or by any committee of either House of Parliament, or pursuant to any statutory authority, whether the evidence at such inquiry is or is not given on oath, but shall not include any inquiry by any court of justice.'

By sec. 2, 'Every person who commits any of the following acts, that is to say, who threatens, or in any way punishes, damnifies, or injures, or attempts to punish, damnify, or injure any person for having given evidence upon any inquiry, or on account of the evidence which he has given upon any such inquiry, shall, unless such evidence was given in bad faith, be guilty of a misdemeanor, and be liable upon conviction thereof to a maximum penalty of one hundred pounds, or to a maximum imprisonment of three months.'

By sec. 3, 'A prosecution for any offence under this Act may be heard and determined by a court of summary jurisdiction under the Summary Jurisdiction Acts, provided that should either the complainant or the party charged object to the case being dealt with summarily, the Court shall send such case for trial to the quarter sessions or assizes, or in cases arising within the metropolitan area to the Central Criminal Court.'

By sec. 4 'It shall be lawful for any Court before which any person may be convicted of any offence under this Act, if it thinks fit, in addition to sentence or punishment by way of fine or imprisonment, to condemn such person to pay the whole or any part of the

(*f*) Upon the construction of these statutes, see 1 Hawk. P. C. c. 85, s. 11, *et seq.*

(*g*) 1 Hawk. P. C. c. 21, s. 15. *R. v. Lawley*, 2 Str. 904. As to mere attempts to commit crimes, see *ante*, p. 195. And see an indictment for dissuading a witness from

giving evidence against a person indicted, 2 Chit. Crim. L. 235; and an indictment for a conspiracy to prevent a witness from giving evidence, *R. v. Steventon*, 2 East, R. 362. And see *R. v. Edwards*, *ante*, p. 293.

AMERICAN NOTE.

¹ See *S. v. Keyes*, 8 Verm. 57; *S. v. Carpenter*, 20 Verm. 9.

costs and expenses incurred in and about the prosecution and conviction for the offence of which he shall be convicted, and, upon the application of the complainant, and immediately after such conviction, to award to complainant any sum of money which it may think reasonable, having regard to all the circumstances of the case, by way of satisfaction or compensation for any loss of situation, wages, status, or other damnification or injury suffered by the complainant through or by means of the offence of which such person shall be so convicted, provided that where the case is tried before a jury, such jury shall determine what amount, if any, is to be paid by way of satisfaction or compensation.'

By sec. 5, 'The amount awarded for such satisfaction or compensation, together with such costs, to be taxed by the proper officer of the court, shall be deemed a judgment debt due to the person entitled to receive the same from the person so convicted, and be recoverable accordingly.'

CHAPTER THE TWENTY-THIRD.

OF BARRATRY, AND OF SUING IN THE NAME OF A FICTITIOUS PLAINTIFF.

A BARRATOR is defined to be a common mover, exciter, or maintainer of suits or quarrels, in courts of record, or other courts, as the county court, and the like; or in the country, by taking and keeping possession of lands in controversy, by all kinds of disturbance of the peace, or by spreading false rumours and calumnies whereby discord and disquiet may grow among neighbours. (a) But one act of this description will not make anyone a barrator, as it is necessary in an indictment for this offence to charge the defendant with being *a common barrator*, which is a term of art appropriated by law to this crime. (b) It has been holden, that a man shall not be adjudged a barrator in respect of any number of false actions brought by him in his own right; (c) but this is doubted, in case such actions be merely groundless and vexatious, without any manner of colour, and brought only with a design to oppress the defendants. (d)¹

An attorney cannot be deemed a barrator in respect of his maintaining another in a groundless action, to the commencing whereof he was in no way privy. (e) And it seems to have been holden that a feme covert cannot be indicted as a common barrator; (f) but this opinion is considered as questionable. (g)

In an indictment for this offence it seems to be unnecessary to allege it to have been committed at any certain place; because, from the nature of the crime, consisting in the repetition of several acts, it must be intended to have happened in several places; wherefore it is said that the trial ought to be by a jury from the body of the county. (h) As the indictment may be in a general form, stating the defendant to be a common barrator, without showing any particular facts, it is clearly settled that the prosecutor must, before the trial, give the defendant a note of the *particular acts* of barratry which he intends

(a) R. v. Uryln, 2 Saund. 308, note (1).
1 Hawk. P. C. c. 81, ss. 1, 2. Co. Litt. 368.
8 Rep. 36. Barrator is said to be a forensic term taken from the Normans. The Icelandic and Scandinavian *barrata*, the Anglo-Norman *baret*, and the Italian *baratta*, are all words signifying a quarrel or contention. See the notes to Bac. Abr. tit. *Barratry* (A).
(b) 8 Co. 36 R. v. Hardwicke, 1 Sid. 282. R. v. Hannon, 6 Mod. 311.

(c) Roll. Abr. 355.
(d) 1 Hawk. P. C. c. 81, s. 3.
(e) 1 Hawk. P. C. c. 81, s. 4.
(f) Bac. Abr. tit. *Baron and Feme*, (G) in the notes, citing Roll. Rep. 39.
(g) 1 Hawk. P. C. c. 81, s. 6.
(h) Parcel's case, Cro. Eliz. 195. 1 Hawk. P. C. c. 81, s. 11. Bac. Abr. tit. *Barratry* (B).

AMERICAN NOTE.

¹ See C. v. McCulloch, 15 Mass. Rep. 227. When a man purchased three notes and brought three separate suits on them, and

levied separate executions oppressively, it was held that though this was not barratry it was still an indictable offence.

to prove against him; and that, if he omit to do so, the Court will not suffer him to proceed in the trial of the indictment. (i) And the prosecutor will be confined to his note of particulars, and will not be at liberty to give evidence of any other acts of barratry than those which are therein stated. (j)

It has been adjudged that justices of peace, *as such*, have, by virtue of the commission of the peace, authority to inquire and hear this offence, without any special commission of oyer and terminer. (k)

The punishment for this offence in common persons is by fine and imprisonment, and binding them to their good behaviour; and in persons of any profession relating to the law, a further punishment by being disabled to practise for the future. (l)

In this place may be mentioned another offence of equal malignity and audaciousness; that of suing another in the name of a fictitious plaintiff; either one not in being at all, or one who is ignorant of the suit. This offence, if committed in any of the King's superior Courts, is left, as a high contempt, to be punished at their discretion; but in Courts of a lower degree, where the crime is equally pernicious, but the authority of the judges not equally extensive, it is directed by the 8 Eliz. c. 2, s. 4, to be punished by six months' imprisonment, and treble damages to the party injured. (m)

(i) *R. v. Grove*, 5 Mod. 18. *J'Anson v. Stuart*, 1 T. R. 748, per Buller, J. And per Heath, J., in *R. v. Wylie*, 1 New R. 95.

(j) *Goddard v. Smith*, 6 Mod. 282.

(k) *Barnes v. Constantine*, Yelv. 46. Cro. Jac. 32, S. C. recognised in *Busby v. Watson*, 2 Black. R. 1050. See *R. v. Urlyn*, 2 Saund. 308, note (1). In Hawk. P. C. c. 81, s. 8, there is a *quære* to this point, as having been ruled differently in Rolle's Reports.

(l) 34 Edw. 3, c. 1. 1 Hawk. P. C. c. 81, s. 14. Bac. Abr. tit. *Barratry* (C). 4 Black. Com. 184. As to punishing in a summary manner, a person convicted of common *Barratry* who shall practise as a solicitor in any suit or action in England, see 12 G. 1, c. 29, s. 4; 21 G. 2, c. 3; 30 & 31 Vict., c. 59; Stat. Law Rev. Act, 1867.

(m) 4 Black. Com. 184.

CHAPTER THE TWENTY-FOURTH.

OF CONSPIRACY. (a)¹

THE conspiring to obstruct, prevent, or defeat the course of public justice; (b) to injure the public health, as by selling unwholesome provisions; (c) or to effect any public mischief (d) as by raising the price of the public funds by illegal means; (e) are offences punishable by indictment. And it appears that an indictment lies, not only wherever a conspiracy is entered into for a corrupt or illegal purpose, but also where the conspiracy is to effect a legal purpose by the use of unlawful means; and this, although such purpose be not effected. (f) And it is laid down in a book of great authority that all confederacies whatsoever wrongfully to prejudice a third person are highly criminal at common law; as where divers persons confederate together by indirect means to impoverish a third person, or falsely and maliciously to charge a man with being the reputed father of a bastard child, or to maintain one another in any matter, whether it be true or false. (g) The conspiracy or unlawful agreement, though nothing be done in prosecution of it, is the gist of the offence. (h) The nature of conspiracy, therefore, requires that more than one person should be concerned in it. In many cases an agreement to do a certain thing has been considered as the subject of an indictment for a conspiracy, though the same act, if done sepa-

(a) The Acts relating to trade disputes will be found at the end of this chapter.

(b) *R. v. Mawbey*, 6 T. R. 619, *et seq.* 4 Black. Com. 136. 1 Hawk. P. C. c. 72, s. 2.

(c) *R. v. Mackarty*, 2 Lord Raym. 1179. 2 East, P. C. c. 18, s. 5, p. 823. 4 Black. Com. 162. And see the remarks upon *R. v. Mackarty* in 6 East, 133, 141.

(d) See *R. v. Boulton*, 12 Cox, C. C. 87.

(e) *R. v. De Berenger*, 3 M. & S. 67.

(f) *R. v. Journeymen Tailors of Cambridge*, 8 Mod. 11. *R. v. Best*, 2 Lord Raym. 1167. 6 Mod. 185. 1 East, P. C. c. 11, s. 11, p. 462. But an *action* will not lie for

a conspiracy unless it be put in execution, 9 Co. 57. *W. Jones*, 93. *Savile v. Roberts*, 1 Lord Raym. 378. And see 8 Mod. 320, that conspiring to do a lawful act, if for an unlawful end, is indictable. See *post*, p. 792, note (b).

(g) 1 Hawk. P. C. c. 72, s. 2. It is not necessary in an indictment for conspiring to charge a man with being the father of a bastard child, to state that the charge was false, *R. v. Best*, *post*, p. 503.

(h) *R. v. Best*, 2 Lord Raym. 1167. *R. v. Spragg*, 2 Burr. 993. *R. v. Rispal*, 3 Burr. 1320. Per Tindal, C. J., *O'Connell v. R.*, 11 Cl. & F. 155, *post*.

AMERICAN NOTE.

¹ See *U. S. v. Cole*, 5 McLean, 513; *Hasen v. C.*, 11 Harris, 366; *C. v. Judd*, 2 Mass. 329; *S. v. Rickey*, 4 Halst. 293; *S. v. Rowley*, 12 Conn. 101; *Smith v. P.*, 25 Ill. 17; *P. v. Clark*, 10 Mich. 310; *Lowery v. S.*, 30 Texas, 402; *S. v. Cawood*, 2 Stew. 360; *Torrey v. Field*, 10 Verm. 353; *Rhoads v. C.*, 8 Harris, 272; *S. v. Potter*, 28 Iowa, 554. There does not appear to be any vari-

ance in principle between the English and American law of Conspiracy; but it may be that a particular act may be unlawful or injurious in one country which may not be so in the other, and hence a confederacy to do such an act in one country may be a Conspiracy, while in the other it would not be so. See *Bishop ii. s. 176 et seq.*

rately by each individual without any agreement amongst themselves, would not have been illegal. (*i*) It has been said that perhaps few things are left so doubtful in the criminal law, as the point at which a combination of several persons, in a common object, becomes illegal. (*j*) It appears, however, to have been holden that if such persons illegally concur in doing an act they may be guilty of conspiracy, though they were not previously acquainted with each other. (*k*) It has been laid down that conspiracy is 'a crime which consists either in a combination and agreement by persons to do some illegal act, or a combination and agreement to effect a legal purpose by illegal means.' (*l*) And also that 'the crime of conspiracy is complete if two, or more than two, should agree to do an illegal thing; that is, to effect something in itself unlawful, or to effect, by unlawful means, something which in itself may be indifferent, or even lawful. (*m*) It is the illegal combination itself that is mischievous, and therefore where a woman, who was not pregnant but believed herself to be so, was convicted of conspiring with other persons to administer drugs to herself with intent to procure abortion, it was held that the conviction was right, although the actual administering to herself of such drugs would not have been criminal on her part under 24 & 25 Vic. c. 100, s. 58. (*n*) The question as to what amounts to an illegal conspiracy has been very fully discussed in a recent case, (*o*) in which an associated body of traders endeavoured to get the whole of a limited trade into their own hands by offering exceptional and very favourable terms to customers who would deal exclusively with them, — so favourable that but for the object of keeping the trade to themselves they

(*i*) By Grose, J., in *R. v. Mawbey*, 6 T. R. 686.¹ And see *R. v. The Journeymen Tailors of Cambridge*, 8 Mod. 11. *R. v. Rowlands*, 17 Q. B. 671, *post*. *R. v. Parnell*, 14 Cox, C. C. 508. See 38 & 39 Vict. c. 86, s. 3, *post*, as to when an agreement or combination by several in furtherance of a trade dispute is not indictable.²

(*j*) 3 Chit. Crim. L. 1139.

(*k*) By Lord Mansfield in the case of the prisoners in the King's Bench, Hil. T. 26 Geo. 3. 1 Hawk. P. C. c. 72, s. 2, in the notes. See *post*, p. 534.

(*l*) Per Alderson, B., *R. v. Vincent*, 9 C. & P. 91, and in *R. v. Seward*, 1 A. & E. 713, Lord Denman, C. J., said, 'An indictment for conspiracy ought to show either that it was for an unlawful purpose, or to effect a lawful purpose by unlawful means;' but in *R. v. Peck*, 9 A. & E. 686, the learned

Chief Justice, upon this dictum being cited, said, 'I do not think the antithesis very correct;' and in *R. v. King*, 7 Q. B. 782, the same learned Chief Justice said, 'The words "at least" should accompany that statement.' In *R. v. Jones*, 4 B. & Ad. 345, 1 N. & M. 78, however, several learned judges gave a similar definition of the crime of conspiracy. And see *ante*, p. 491, note (*f*). C. S. G. See *R. v. Bunse*, 12 Cox, C. C. 316.

(*m*) Per Tindal, C. J., delivering the opinion of all the judges in *O'Connell v. R.*, 11 Cl. & F. 155, *post*, p. 526.

(*n*) *R. v. Whitchurch*, 24 Q. B. D. 420.

(*o*) *Mogul Steamship Company v. McGregor, Gow & Co.* (1892) A. C. 25, 23 Q. B. D. 598; 21 Q. B. D. 544. See also *Temperton v. Russell* (1893), 1 Q. B. 715.

AMERICAN NOTES.

¹ It has been held in America that where several men conspire together to obtain money from a bank by severally drawing cheques, knowing they had then no money at the bank, there was no criminal conspiracy. *S. v. Rickey*, 4 Halst. 293.

² With respect to the law in America as to trade disputes, reference may be made to Bishop ii. ss. 230 *et seq.* In New York Revised Statutes certain conspiracies which

will be found to include all common-law conspiracies are declared to be indictable, and it is declared that no conspiracies other than those should be considered crimes. In New Jersey the same law is declared, but without the restriction. In Maine, Pennsylvania, Georgia, Indiana, Iowa, and some others, there are statutes more or less similar to the above, see Bishop ii. ss. 236-238.

would not have given such terms but with the intention not of injuring their rivals, but of preventing rival traders from competing with them. It was held that this would not amount to an indictable conspiracy. In the course of his judgment Bowen, L. J., said (*p*): 'It is urged on behalf of the plaintiffs that even if the acts complained of would not be wrongful had they been committed by a single individual, they become actionable when they are the result of concerted action among several. In other words, the plaintiffs, it is contended, have been injured by an illegal conspiracy. Of the general proposition that certain kinds of conduct not criminal in any one individual may become criminal if done by combination among several, there can be no doubt. The distinction is based on sound reason, for a combination may make oppressive or dangerous that which if it proceeded only from a single person would be otherwise, and the very fact of the combination may show that the object is simply to do harm and not to exercise one's own just rights. In the application of this undoubted principle it is necessary to be very careful not to press the doctrine of illegal conspiracy beyond that which is necessary for the protection of individuals or of the public. . . . But what is the definition of an illegal combination? It is an agreement by one or more to do an unlawful act, or to do a lawful act by unlawful means; *O'Connell v. R.*, (*q*) *R. v. Parnell*, (*r*) and the question to be solved is whether there has been any such agreement here. Have the defendants combined to do an unlawful act? Have they combined to do a lawful act by unlawful means? . . . The truth is that the combination of capital for purposes of trade and competition is a very different thing from such a combination of several persons against one with a view to harm him as falls under the head of an indictable conspiracy. There is no just cause or excuse in the latter class of cases. There is such a just cause or excuse in the former. There are cases in which the very fact of a combination is evidence of a design to do that which is hurtful without just cause, — is evidence (to use a technical expression) of malice. But it is perfectly legitimate, as it seems to me, to combine capital for all the mere purposes of trade for which capital may, apart from combination, be legitimately used in trade. . . . Would it be an indictable conspiracy to agree to drink up all the water from a common spring in a time of drought; to buy up by preconcerted action all the provisions in a market or district in times of scarcity (see *R. v. Waddington*, 1 East, 143); to combine to purchase all the shares of a company against a coming settling day, or to agree to give away articles of trade gratis in order to withdraw custom from a trade? May two itinerant match-vendors combine to sell matches below their value in order by competition to drive a third match-vendor from the street? . . . The question must be decided by the application of the test I have indicated. Assume that what is done is intentional and that it is calculated to do harm to others. Then comes the question, Was it done without just cause or excuse? If it was *bonâ fide* done in the use of a man's own property, in the exercise of a man's own trade, such legal justification would, I think, exist not the less because what was done might seem to others to be selfish or unrea-

(*p*) 23 Q. B. D. at p. 616.(*r*) 14 Cox, C. C. 508.(*q*) 11 Cl. & Fin. 155.

sonable (see *R. v. Rowlands*, 17 Q. B. 671). But such legal justification would not exist when the act was merely done with the intention of causing temporal harm without reference to one's own lawful gain or the lawful enjoyment of one's own rights. The good sense of the tribunal which had to decide would have to analyse the circumstances, and to discover on which side of the line each case fell. But if the real object were to enjoy what was one's own, or to acquire for one's self some advantage in one's property or trade, and what was done was done honestly, peaceably, and without any of the illegal acts before referred to, it could not in my opinion properly be said that it was done without just cause or excuse. One may with advantage borrow for the benefit of traders what was said by Erle, J., in *R. v. Rowlands*, 17 Q. B. 671, at p. 687 (*n*), of workmen and of masters. "The intention of the law is at present to allow either of them to follow the dictates of their own will with respect to their own actions and their own property, and either I believe has a right to study to promote his own advantage or to combine with others to promote their mutual advantage."

This judgment was approved and adopted in the House of Lords.

Amongst the most flagrant instances of conspiracies against the public justice of the kingdom, may be mentioned a case in which the defendants were charged with a conspiracy, in causing a man to be executed for a robbery, which they knew he was innocent of, with intent to get into their possession the reward offered by Act of Parliament. (*s*) And it would have been equally a conspiracy, though the defendants had failed in their infamous design, and the man had been acquitted. Indeed one of the more ancient descriptions of conspiracy is 'a consultation and agreement between two or more to appeal, or indict an innocent person falsely and maliciously of felony, whom accordingly they cause to be indicted or appealed; and afterwards the party is lawfully *acquitted* by the verdict of twelve men.' (*t*) But of this description it is observed, that the lawful acquittal of the party grieved does not appear to be required in order to make the offenders guilty of conspiracy. (*u*) The description of conspirators in the old statute, 33 Edw. 1, st. 2 (sometimes cited as 21 Edw. 1), is 'that conspirators be they that do confeder or bind themselves by oath, covenant, or other alliance, that every of them shall aid and bear the other falsely and maliciously to indict, or cause to indict, or falsely to move and maintain pleas; and also such as cause children within age to appeal men of felony, whereby they are imprisoned and sore grieved; and such as retain men in the country with liveries of fees for to maintain their malicious enterprizes; and this extendeth as well to the takers as

(*s*) *R. v. Macdaniel*, 1 Leach, 45. And see *Fost.* 130. It should seem that the only objection to this being treated as a conspiracy was that which might arise from its being considered as a crime of the highest degree (*i. e.*, murder), in which the misdemeanor would be merged.

(*t*) 3 Inst. 143. 4 Black. Com. 136.

(*u*) 1 Hawk. P. C. c. 72, s. 2. In the case of *R. v. Spragg*, 2 Burr. 998, Serjt.

Davy said, 'There is a distinction between a writ of conspiracy and an indictment for conspiracy. In an action the damage is the gist of the action; and therefore the writ and declaration must charge "that he was indicted and sustained damage;" but that is not necessary in an indictment, which is for an offence against the public. And this distinction explains Lord Coke's meaning in 3 Inst. 143.'

to the givers, and to stewards and bailiffs of great lords, who by their seigniority, office, or power, undertake to bear or maintain quarrels, pleas, or debates, that concern other parties than such as touch the estate of their lords or themselves.' From which definition of conspirators it is said that it seems clearly to follow that not only those who actually cause an innocent man to be indicted, and also to be tried upon the indictment, whereupon he is lawfully acquitted, are properly conspirators, but that those also are guilty of this offence, who barely conspire to indict a man falsely and maliciously, whether they do any act in prosecution of such conspiracy or not; for the words of the statute seem expressly to include all such confederacies under the notion of conspiracy, whether there be any prosecution or not. (v) But it is also said that since it does not appear to have been solemnly resolved that persons offending by a false and malicious accusation against another are indictable upon this statute, it seems to be more safe and advisable to ground an indictment for such offence upon the common law than upon the statute. (w)

A conspiracy of this kind appears, therefore, to consist in the unlawful agreement to injure a person by a false charge; though it be in no way prosecuted. And whether the conspiracy be to charge a temporal or an ecclesiastical offence on an innocent person, it is the same thing. (x)

A conspiracy to indict a person for the purpose of extorting money from him is a misdemeanor, whether the charge be or be not false. (y) A conspiracy to enforce by legal process the payment of sums of money which the persons conspiring knew not to be due is indictable. (z)

It seems not to be any justification of a confederacy to carry on a false and malicious prosecution, that the indictment or appeal which was preferred, or intended to be preferred in pursuance of it, was insufficient, or that the court wherein the prosecution was carried on or designed to be carried on had no jurisdiction of the cause, or that the matter of the indictment did import no manner of scandal, so that the party grieved was, in truth, in no danger of losing either his life, liberty, or reputation. For notwithstanding the injury intended to the party against whom such a confederacy is formed may perhaps be inconsiderable, yet the association to pervert the law, in order to procure it, seems to be a crime of a very high nature, and justly to deserve the resentment of the law. (a) Therefore, on an indictment for wickedly and unlawfully conspiring to accuse another of taking hair out of a bag, without alleging it to be an unlawful and felonious taking, it was said by Lord Mansfield that the gist of the offence was the unlawful conspiracy to do an injury to another by a false charge, and that whether the conspiracy be to charge a man with criminal acts or such only as may affect his reputation, it is sufficient. (b)

It is observed that it appears not only from the words of the statute,

(v) 1 Hawk. P. C. c. 72, s. 2.

(w) Ibid.

(x) R. v. Best, 2 Lord Raym. 1167. 1 Salk. 174.

(y) R. v. Hollingberry, 4 B. & C. 329.

6 D. & R. 345. S. P. R. v. Jacobs, 1 Cox, C. C. 173; but whether the charge be true

or false is material on the question whether the prosecution was *bona* or *malâ fide*. Ibid.

(z) R. v. Taylor, 15 Cox, C. C. 265, 268.

(a) 1 Hawk. P. C. c. 72, s. 3.

(b) R. v. Rispal, Black. R. 368. 3 Burr. 1320. And see Pippet v. Hearn, 5 B. & A. 634, *ante*, p. 350, note (m).

but also from the plain reason of the thing, that no confederacy whatsoever to maintain a suit can come within the words of the 33 Edw. 1, stat. 2, unless it be both false and malicious. (c) And several persons may lawfully meet together and consult to prosecute a guilty person, or one against whom there is probable cause of suspicion; but not to prosecute one that is innocent, right or wrong. (d) And associations to prosecute felons, and even to put the laws in force against political offenders, are lawful. (e)

It has been held that a certificate by justices of the peace that an indicted highway is in repair, is a legal instrument, recognised by the courts of law, and admissible in evidence after conviction, when the court is about to impose a fine; and that, consequently, it is illegal to conspire to pervert the course of justice by producing a false certificate in evidence to influence the judgment of the court. The indictment stated that a highway was indicted as being out of repair, and a plea of not guilty, but that it was intended to apply to withdraw the plea and plead guilty; that two justices of the county, and two other persons, conspired to pervert the course of justice and impose on the court by producing a false certificate from the two defendants, who were justices, that the road was in repair, and that they did so. There was a verdict against the two justices, and a rule was obtained to arrest the judgment. Upon showing cause against this rule the counsel for the prosecution went at large into a discussion of the doctrine and nature of conspiracies. He said: 'It follows from the very nature of the offence of conspiracy that there is no charge of any specific crime, but it consists wholly in the unlawful combination; and this will appear fully by adverting to the several sorts of conspiracy to be found in the Books:—

'1. Where the subject-matter is neither *malum prohibitum*, nor *malum in se*, as referred to the individual; but the criminality in law arises wholly from the conspiracy. Such as an agreement to maintain each other, right or wrong; (f) or a combination amongst labourers or mechanics to raise their wages. (g) So where several conspired to hiss at the Birmingham Theatre, Lord Mansfield held it indictable, although each might have done so separately. (h) So a combination between officers in the service of the East India Company to resign their commissions was held an illegal act; and consequently a resignation tendered under those circumstances was held not to be a determination of the service. (i)

'2. Where the subject-matter is not *malum prohibitum*, as referred to the individual, though *malum in se*; but the criminality in law arises from the conspiracy, such as a malicious combination against a trader to ruin him in his trade. (j) So the taking up dead bodies, even though for the purpose of science in dissecting them, is now held an

(c) 1 Hawk. P. C. c. 72, s. 7.

(d) R. v. Best, 1 Salk. 174. And see 1 Hawk. P. C. c. 72, s. 7.

(e) R. v. Murray, 1 Chit. Burn's Just. 817. Matth. Dig. 90. Abbott, C. J., Guildhall, 1823.

(f) 9 Co. 56.

(g) 8 Mod. 10; but see R. v. Rowlands, 17 Q. B. 671, post.

(h) Anon., B. R. 18 or 19 Geo. 3.

(i) 4 Burr. 2472.

(j) 1 Stra. 144. 1 Lev. 125. R. v. Eccles, 1 Leach, 274, post. R. v. Rowlands, 17 Q. B. 671, post; and see Mogul Steamship Co. v. McGregor, Gow & Co. (1892) A. C. 25.

indictable offence *per se*; (*k*) yet formerly it was not so considered, but even then it was held that an indictment lay for conspiracy to do so. (*l*) A false indictment is no crime as referred to the individual, (*m*) but a conspiracy for that purpose subjects the offenders to the villanous judgment. (*n*) The private slander of another by an individual is not indictable; but conspiring to charge another with slanderous matter is so, (*o*) though no legal charge be actually preferred. (*p*) And in this latter case it was held that the Quarter Sessions had jurisdiction over conspirators. It is the same with private immorality, which is only indictable when coupled with a conspiracy. (*q*) So two or more joining to do legal acts with a corrupt intent may be indicted. (*r*) And private deceits, coupled with a conspiracy, are indictable on that account. (*s*)

'3. The third head of conspiracy is where the subject-matter is *malum prohibitum*, as referred to the individual, and the criminality in law is thereby aggravated if executed. Of this nature is the bare attempt to subvert religion, (*t*) or public justice; and the latter will apply to both descriptions of counts in the indictment. Such also is the endeavour to dissuade witnesses from giving evidence, (*u*) or the preparation of witnesses, (*v*) or the tampering with jurors. (*w*) Such are public frauds in trade, (*x*) or public cheats, (*y*) or deceit or collusion in the King's courts, or any consent thereto. (*z*)

'4. Where there is a bare conspiracy unexecuted, (*a*) or where the conspiracy by the execution merges in a higher offence.' (*b*) And he then argued that the offence charged against the defendants fell within the principles of the above cases.

In giving his judgment in this case, Ashurst, J., said, 'The principal question is whether a conspiracy to pervert the course of justice by producing in evidence a false certificate be or be not a crime? It seems to me that a greater offence can hardly be stated than that of obstructing or perverting the course of justice, on which the lives and properties of all the subjects depend.' And Grose, J., said, 'It is laid down in some of the cases that an attempt to persuade another not to give evidence in a court of justice is indictable; then it cannot be doubted but that an attempt to mislead the court by misrepresentation is equally criminal. The course of justice is perverted if the certificate of the justices be false. If they agree to certify that a road is in repair for the purpose of perverting the course of justice it is a crime and indictable; and it is not necessary

(*k*) R. v. Lynn, 2 T. R. 733.

(*l*) R. v. Young, cited in 2 T. R. 733. This was an indictment for a conspiracy to prevent the burial of a corpse. And see a precedent for such a conspiracy, 2 Chit. Crim. L. 36.

(*m*) 1 Ed. 3, stat. 2, c. 11. 2 Black. Rep. 1328, 9.

(*n*) Ibid.

(*o*) 1 Lev. 62. 1 Vent. 304.

(*p*) 1 Salk. 174. 1 Stra. 193. 3 Burr. 1320.

(*q*) 1 Salk. 382, 552. 3 Burr. 1434, 1878. 2 Lord Raym. 1031. 4 St. Tr. 515.

(*r*) R. v. Robinson, 1 Leach, 37. 8 Mod. 321. 1 Wils. 41. 3 Burr. 1439.

(*s*) 6 Mod. 42, 301. 2 Burr. 1127. 2 Stra. 866.

(*t*) Fitzg. 66.

(*u*) 1 Hawk. P. C. c. 21, s. 15. 2 Stra. 904. And see R. v. Steventon, 2 East, R. 362.

(*v*) Hob. 271. 3 Inst. 106. 2 Show. 1.

(*w*) 1 Saund. 300. 1 Lord Raym. 148. 1 Burr. 510. R. v. Jolliffe, 4 T. R. 285. Co. Lit. 157.

(*x*) 1 Sess. Cas. 217. Comb. 16. 1 Sid. 409. 1 Vent. 13.

(*y*) 5 St. Tr. 486. 1 Latch. 202. 1 Roll. Rep. 2. 2 Lord Raym. 865. 1 Barnard. 330.

(*z*) 3 Edw. 1, c. 29. 2 Inst. 212, 217.

(*a*) 1 Lev. 62, 125. 1 Vent. 304. 3 Burr. 1320. 1 Lord Raym. 379. 1 Salk. 174. 1 Stra. 193. T. Raym. 417.

(*b*) 1 Lord Raym. 711.

that they should know at the time of such agreement that the road is out of repair; it is sufficient that they did not know that the fact which they certified to be true was true.' And Lawrence, J., said, 'The question is, whether a conspiracy to do an act from which the public may receive any damage be or be not indictable? At first I thought this a very doubtful case, because it struck me that this was an act by which the public would not suffer, as the court of the assizes were not bound to receive the certificate of the defendants, it not being on oath. But on examination it appears that the practice of receiving the certificates of magistrates respecting the state of roads, has existed as far as the memory of living persons extends, and the books carry it still further back. I have not been able to discover how or when the practice of receiving these certificates arose; but a practice that has been adopted in the courts at least as long back as the reign of Charles the First, goes a great way to show what the law is upon the subject. And this is not the only instance of receiving certificates in evidence; certificates of bishops with respect to marriages are received; the customs of London are certified by the recorder; so formerly were certificates received from the captain of Calais; and in *Cro. Eliz.* 502, this court said that they would give credit to the certificates of the judges in Wales respecting the practice of their court, and that the custom of the court is a law in that court.' (c)

Where one brother had executed a conveyance of land to another for the avowed object of giving the latter a colourable qualification to kill game, and to get rid of an information then pending against him, it seems to have been considered as quite clear that they were both guilty of an indictable conspiracy. (d)

A count alleged that C. Staden, J. James, and J. Broome had been committed for trial for having, by cheating and false pretences, obtained from W. Hamp 300*l.*, and that W. Hamp had been bound by recognizances to prosecute them; and that W. Hamp, W. Watkins, and W. Probert, intending to defeat the due course of law, did agree amongst themselves and with the wife of the said J. Broome that W. Hamp should not attend to prosecute or give evidence, and should receive, in consideration thereof, 400*l.* from the said wife of J. Broome, and then alleged that W. Hamp did receive the 400*l.* The three following counts alleged the object to be to defeat and obstruct the due course of law. The prefatory averments were proved, and the wife of J. Broome proved that, prior to the trial for cheating Hamp, she met the now defendants at a tavern; they said they were sorry to carry on the prosecution; and if she would give them 500*l.* they would not do so; and after some conversation it was arranged that a cheque for 400*l.* should be given, and it was given, and W. Hamp thereupon told her that they would not further prosecute her husband. W. Hamp had been bound by recognizances in 500*l.* to prosecute. For the defendants it was alleged that J. Broome had such influence over W. Hamp that the latter had made an affidavit exculpating J. Broome from any participation in the fraud, and that he was thus placed in the dilemma that, if he did not prosecute, he forfeited his recognizances,

(c) *R. v. Mawbey*, 6 T. R. 619 to 638.

(d) *Doe dem. Roberts v. Roberts*, 2 B. & A. 367.

and, if he did prosecute, he might be indicted for perjury; and that Probert, who was his guardian, in order to extricate his ward from this position, had been a party to the compromise, but without any intention to do wrong, or to obstruct the course of justice. But Lord Campbell, C. J., held that, if the necessary effect of the agreement was to defeat the ends of justice, that must be taken to be the object; and the jury were directed to say, on the first and second counts, whether the defendants did agree not to prosecute as therein alleged; and on the third and fourth counts whether they conspired to obstruct and defeat the ends of justice. If they did so agree and conspire, whatever might be their private reasons, it was the duty of the jury to convict the defendants. (e)

Where the plaintiff had been arrested for 38*l.* at the suit of Cohen, and Blake had become bail for her, and some proceedings had been taken against him as bail, and Blake, Cohen, Swaysland, and Solomon went to the plaintiff's lodgings, and Blake said he must have his money or the plaintiff must go to gaol, and stated that Swaysland and Solomon were officers, which was not the fact; and the plaintiff being frightened, delivered to Blake a watch and other articles, and Swaysland and Solomon wrote two papers, which were signed by the plaintiff and Blake, and which papers stated that the articles were deposited with Blake as a security, and that he should be at liberty to sell them within forty-two days unless he was paid in the meantime; Lord Lyndhurst, C. B., held that, as the defendants all acted in concert, they were guilty of a conspiracy, for which they might all have been indicted. (f)

It has been held to be an indictable offence to conspire on a particular day by false rumours to raise the price of the public government funds, with intent to injure the subjects who should purchase on that day, and that the indictment was well enough without specifying the particular persons who purchased as the persons intended to be injured, and that the public government funds of this kingdom might mean either British or Irish funds, which since the Union were each a part of the United Kingdom. After argument in arrest of judgment, Lord Ellenborough, C. J., said, 'I am perfectly clear that there is not any ground for the motion in arrest of judgment. A public mischief is stated as the object of this conspiracy; the conspiracy is by false rumours to raise the price of the public funds and securities, and the crime lies in the act of conspiracy and combination to effect that purpose, and would have been complete, although it had not been pursued to its consequences, or the parties had not been able to carry it into effect. The purpose itself is mischievous; it strikes at the price of a vendible commodity in the market, and if it gives a fictitious price by means of false rumours, it is a fraud levelled against all the public, for it is against all such as may possibly have anything to do with

(e) *R. v. Hamp*, 6 Cox, C. C. 167. Lord Campbell, C. J., held that the facts did not support counts charging a conspiracy to obtain money from the wife of J. Broome, with intent to cheat him of it. The first count had only the word, 'agree' and not

conspire, and on its being said that this count did not charge a conspiracy, Lord Campbell said, 'Nothing turns on that. Conspire is nothing: agreement is the thing.'

(f) *Bloomfield v. Blake*, 6 C. & P. 75.

the funds on that particular day.' Bayley, J., 'It is not necessary to constitute this an offence that it should be prejudicial to the public in its aggregate capacity, or to all the King's subjects, but it is enough if it be prejudicial to a class of the subjects. Here then is a conspiracy to effect an illegal end, and not only so, but to effect it by illegal means, because to raise the funds by false rumours is by illegal means. And the end is illegal, for it is to create a temporary rise in the funds without any foundation, the necessary consequence of which must be to prejudice all those who become purchasers during the period of that fluctuation.' Dampier, J., 'I own I cannot raise a doubt, but that this is a complete crime of conspiracy according to any definition of it. The means used are wrong, they were false rumours; the object is wrong, it was to give a false value to a commodity in the public market, which was injurious to those who had to purchase.' (g)

The defendants were indicted, as directors and promoters of a certain company called the Eupion Fuel and Gas Company, Limited, for conspiring to induce the committee of the Stock Exchange to order a quotation of the shares of the company in their official list, 'and thereby to induce and persuade divers of the liege subjects of our Lady the Queen, who should thereafter buy and sell the shares of the said company, to believe that the said company was duly formed and constituted, and had in all respects complied with the rules and regulations of the . . . said Stock Exchange, so as to entitle the said company to have their shares quoted in the official list of the said Stock Exchange,'—Held, that the indictment disclosed an indictable offence, since there was an agreement to cheat and defraud by means of false pretences those liege subjects who might buy shares in the company. (h) But an indictment charging a conspiracy 'by false pretences to defraud all such persons as should apply' to the prisoners for a loan of money, was held bad in Ireland. (i)

In the argument upon the foregoing case an authority was cited where the defendants being acquitted of all but conspiring to impoverish the farmers of the excise, it was objected that there was no offence; but the Court held it well, because the information showed that the excise was parcel of the revenue of the crown, and so the impoverishment of the farmers of excise tended to prejudice the revenue of the crown. (j)

It seems that parties may be guilty of a conspiracy to raise the price of oil by making fictitious sales. (k)

A conspiracy to obtain money by procuring from the lords of the

(g) *R. v. De Berenger*, 3 M. & S. 76.
R. v. Gurney, 11 Cox, C. C. 414.

(h) *R. v. Aspinall*, 1 Q. B. D. 730; 2 Q. B. D. 48; 13 Cox, C. C. 231; 45 L. J. M. C. 129.

(i) *White v. R.*, 13 Cox, C. C. 318.

(j) *R. v. Starling*, 1 Sid. 174.¹

(k) *R. v. Hilbers*, 2 Chitty Rep. 163.

This was a motion for a criminal information for a conspiracy to raise the price of oil by making fictitious sales, and the court held that it must appear that two combined together, as it was no offence for an individual separately to endeavour.

treasury the appointment of a person to an office in the customs is a misdemeanor at common law. The counsel for the defendant proposed to argue that the indictment was bad on the face of it, as it was not a misdemeanor at common law to sell or to purchase an office like that of a coast waiter, and that, however reprehensible such a practice might be, it could only be made an indictable offence by Act of Parliament. But Lord Ellenborough, C. J., said, 'If that be a question it must be debated on a motion in arrest of judgment, or on a writ of error. But after reading the case of *R. v. Vaughan*, (l) it will be very difficult to argue that the offence charged in the indictment is not a misdemeanor.' And Grose, J., in passing sentence, likewise observed that there could be no doubt that the indictment was sufficient, and that the offence charged was clearly a misdemeanor at common law. (m)

Precedents are to be met with in the books of indictments for conspiracies to commit riots. (n) And in one case, it was said by a learned judge, with respect to premeditated and systematic tumults at a theatre, that 'the audience have certainly a right to express by applause or hisses the sensations which naturally present themselves at the moment; and nobody has ever hindered, or would ever question, the exercise of that right. But if any body of men were to go to the theatre with the settled intention of hissing an actor or even of damning a piece, there can be no doubt that such a deliberate and preconcerted scheme would amount to a conspiracy, and that the persons concerned in it might be brought to punishment.' (o)

Where some of the counts of an indictment charged the defendant with conspiring to cause a great number of persons to meet together for the purpose of exciting discontent and disaffection in the minds of the subjects of the Queen, and for the purpose of exciting the said subjects to hatred and contempt of the government and constitution, and it appeared that a large number of persons had assembled at meetings, at which violent speeches had been made respecting the government and constitution and the people's charter, Alderson, B., told the jury, 'The purpose which the defendants had in view, as stated by the prosecutors, was to excite disaffection and discontent, but the defendants say that their purpose was by reasonable argument and proper petitions to obtain the five points mentioned by their learned counsel. If that were so, I think it is by no means illegal to petition on those points. The duration of Parliaments and the extent of the elective franchise have undergone more than one change by the authority of Parliament itself; and with respect to the voting by ballot, persons whose opinions are entitled to the highest respect are found to differ. There can also be no illegality in petitioning that members of Parliament should be paid for their services by their constituents; indeed, they were so paid in ancient times, and they were not required to have a property qualification till the reign of Queen Anne, and are now not required to have it in order to represent any part of Scotland or the English Universities.' And the learned Baron directed the

(l) 4 Burr. 2494.

(m) *R. v. Pollman*, 2 Campb. 229.

(n) 2 Chit. Crim. L. 506, note (a). See

R. v. Vincent, 9 C. & P. 91.

(o) By Mansfield, C. J., in *Clifford v. Brandon*, 2 Camp. 369. *Gregory v. The Duke of Brunswick*, 6 M. & G. 953. 3 C. B. 481. 1 C. & K. 24.

jury to say whether they were satisfied that the defendants conspired to excite disaffection, and if they were to find them guilty of conspiracy. (*p*)

Several cases have occurred in which the conspiring and contriving, by sinister means, to marry a pauper of one parish to a settled inhabitant of another, in order to bring a charge upon it, have been considered as indictable offences. (*q*) It is observed respecting a conspiracy of this kind, that, considering the offence is a prostitution of the sacred rites of marriage, for corrupt and mercenary purposes, and that, by artful and sinister means, persons are seduced into a connection for life without any inclination of their own, and contrary to that freedom of choice which is peculiarly required in forming so close an union, and on which the happiness of them both so entirely depends; and this for the sake of some gain or saving to others who bring about such marriage; in this light it seems a fit ground for criminal cognizance, not only as being a great oppression upon the parties themselves more immediately interested, but as an offence against society in general, being an abuse of that institution by which society is best continued and legal descents preserved, and a perversion of the purposes for which it was ordained. (*r*) But where, upon an indictment against parish officers for a conspiracy of this kind, it appeared that a man of one parish having gotten a woman with child belonging to another, the defendants had agreed with the man (who was of the age of 29), with the approbation of his father, to give him two guineas if he would marry the woman, and that he afterwards married her on such condition, and received the money from the defendants immediately after the marriage; and it was also sworn, both by the man and the woman, that they were willing to marry at the time; Buller, J., directed an acquittal, notwithstanding the proof of the money having been given to procure such consent; and this after the putative father had been taken up under a magistrate's warrant, and was in custody of the overseers. And that learned judge held it necessary, in support of such an indictment, to show that the defendants had made use of some violence, threat, or contrivance, or used some sinister means to procure the marriage without the voluntary consent or inclination of the parties themselves; and that the act of marriage, being in itself lawful, a conspiracy to procure it could only amount to a crime by the practice of some undue means. (*s*)

In a case where the indictment stated the marriage to have been procured by threats and menaces against the peace, &c., it was holden to be sufficient, without averring in terms that the marriage was against the will or consent of the parties, though that must be proved. (*t*)

(*p*) *R. v. Vincent*, 9 C. & P. 91. See *O'Connell v. R.*, 11 Cl. & F. 155, *post*. Since this case the Ballot Act has passed (see 35 & 36 Vict. c. 33); and the property qualification of members of Parliament has been abolished by 21 & 22 Vict. c. 26.¹

(*q*) *R. v. Tarrant*, 4 Burr. 2106. *R. v. Herbert*, 1 East, P. C. c. 11, s. 11, p. 461. *R. v. Compton*, Cald. 246. 8 Mod. 320.

(*r*) 1 East, P. C. c. 11, s. 11, p. 461.

(*s*) *R. v. Fowler*, 1 East, P. C. c. 11, p. 461. And the learned judge said that this point had been so ruled several times by several judges.

(*t*) *R. v. Parkhouse*, 1 East, P. C. c. 11, s. 11, p. 462, Buller, J.

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¹ As to conspiracy to excite discontent in America, see Bishop ii. s. 224.

And it has since been held that an indictment does not lie for conspiracy merely to exonerate one parish from the charge of a pauper and to throw it on another, nor for conspiring to cause a male pauper to marry a female pauper for that purpose, it not being stated that the conspiracy was to effect such marriage by force, threats, or fraud, or that it was so effected in pursuance of the conspiracy. (*u*) An allegation in such an indictment that a poor unmarried woman in a parish was with child is not equivalent to an allegation that she was chargeable to such parish. (*v*) And it has been doubted whether an allegation that the defendants conspired together for the purpose of exonerating, is equivalent to allegation that they conspired to exonerate. (*w*)

Upon an indictment for conspiring together, and giving the husband money to marry a poor helpless woman, who was an *inhabitant* of B., in order to settle her in the parish of A., where the husband was settled, judgment was arrested, because it was not averred that she was last legally settled in B. (*x*) But it is observed, that it seems to be perfectly immaterial where the woman's settlement was, if it were not in A., provided that fact distinctly appeared. (*y*) It is further said, however, that it is usual to aver the settlements of the parties in their respective parishes, and also that the woman was chargeable to her own parish at the time, though this latter has never been adjudged to be necessary, nor seems to be required according to the general rules which govern the offence of conspiracy. (*z*) It should seem that in such cases both the purpose and the means used are clearly unlawful.

Conspiring to let a pauper land to the intent that he may gain a settlement is illegal. (*a*)

Conspiring to charge a man with being the father of a bastard child, with intent to extort money from him, is indictable; and where the object is stated to be to extort money, it is immaterial whether the woman is or is not pregnant. (*b*) And conspiring to make such a charge, though without any intent to extort money, is indictable; and it is not necessary to state in the indictment that the charge was false, or that the child was likely to be chargeable. The court doubted upon the objection that the charge was not stated to be false, but ultimately they held the indictment to be sufficient, as the defendants were at least charged with conspiring to accuse the prosecutor of fornication, and although that was spiritual defamation, conspiring to do it was a temporal offence. (*c*)

The frauds practised by swindlers may sometimes be indictable as conspiracies. In a case where the prisoner had been acquitted upon a charge of forgery, he was afterwards indicted with two of his associates for a conspiracy to defraud. The indictment charged that the defendants Hevey, Beatty, and M'Carty, fraudulently and unlawfully conspired that Beatty should write his acceptance to a certain paper-

(*u*) *R. v. Seward*, 1 A. & E. 706. 3 N. & M. 557.

(*v*) Per Lord Denman, C. J., and Taunton, J., *ibid.*

(*w*) Per Williams, J., *ibid.*, citing *R. v. Nield*, 6 East, 417. But see *R. v. Ridgway*, 5 B. & Ald. 527, where *R. v. Nield* was doubted by Lord Tenterden, C. J.

(*x*) *R. v. Edwards*, 8 Mod. 320.

(*y*) 1 East, P. C. c. 11, s. 11, p. 462.

(*z*) *Id. ibid.*

(*a*) Per *cur.* *R. v. Edwards*, 8 Mod. 320.

(*b*) *R. v. Armstrong*, 1 Ventr. 304. 1 Lev. 62. Sid. 68.

(*c*) *R. v. Best*, 2 Lord Raym. 1167.

writing, purporting to be a bill of exchange, &c. (the tenor of which was set out) in order that Hevey might, by such acceptance, and by the name M'Carty being indorsed on the back thereof, negotiate the said paper-writing as a good bill of exchange, truly drawn at Bath, by one Jer. Connell, for Smith and Co., as partners in the business of bankers, under the style of Bath Bank, as persons well known to them the said defendants, and thereby fraudulently to obtain from the King's subjects goods and monies; that Beatty, in pursuance of such conspiracy and agreement, did fraudulently and unlawfully *write his acceptance* to the said paper-writing to the tenor following, viz., 'Accepted, 20 Nov. — 81, R. B.,' well knowing the firm of Smith & Co. to be fictitious; that the defendants procured the indorsement 'B. M'Carty' to be written on the same, and that the said Hevey, in pursuance of such fraudulent conspiracy, did utter the said paper-writing to one S. Read, as and for a good bill of exchange, truly drawn, &c., and accepted by the said Beatty as a person able to pay the said sum of 30*l.*, in order to negotiate the same, and by means thereof did fraudulently obtain a gold watch, value twelve guineas, and 7*l.* 8*s.* in money; whereas, in truth, at the time of drawing, accepting, and uttering the said bill, there were no such persons as Smith and Co. in the business of bankers at Bath, and the said Beatty was not of sufficient ability to pay the said 30*l.*, they, the defendants, well knowing the same, &c., whereby they defrauded the said S. Read of the said goods and monies. The facts so charged being fully proved, the defendants were convicted. (*d*)

In one case the defendants were convicted on an indictment which charged them with a conspiracy to cause themselves to be believed persons of large property for the purpose of defrauding tradesmen. (*e*)

The getting of goods on credit without meaning to pay for them may not be criminal or punishable; but for several to combine together to enable a person to get goods on credit by means of a false character, knowing that he did not intend to pay for them, is criminal. (*f*)

Where in an action for slander it appeared that certain brokers were in the habit of agreeing together to attend sales by auction, and that one of them only should bid for any particular article, and that after the sale they should have a meeting consisting of themselves only, at another place, to put up to sale among themselves, at a fair price, the goods that each had bought at the auction, and that the difference between the price at which the goods were bought at the auction, and the fair price at this private resale, should be shared among them; Gurney, B., was of opinion that, as owners of goods had a right to expect at an auction that there would be an open competition from the public, if a knot of men went to an auction upon an agreement among themselves of the kind that had been described, they were guilty of an indictable offence, and might be tried for a conspiracy. (*g*)

A mock auction, with sham bidders, who pretend to be real bidders,

(*d*) *R. v. Hevey*, 2 East, P. C. c. 19, s. 5. Ellenborough, C. J. See *R. v. Whitehouse*, 6 Cox, C. C. 38, *post*, p. 536.
Anonymous, 1782. MSS. Bayley, J., Rosc. Cr. Evid. 368.

(*f*) *R. v. Orman*, 14 Cox, C. C. 381, per Bramwell, L. J.

(*e*) *R. v. Roberts*, 1 Campb. 399. Lord
(*g*) *Levi v. Levi*, 6 C. & P. 239.

for the purpose of selling goods at prices grossly above their worth, is an offence at common law; and persons aiding or abetting such a proceeding may be indicted for a conspiracy with intent to defraud. (*h*)

Where an indictment alleged that a certain joint stock company had been established, the capital of which was to consist of 2,000 shares, and charged the defendants with conspiring to fabricate a great number of other shares in addition to the said 2,000, and it appeared that the company had not been legally established, Abbott, C. J., was of opinion that if, in point of fact, a combination to the effect stated in the indictment were made out, such conduct, in point of law, constituted an offence punishable in a criminal way, notwithstanding the original imperfection of the company's formation. (*i*)

The selling unwholesome provisions is, as we have seen, an indictable offence; and the following case of bartering bad and unwholesome wine appears to have been treated as a conspiracy. The indictment charged that the defendants, Fordenborough and Mackarty, falsely and deceitfully intending to defraud Thomas Chowne of divers of his goods, &c., together deceitfully bargained with him to barter, sell, and exchange a certain quantity of pretended wine, as good and true new Portugal wine, of him the said Fordenborough, for a certain quantity of hats of him the said Chowne; and that, upon such bartering, &c., the said Fordenborough pretended to be a merchant of London, and to trade as such in Portugal wines, when, in fact, he was no such merchant, nor traded as such in wines; and the said Mackarty, on such bartering, &c., pretended to be a broker of London, when, in fact, he was not, and that the said Chowne, giving credit to the said fictitious assumptions, personating, and deceits, did barter, sell, and exchange to Fordenborough, and did deliver to Mackarty, as the broker between the said Chowne and Fordenborough, for the use of Fordenborough, a certain quantity of hats, of a certain value, for so many hogsheads of the pretended new Portugal wine; and that Mackarty and Fordenborough, on such bartering, &c., affirmed that it was true New Lisbon wine of Portugal, and was the wine of Fordenborough, when, in fact, it was not Portugal wine, nor was it drinkable or wholesome, nor did it belong to Fordenborough, to the great deceit and damage of the said Chowne, and against the peace, &c. (*j*) It is observed of this indictment, which was for a cheat at common law, that though it did not charge that the defendants *conspired eo nomine*, yet it charged that they together, &c., did the acts imputed to them, which might be considered to be tantamount. (*k*) The case was considered as one of doubt and difficulty, but it seems that judgment was ultimately given for the crown, on the ground that the offence was conspiracy. (*l*)

A count alleged that the prisoners unlawfully did conspire by divers unlawful and fraudulent devices and contrivances, and by divers false pretences, unlawfully to win from A. Rhodes the sum of 2*l.* 10*s.* of his money, and unlawfully to cheat him of the same. The prisoners and Rhodes were in a public house, and in concert with the other two

(*h*) *R. v. Lewis*, 11 Cox, C. C. 404.

(*i*) *R. v. Mott*, 2 C. & P. 521.

(*j*) *R. v. Mackarty*, 2 Lord Raym. 1179.
2 East, P. C. c. 18, s. 5.

(*k*) 2 East, P. C. c. 18, s. 5.

(*l*) 2 East, *ibid.*

prisoners, J. Dewhurst placed a pen-case on the table, and left the room to get writing-paper. Whilst he was absent the other prisoners, Hudson and Smith, were alone with Rhodes, and Hudson took up the pen-case, and took the pen from it, placing a pin in the place of it, and put the pen he had taken out under the bottom of Rhodes' drinking-glass, and Hudson then proposed to Rhodes to bet Dewhurst, when he returned, that there was no pen in the pen-case. Rhodes was induced by Hudson and Smith to stake fifty shillings in a bet with Dewhurst that there was no pen in the pen-case, which money Rhodes placed on the table, and Hudson snatched up to hold. The pen-case was then turned up into Rhodes' hand, and another pen with the pin fell into his hand, and then the prisoners took his money. It was contended, on a case reserved, that this was a mere deceit not concerning the public, and that there was no false pretence on which any of the prisoners could have been convicted of obtaining money by false pretences. The prosecutor intended to cheat Dewhurst, and was a party to the fraud, and could not maintain this indictment. Pollock, C. B., 'We are all of opinion that the conviction is good. The expression "by false pretences" used in the count is not to be construed in the technical sense contended for by the counsel for the prisoners. We think that there was abundant evidence of a conspiracy to cheat. Though it be an ingredient in that conspiracy to induce the man who is cheated to think that he is cheating some one else, that does not prevent those who use that device from being amenable to punishment.' (n)

Where a woman, living in the service of her master, conspired with another man that he should personate her master, and in that character should solemnize a marriage with her, which was accordingly done, for the purpose of afterwards raising a specious title to the property of the master; the gist of the indictment was for the conspiracy, and the conviction was founded on that ground. And it was considered in this case that, though no actual injury was proved, yet it was the province of the jury to collect, from all the circumstances of the case, whether there was not an intention to do a future injury to the person whose name was assumed. (o)

And a conviction has taken place upon an indictment, which charged that M. A. Wrench was a person of ill-fame and bad character, and a common prostitute, and that W. B. Serjeant was an infant within the age of 21 years, and that M. A. W. and P. D. and S. J., intending to defraud the said W. B. S. of his property, conspired for the purpose aforesaid to procure a marriage to be solemnized

(n) *R. v. Hudson*, Bell, C. C. 263. Channell, B., 'If the count had omitted the words "by false pretences," it would have been good.' Blackburn, J., 'If proof was given of an agreement by fraudulent devices to obtain the money, which is the substance of the third count, is there not evidence for the jury?'¹

(o) *R. v. Taylor*, 1 Leach, 37. 2 East, P. C. c. 20, s. 6, p. 1010. See *Wade v. Broughton*, 3 Ves. & B. 172, that persons conspiring to procure the marriage of a female for the sake of her fortune may be indicted for a conspiracy.

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¹ In New York however it was held that where the complainant parted with his money under such circumstances as to make

the act criminal in him, no conviction could be had. *P. v. Stetson*, 4 Barb. 151.

between the said W. B. S. and the said M. A. W., by means of a false oath to be taken by the said M. A. W., and by divers false pretences, and without the consent of the mother of the said W. B. S., his father being dead, and that the said M. A. W. and P. D. and S. J., in pursuance of the said conspiracy, did prevail on the said W. B. S. to consent to marry the said M. A. W., and by means of such persuasion, and by means of a false oath taken by the said M. A. W., in order to obtain a licence for the solemnization of marriage between the said W. B. S. and the said M. A. W., did cause the said W. B. S. to marry the said M. A. W., and a marriage by such licence was accordingly solemnized between them, without the leave of the mother of the said W. B. S., who then was such infant as aforesaid. (*p*)

The seduction of a young woman may be attended with such circumstances as to be indictable as a conspiracy. A case is reported where Lord Grey and others were charged, by an information at common law, with conspiring and intending the ruin of the Lady Henrietta Berkeley, then a virgin unmarried, within the age of eighteen years, one of the daughters of the Earl of Berkeley (she being under the custody, &c., of her father), and soliciting her to desert her father, and to commit whoredom and adultery with Lord Grey, who was the husband of another daughter of the Earl of Berkeley, sister of the Lady Henrietta, and to live and cohabit with him; and, further, the defendants were charged, that in prosecution of such conspiracy, they took away the Lady Henrietta at night from her father's house and custody, and against his will, and caused her to live and cohabit in divers secret places with Lord Grey, to the ruin of the lady and to the evil example, &c. The defendants were found guilty, though there was no proof of any force, but, on the contrary, it appeared that the lady, who was herself examined as a witness, was desirous of leaving her father's house, and concurred in all the measures taken for her departure and subsequent concealment. It was not shown that any artifice was used to prevail on her to leave her father's house; but the case was put upon the ground that there was a solicitation and enticement of her to unlawful lust by Lord Grey, who was the principal person concerned, the others being his servants, or persons acting by his command, and under his control. (*q*)

A count charged that the prisoners did between themselves conspire, combine, confederate, and agree together knowingly and designedly to procure, by false representations, false pretences, and other fraudulent means, J. C., a poor child, under the age of twenty-one years, to wit, of the age of fifteen years, to have illicit carnal connection with a man whose name is to the jurors unknown, and, upon a case reserved, the judges were unanimously of opinion that this count charged an indictable offence at common law. (*r*)

A count alleged that the prisoners unlawfully conspired, &c., to solicit, persuade, and procure, and in pursuance of the said conspiracy did unlawfully solicit, incite, and endeavour to procure L. M., an

(*p*) *R. v. Serjeant, R. & M. N. P. R.* 352.

(*q*) *R. v. Lord Grey, 3 St. Tri. 519.*
1 *East, P. C. c. 11, s. 10, p. 460.* See also
R. v. Delaval, 3 Burr. 1434.

(*r*) *R. v. Mears, 2 Den. C. C. 79.* The indictment also contained two counts framed to charge an attempt to commit the offence created by the 12 & 13 Vict. c. 76; but no opinion was expressed as to these counts.

unmarried girl, within the age of eighteen years, to become and be a common prostitute, and to commit whoredom and fornication for lucre and gain with men; and it was urged, in arrest of judgment, that the count was bad, as it did not aver that the girl was chaste; the fact of a loose woman committing fornication was not punishable by law; but it was held that the count was good, as it charged a conspiracy to bring about an illegal condition of things. (s)

An indictment has been held to lie against several persons for conspiring to carry away a young female under the age of twenty-one from the custody of her parents and instructors, and afterwards to marry her to one of the offenders, contrary to the provisions of the 4 & 5 Ph. & M. c. 8, ss. 3 & 4, and also for conspiring to commit the capital felony (under the 3 Hen. 7, c. 2, s. 1) of taking away an heiress against her will, and afterwards marrying her to one of the defendants. The young lady, who was the heiress of a gentleman of large fortune, and was only fifteen years of age, had been placed under the care of some ladies at Liverpool, for the purpose of finishing her education, and was induced to leave their house by means of a fictitious letter, fabricated by the defendants, who conveyed her to Gretna Green, where she was induced by means of false representations to go through the ceremony of a Scotch marriage, and to consent to become the wife of one of the defendants: and the defendants were convicted. (t)

A case is reported where several persons were convicted on an indictment which charged them with conspiring to impoverish one H. B., a tailor, and to prevent him, by indirect means, from carrying on his trade. (u) This, however, appears to have been considered as a conspiracy in restraint of trade, and so far a conspiracy to do an unlawful act affecting the public. (v)

If traders conspire to defeat their creditors by disposing of their goods in contemplation of bankruptcy, they are guilty of a conspiracy at common law. (w)

So if bankers combine to deceive and defraud their shareholders by publishing false balance sheets, they are indictable for a conspiracy. (x)

Where the prisoners were indicted for a conspiracy to cheat one Edwards, and the case was that the prisoners had made false representations as to the amount of profits of a business carried on by one of them, and thereby induced Edwards to enter into partnership with one of them; it was held, that they were liable to be indicted for the conspiracy, although no action might lie for the false representation, as it was not in writing so as to satisfy the 9 Geo. 4, c. 14, s. 16. (y)

(s) *R. v. Howell*, 4 F. & F. 160, Bramwell, B., and the Recorder.

(t) *R. v. Wakefield*, 2 Lew. 1. The marriage being in Scotland, an indictment for felony under the 3 Hen. 7, c. 2, s. 1, could not have been supported, and there was no evidence to support an indictment under the 4 & 5 Ph. & M. c. 8, s. 4. An indictment was preferred upon the 4 & 5 Ph. & M. c. 8, s. 3, but no judgment given upon it.

(u) *R. v. Eccles*, 1 Leach, 274.

(v) By Lord Ellenborough, C. J., in *R. v. Turner*, 13 East, 228. See per Lord Campbell, C. J., *R. v. Rowlands*, 17 Q. B. 671, and per Fry, L. J. in *Mogul Steamship Co. v. McGregor, Gow & Co.*, 23 Q. B. D. at p. 631.

(w) *R. v. Hall*, 1 F. & F. 33, Watson, B.

(x) *R. v. Esdaille*, 1 F. & F. 213.

(y) *R. v. Timothy*, 1 F. & F. 39, Channell, B.

An indictment will not lie for conspiring to commit a civil trespass upon property, by agreeing to go, and by going into, a preserve for hares, the property of another, for the purpose of snaring them, though it be alleged to be done in the 'night-time, and that the defendants were armed with offensive weapons, for the purpose of opposing resistance to any endeavours to apprehend or obstruct them. And Lord Ellenborough, C. J., in pronouncing the judgment of the Court, said, 'I should be sorry that the cases in conspiracy against individuals, which have gone far enough, should be pushed still farther. I should be sorry to have it doubted whether persons agreeing to go and sport upon another's ground, in other words, to commit a civil trespass, should be thereby in peril of an indictment for an offence which would subject them to infamous punishment.' (z) It may be observed that it was not stated in the indictment that the weapons were *dangerous*, nor that the defendants conspired to go, &c., *with strong hand*.

But this case is overruled by *R. v. Rowlands*, (a) where Lord Campbell, C. J., said, 'I have no doubt whatever that it was wrongly decided. Going into the prosecutor's close against his will, armed with offensive weapons for the purpose of opposing any persons who should endeavour to apprehend, obstruct, or prevent them, would in itself be an indictable offence; and conspiring to commit such an offence must be an indictable conspiracy.'

It is now settled that persons may be guilty of a conspiracy to defraud another in the fraudulent sale of a horse. Thus where the defendants conspired to make a false representation that horses were the property of a private person and not of a horse-dealer, and were quiet to ride and drive, and thereby induced a gentleman to buy them at a large price, they were held to have been rightly convicted on a count which charged them with conspiring by false pretences and subtle means to cheat the gentleman of his money. (b) Where a person was indicted for soliciting a servant to conspire to cheat and defraud his master, and it was proved that such person had offered a bribe to the servant as an inducement to sell his master's goods at less than their value, it was held that he might properly be convicted. (c)

An indictment against Brown and Carlisle for conspiracy alleged that one Sibson sold to Brown a mare for 39*l.*, and that the prisoners, whilst the said sum was unpaid, conspired by false and fraudulent representations that the said mare was unsound of her wind, and that

(z) *R. v. Turner*, 13 East, 228, 231. But *qu.* as to that which is reported in this case (p. 230) to have been said by Lord Ellenborough in the course of the argument, viz. that '*all* the cases in conspiracy proceed upon the ground that the object of the combination is to be effected by some falsity.' The facts stated in this case would constitute an offence within the 9 Geo. 4,

c. 69, and it is conceived that a conspiracy to commit an offence within that statute would be indictable, although not carried into effect. See *R. v. Wakefield*, *supra*. See also the observations on this case in Deac. Game L. 175. C. S.

(a) 17 Q. B. 671.¹

(b) *R. v. Kenrick*, 5 Q. B. 49.

(c) *R. v. De Kromme*, 17 Cox, 492.

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¹ See also Bishop ii. s. 183, as to these cases, and it seems there may be an indict-

able conspiracy to enter upon lands and hold possession of them. *Wilson v. C.*, 96 Pa. 56.

she had been examined by a veterinary surgeon, who had pronounced her a roarer, and that Brown had sold her for 27*l.* to induce Sibson to receive a much less sum in payment for the said mare than Brown had agreed to pay Sibson for the same, and thereby to cheat Sibson of a large part of the said sum agreed to be paid for the said mare. The mare had been sold by Sibson to Brown for the price as alleged, and Sibson had agreed to trust Brown for the price till after a fair. The prisoners afterwards conspired to send a false account of the mare to Sibson, and thereby to get him to forego part of the agreed price; and, in pursuance of this conspiracy, they sent a letter to Sibson, stating that the mare was unsound of her wind and had been examined by a veterinary surgeon, and he had pronounced her a roarer. In consequence of this letter Sibson saw Carlisle, who stated that he had examined the mare and that she was unsound, which he knew to be false. Sibson afterwards saw Brown, who told him that he had sold the mare for 27*l.* only (which was false), and persuaded him to receive that sum in satisfaction of his claim, but no receipt or other discharge was given. It was contended that no indictable offence had been proved or charged; for that the facts proved and alleged did not and could not alter the position of Sibson, as the payment of a smaller sum was no satisfaction of the larger sum, for which he had sold the mare, and he might afterwards enforce the payment of the residue. But, upon a case reserved, it was held that the indictment was sustainable, and that the facts given in evidence did sustain it. The substance of the charge was that the prisoners conspired to use unlawful means, namely, false representations, to induce the prosecutor to forego a part of his claim; and there was no force in the argument that, because the prisoners did not by means of their false representations alter the right of the prosecutor to his full claim, the indictment is not sustainable; since in no case where a change is made in the possession of a chattel through a fraud is the property altered. It was not necessary that the fraud should be successful. The offence charged and proved came within the legal definition of a conspiracy. (*d*)

An indictment cannot be supported for a conspiracy to deprive a man of the office of secretary to an illegal unincorporated trading company. Lord Ellenborough, C. J., said that the society being certainly illegal, to deprive an individual of an office in it could not be treated as an injury: and that when the prosecutor was secretary to the society, instead of having an interest which the law would protect, he was guilty of a crime. (*e*)

The prisoner, a foreigner, was indicted for conspiring at Ramsgate with the owner, the master, and the mate of a ship, to cast away the ship, with intent to prejudice the underwriters. The ship was a Prussian merchant vessel, named the *Alma*, and arrived at Ramsgate, and afterwards sailed thence, and she was in six days' time scuttled and

(*d*) *R. v. Carlisle*, Dears. C. C. 337; *R. v. Read*, 6 Cox, C. C. 134. borough, C. J., 1 Campb. 549, in the notes. See *R. v. Hunt*, 8 C. & P. 642.¹

(*e*) *R. v. Stratton*, *cor.* Lord Ellen-

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¹ See *S. v. Flynn*, 28 Iowa, 26.

sunk by the prisoner and others. The prisoner was apprehended, and made statements implicating himself, the captain, and the mate. He said that the mate had said in Ramsgate that the ship would never reach her place of destination, and spoke of the making away of the ship in an unlawful manner; and when the prisoner said, 'Then we had better sink her here at once on the bar,' the mate replied that was too close to land to make away with the ship in an unlawful manner, or to sink her. Martin, B., told the jury, 'The ship was a foreign ship, and she was sunk by foreigners far from the English coast, and so out of the jurisdiction of our courts. But the conspiracy in this country to commit the offence is criminal by our law. And this case does not raise the point which arose in *R. v. Bernard*, 1 F. & F. 240, as to a conspiracy limited to a criminal offence to be committed abroad. For here, if the prisoner was party to the conspiracy at all, it was not so limited; for it was clearly contemplated that the ship might be destroyed off the bar at Ramsgate, which would be within the jurisdiction. The offence of conspiracy would be committed by any persons conspiring together to commit an unlawful act to the prejudice or injury of others, if the conspiracy was in this country, although the overt acts were abroad. . . . The question is, was it agreed by and between the prisoner and any other person at Ramsgate that the ship should be destroyed, whether at sea or in port?' (f)

A partnership consisting of the prisoner and L. carried on business abroad. The prisoner gave notice under the articles of partnership to dissolve the partnership. An account of the partnership property had to be taken on the dissolution, and upon such account, after payment of partnership liabilities, the partnership assets were to be divided between the prisoner and L. The prisoner agreed with W. and P. to forge documents, and to make false entries in the partnership books and accounts, so as to make it appear that debts existed and were owing which did not exist, so as to reduce the amount divisible between the partners on the dissolution, with intent to cheat and defraud L. Held, that the prisoner was rightly convicted of conspiring with W. and P. to defraud L. (g)

Where complaint was made before a magistrate that certain members of the House of Lords had conspired to deceive the House by stating that a charge of falsehood contained in a petition presented to the House was false, though they knew it to be true, in order to prevent the prayer of the petition from being granted, to the injury of the petitioner, — Held, that the complaint did not charge an indictable offence, as an agreement by members of either house to make defamatory speeches there could not be the subject of an indictment. (h)

The Trade Union Act, 1871, and the Act amending the law of conspiracy in trade disputes are noticed *post*, p. 544.

We have seen that from the nature of conspiracy it is an offence which cannot be charged as having been committed by one person only. (i) And upon this ground it has been holden that no prosecution for a conspiracy can be maintained against a husband and wife

(f) *R. v. Kohn*, 4 F. & F. 68.

(g) *R. v. Warburton*, 40 L. J. M. C. 22.

(h) *Ex parte Wason*, 38 L. J. Q. B. 302.

(i) *Ante*, p. 491.

only, because they are esteemed but one person in law, and presumed to have but one will. (*j*) But husband, wife, and another may be convicted of a conspiracy. (*k*) So if all the defendants who are prosecuted for a conspiracy be acquitted but one, and the conspiracy be not stated as having been had with persons unknown, the acquittal of the rest is the acquittal of that one also. (*l*) But if two persons be indicted for a conspiracy, and one only of them appear and take his trial, he may be found guilty, though the other defendant be absent, and has not pleaded; (*m*) and this, although the other conspirator named in the indictment was dead before the indictment was preferred, (*n*) or after pleading not guilty. (*o*)

All the counts of an indictment alleged that Thompson, Tillotson, and Maddock conspired, &c., 'with divers other persons to the jurors aforesaid unknown.' The jury stated their opinion, upon the evidence, to be that Thompson had conspired with either Tillotson or Maddock, but that they did not know with which. No evidence was given of participation by any other party; and thereon the judge directed a verdict of not guilty, as to Tillotson and Maddock, and a verdict of guilty as to Thompson; and it was held that as Tillotson and Maddock had been acquitted, the verdict could not be supported against Thompson. (*p*)

(*j*) 1 Hawk. P. C. c. 72, s. 8.

(*k*) *R. v. Whitehouse*, 6 Cox, C. C. 38, Platt, B.

(*l*) 1 Hawk. P. C. c. 72, s. 8. 3 Chit. Crim. L. 1141.

(*m*) *R. v. Kinnerley*, 1 Str. 193.

(*n*) *R. v. Nicholls*, 2 Str. 1227. But see the case better reported in 13 East, 412, in the notes.

(*o*) *R. v. Kenrick*, 5 Q. B. 49.

(*p*) *R. v. Thompson*, 16 Q. B. 832. Erle, J., *dissentiente*. Lord Campbell, C. J., Patteson, J., and Coleridge, J., rested the decision on the ground that 'other persons' must mean persons other than Tillotson and Maddock; and that the acquittal of those defendants, therefore, must have the same effect as if Thompson, Tillotson, and Maddock, had alone been charged with the conspiracy; in which case it was clear Thompson must have been acquitted: and Patteson, J., said, 'I cannot see how Thompson can be convicted of conspiring with persons unknown; upon the evidence he conspired, if at all, with Tillotson or Maddock.' Erle, J., was of opinion that, 'according to the rules of pleading, this charge, as to each individual, must be construed as if he were charged solely, and it follows that the acquittal of the two becomes immaterial; and the verdict may be found in any terms comprised in the indictment. The finding may be that Thompson conspired with Tillotson, or with Maddock, or with other persons unknown; and so there may be similar findings as to the others. Therefore if any one be found guilty, the verdict must stand as against him; the judge must take the opinion of the jury as to each, whatever be the finding as to the others. "Are you of opin-

ion that Thompson conspired with Tillotson?" "No." "With Maddock?" "No. But we are satisfied that he conspired with some one; we do not know whom." The conspiracy, then, cannot be truly predicated of either Tillotson or Maddock, because the jury do not know which of these two was the conspirator; they do, however, know that one of them was; so that against Thompson, the verdict should be that he conspired with some one, it is not known with whom.' This decision deserves reconsideration. It is a fallacy to suppose that the expression 'a person to the jurors unknown,' means a person absolutely unknown: it merely means any person whose identity is not sufficiently proved to the satisfaction of the jury; and it cannot be doubted that if Thompson had been charged with conspiring with a person to the jurors unknown, a verdict of guilty ought to have been entered on this finding of the jury. Suppose a count for stealing the coat of A., another the coat of C., and a third of a person unknown, the jury find that the coat belongs to A. or B., but they cannot say which, this is a verdict of guilty on the third count. This indictment was in the form which has been in use for ages in conspiracy and riot, and was originally introduced, and has always been used, for the very purpose of avoiding an acquittal where the evidence might fail to satisfy the jury that any of the persons named were parties to the offence. In *R. v. Sudbury*, 1 Lord Raym. 484, where two out of four persons charged with a riot had been acquitted, Lord Holt, C. J., said, 'If the indictment had been that the defendants, with divers other disturbers of the peace,

Where to an indictment against four for a conspiracy, two pleaded not guilty; one pleaded in abatement, to which plea there was a demurrer; and the fourth never appeared; and before the argument of the demurrer the record was taken down for trial, and one of the defendants who had pleaded not guilty acquitted, and the other found guilty of conspiracy with him who had pleaded in abatement; and the demurrer was afterwards argued, and judgment of *respondeat ouster* given, whereupon a plea of not guilty was pleaded; the Court of King's Bench held that judgment might be pronounced upon the one that had been found guilty before the trial of the other defendant; for although it was possible that such defendant might be acquitted, yet the court were not warranted in coming to the conclusion that that would be so against the verdict that had been found, or in forbearing to pronounce judgment upon the defendant who had been found guilty. (q) So where three prisoners were indicted in Ireland for the capital offence of conspiring to murder, and, having refused to join in their challenges, one of them was tried alone and convicted; it was held, on a case reserved, that he had been properly tried and convicted, and that there was no ground for respiting or arresting the judgment. (r) But where two persons are indicted for conspiring together and they are tried together, both must be acquitted or both convicted, and where the jury convict one but disagree as to the other the conviction is bad. (s)

&c., had committed this riot and battery, and the verdict had been as in this case, the King might have had judgment.' In *R. v. Kinnersley*, 1 Str. 193, at p. 195, *R. v. Herne* is cited. There the indictment alleged that Herne with A., *et multis aliis*, did conspire to accuse a man of an offence; the grand jury ignored the bill as to A., but found it as to Herne, who was convicted; and it was moved in arrest of judgment, that there being an *ignoramus* as to A., Herne could not be guilty of conspiring with him; but the whole court held that it was sufficient, it being found that he, *cum multis aliis*, did conspire, and that it might have been laid so at first. See also *R. v. Scott*, 3 Burr. R. 1262. It is quite an error to suppose that the word 'other,' as used in indictments, means 'different from.' It is a mere word of form, used like 'further' and 'afterwards.' See *R. v. Downing*, 1 Den. C. C. 52. If the indictment had contained three counts, the first alleging a conspiracy between Thompson and Tillotson, the second between Thompson and Maddock, and the third between Thompson and divers other persons to the jurors unknown, and the facts had been as in this case, the verdict must have been not guilty on the first two counts, and guilty on the third; and yet each count in this indictment was in point of law exactly the same as such three counts.

The authorities seem to show, that if several persons are indicted for a riot or a conspiracy, and the jury acquit all except two in riot and one in conspiracy, the latter must also be acquitted. It is very confidently submitted that these authorities rest on a fallacy, viz. that because some are acquitted,

therefore the others could not have been guilty of the offence together with those that are acquitted. The acquittal of A. necessarily amounts to no more than that A. was not proved to be guilty. Suppose A. and B. are indicted for a conspiracy, and A. has made a written confession that he did conspire with B., and B. with him, but the evidence fails as against B., is A. to be acquitted? Suppose, in such a case, A. had pleaded guilty, is his plea to be set aside because B. for want of evidence is acquitted? This shows that in fact one may be guilty, though the rest are acquitted, and that the doctrine in question rests on an entire fallacy. Again, it is conceived that a still more fatal objection to the doctrine exists. It is apprehended that the acquittal of B. can in no case be admissible in evidence for A. It is obvious that the conviction of A. would not be evidence against B. And the rule is, that 'no record of a conviction or verdict can be given in evidence, but such whereof the benefit may be mutual.' *R. v. The Warden of the Fleet*, Holt, 133; and see other cases, 2 Phill. Evid. c. 1, s. 1. C. S. G.

(q) *R. v. Cooke*, 5 B. & C. 538. 7 D. & R. 673. Littledale, J., said, 'If the other defendant shall hereafter be acquitted, perhaps this judgment may be reversed.' *Sed quære*, for such acquittal would not necessarily show that the verdict of guilty on the former trial was wrong, as witnesses might be dead or absent who were examined on the former trial, or the one defendant might have been convicted on his own confession, which would not be admissible against the other defendant. C. S. G.

(r) *R. v. Ahearne*, 6 Cox, 6.

(s) *R. v. Manning*, 12 Q. B. D. 241.

With respect to the statement of the charge in the indictment it may be observed, that though it is usual to state the conspiracy, and then show that in pursuance of it certain overt acts were done, it is sufficient to state the conspiring alone. (t)¹ And it is not necessary to state the means by which the object was to be effected, as the conspiracy may be complete before the means to be used are taken into consideration. Therefore an indictment for conspiring by divers false pretences and subtle means and devices to get money from J. S., and cheat him thereof, is not objectionable on the ground that it is too general, or does not sufficiently show the *corpus delicti*, or specify any overt act. (u) So a count alleging that the defendants 'unlawfully, fraudulently, and deceitfully did combine, conspire, confederate, and agree together by divers false pretences and subtle means and devices to obtain and acquire to themselves from one G. W. F. divers large sums of money of the monies of the said G. W. F., and to cheat and defraud him thereof,' has been held good. (v) So where a count alleged that the defendants unlawfully, falsely, fraudulently, and deceitfully did conspire, combine, confederate, and agree together, by divers false pretences and indirect means, to cheat and defraud the prosecutor of his monies, the Court of Queen's Bench held that this count was good, on the authority of *R. v. Gill*, (w) which was founded on excellent reason. (x) So where a count alleged that the defendants 'unlawfully, fraudulently, and deceitfully did conspire, combine, confederate, and agree together to cheat and defraud' the prosecutor 'of his goods and chattels;' upon error in the Exchequer Chamber it was held that this case was not distinguishable from *R. v. Gill*, (y) and that the count was good. (z) But this is only the case where the conspiracy is to commit some offence, and if it be not to commit some offence, the indictment must show some illegal act done in pursuance of the conspiracy, or it is insufficient. (a)

A count alleged that C. C. died possessed of certain East India stock, and that the defendants conspired, &c., by divers false, fraudulent, and unlawful ways, means, and contrivances, and by false pretences and false swearing, unlawfully, &c., to obtain the means and power to and for S. P. of transferring and disposing of the said stock; and that in pursuance of the said conspiracy the defendants afterwards caused a certain false deposition, purporting to have been made on oath by S. P. as one of the lawful children of the said C. C., wherein S. P. falsely stated that the widow of the said S. P. died without having taken upon her letters of administration of his goods, to be exhibited in the Prerogative Court of Canterbury; and did then fraudulently procure letters of administration to

(t) *R. v. Best*, 2 Lord Raym. 1167. 1 Salk. 174. 3 Chit. Crim. L. 1143. The Poulterers' Case, 9 Rep. 55. *R. v. Kimberty*, 1 Lev. 62. *R. v. Sterling*, 1 Lev. 125.
(u) *R. v. Gill*, 2 B. & A. 204.
(v) *R. v. Kenrick*, 5 Q. B. 49.

(w) *Supra*.
(x) *R. v. Gompertz*, 9 Q. B. 824.
(y) *Supra*.
(z) *Sydserrf v. R.*, 11 Q. B. 245.
(a) *R. v. Seward*, 1 A. & E. 706.

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¹ The same law prevails in America, but in New York and some of the States there are statutes which make it necessary to allege and prove an overt act. Bishop, i. s. 432, ii. §§ 192, 200.

be issued of the goods of C. C. to S. P., as one of the lawful children of C. C. After alleging two other overt acts of a similar kind, the count alleged that the defendants presented such letters of administration to the East India Company, and did, by such false ways, &c., false pretences and false swearing, fraudulently obtain the means and power to and for S. P. of transferring and disposing of the stock; and that S. P. did transfer and dispose of the said stock, &c., with intent to defraud the widow of C. C. It was objected, 1st, that the conspiracy as alleged did not amount to any offence, as no legal meaning could be ascribed to obtaining 'the means and power' of doing an act. 2nd, that the person intended to be defrauded ought to have been shown with more certainty. 3rd, that it ought to have been stated to whom the stock belonged. But the court held that the statement of the means used for effecting the object of the conspiracy was so interwoven with the charge of conspiracy as to show on the face of the count an unlawful conspiracy. But if that were not so, the overt acts showed an indictable misdemeanor. (b)

It need not be averred in the indictment that the prosecutor was innocent of the crime imputed to him by the conspirators. (c) And in a case of a conspiracy to charge a person with being the father of a bastard child, it was holden not to be necessary to aver that the prosecutor was not the father, especially when the words of the indictment were 'did *falsely* conspire *falsely* to charge,' &c.; the principle being that innocence must be intended till the contrary appears. (d) And it should seem that even without those words the indictment would be sufficient, and need not state that the charge was false, nor that the child was likely to become chargeable, &c. (e) And an indictment for a conspiracy was holden to be good, although it was not alleged *in the charge itself* that the defendants conspired *falsely* to indict the prosecutor, and although it did not appear of what *particular crime or offence* they conspired to indict him, but only in *general* that the defendants did wickedly and maliciously conspire to indict and prosecute the prosecutor for a crime or offence liable to be capitally punished by the laws of this kingdom. (f) The conspiracy is the gist of the charge alleged in such an indictment.

(b) *Wright v. R.* 14 Q. B. 148. This judgment was affirmed on error, *ibid.* 180, on the authority of *Sydserff v. R. supra*. The indictment contained several other counts, varying the intent to defraud, and omitting some of the overt acts. The seventh count alleged that H. M. C. was entitled to the stock, and that the defendants conspired by false, &c., and unlawful ways and means, and by false pretences, unlawfully to obtain the means and power to and for S. P. of transferring and disposing of the said stock. The eleventh count stated that the defendants unlawfully conspired by false, &c., and unlawful pretences, &c., to obtain and get into their possession of and from one S. B. divers large sums of money with intent to defraud S. B. The Court of Queen's Bench arrested the judgment on these counts.

(c) *R. v. Kinnersley*, 1 Str. 193.

(d) *R. v. Best*, 1 Salk. 174. 2 Lord Raym. 1167.

(e) 2 Lord Raym. 1167.

(f) *R. v. Spragg*, 2 Burr. 993. In *R. v. King*, 7 Q. B. 782, Tindal, C. J., said of this case, 'The point decided in that case appears to have been merely this, that, in an indictment for a conspiracy, though the conspiracy be insufficiently charged, yet if the rest of the indictment contains a good charge of a misdemeanor, the indictment is good. Lord Mansfield distinguishes between the allegation of the unexecuted conspiracy to prefer an indictment, as to the sufficiency of which he gave no opinion, and that of the actual preferring of the indictment maliciously and without probable cause, which he calls a completed conspiracy actually carried into execution; and this he holds to be clearly sufficient; and no doubt it was so; for, rejecting the averment of the unexecuted conspiracy, the indictment undoubtedly contained a complete description of a common-law misdemeanor.'

Where the defendants were indicted for conspiring to pervert the course of justice by producing in evidence a false certificate of a justice of peace, it was holden not to be necessary to set forth in the indictment that the defendants knew at the time of the conspiracy that the contents of the certificate were false, on the ground that if persons with intent to obstruct the course of justice conspire to state a fact at all events as true, which they do not know to be true, it is criminal; and that the defendants were bound to have known that the fact was true which they agreed to certify as such. (*g*)

Where the act is in itself illegal, it is not necessary to state the means by which the conspiracy was effected. Thus where the indictment charged that the defendants conspired together by indirect means to prevent one H. B. from exercising the trade of a tailor, and it was contended that it should have stated the fact on which the conspiracy was founded,—the means used for the purpose; Lord Mansfield, C. J., said, 'The conspiracy is stated and its object; it is not necessary that any means should be stated;' and Buller, J., said, 'If there be any objection it is that the indictment states too much; it would have been good certainly if it had not added "by indirect means," and that will not make it bad.' (*h*) And where the indictment charged that the defendants conspired, by divers false pretences and subtle means and devices, to obtain from A. divers large sums of money, and to cheat and defraud him thereof; it was holden that the gist of the offence being the conspiracy, it was quite sufficient only to state that fact, and its object, and not necessary to set out the specific pretences. Bayley, J., said, that when parties had once agreed to cheat a particular person of his monies, although they might not then have fixed on any means for that purpose, the offence of conspiracy was complete.' (*i*) But where the act only becomes illegal from the means used to effect it, the illegality of it should be explained by proper statements,¹ as in the cases which have been cited of conspiracies to marry paupers. (*j*)

Where an indictment charged the defendants with conspiring 'to defraud J. W. of divers goods, and in pursuance of that conspiracy defrauding him of divers goods, to wit, of the value of 100*l*.;' the Court of King's Bench refused to quash the indictment on motion; for although if this had been an indictment for stealing the prosecutor's goods, it would have been bad for uncertainty, yet in this case

(*g*) *R. v. Mawbey*, 6 T. R. 619. *Ante*, p. 498. Lawrence, J., said that it was not unlike the case of perjury where a man swears to a particular fact without knowing at the time whether the fact be true or false; which is as much perjury as if he knew the fact to be false, and equally indictable. *Ante*, p. 294.

(*h*) *Eccles's case* in note (*d*) to *R. v. Turner*, 13 East, 230. *Ante*, p. 503.

(*i*) *R. v. Gill*, 2 B. & A. 204. In *R. v. Parker*, 3 Q. B. 292, 11 Law J. M. C. 102, Williams, J., said, 'It has been always thought that in *R. v. Gill* the extreme of laxity was allowed.'

(*j*) *Ante*, p. 502. See also *R. v. Seward*, *ante*, p. 503.

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¹ A curious case is reported in America where there was a conspiracy to effect what in itself would be lawful by unlawful means. It was arranged that policies of insurance should be issued in due form by innocent

directors to certain of the conspirators to enable them to vote for directors who would employ the conspirators in the company's service. This was held to be an indictable conspiracy. *S. v. Burnham*, 15 N. H. 396.

the gist of the indictment was the conspiracy, and it might be that there was so much uncertainty in the transaction, which was the subject of the indictment, that the allegation could not be made with greater certainty, as the conspiracy might be to defraud the prosecutor, not of any particular goods, but of any goods the prisoner could get hold of. (*k*)

And so where an indictment stated that the defendants conspired by false rumours to raise the funds, with 'intention thereby to injure and aggrieve all the subjects of the King who should on the 21st of February purchase or buy' any shares in the funds; and it was objected that the persons to be affected by the conspiracy were not particularised, as they ought to be, it was held that the indictment was good; for it followed from the nature of the charge that the persons could not be named, because this was a charge of conspiracy on a previous day to raise the funds on a future day, so that it was uncertain who would be the purchasers; and the offence being to raise the funds on a future day, its object was to injure all those who should become purchasers on that day, and not some individuals in particular. (*l*)

So where the first count of an indictment stated that the defendants conspired to defraud 'divers of her Majesty's liege subjects, who should bargain with the defendants for the sale of goods and merchandise of the said subjects' of great value, without making payment or other remuneration or satisfaction for the same, with intent to acquire to the said defendants divers sums of money and other profit and emolument; it was held that it was no valid objection that the count did not state what particular creditors the defendants meant to defraud; for if the offence went no further than the conspiracy, it could not be known what particular persons fell into the snare. But it was further held that the count was defective in not stating with sufficient particularity what the defendants conspired to do. For obtaining goods without making payment was not necessarily a fraud, as the words of the indictment might apply to the obtaining goods to sell on commission. (*m*)

The second count in the same indictment alleged that the defendants being 'indebted to divers persons in large sums of money,' conspired to defraud the said creditors of the defendants of payment of their said debts, and in pursuance of the said conspiracy unlawfully did execute a certain false and fraudulent deed of bargain and sale and assignment of certain fixtures, stock in trade, and goodwill, of great value, belonging to the said defendants, from two of themselves to the third, for divers false and fraudulent considerations, with intent thereby to procure to the said defendants divers sums of money and other emoluments; and it was held that this count was bad for

(*k*) Anonymous, 1 Chitty Rep. 698. In *R. v. Parker, supra*, it was said that the objection in this case was that the particular goods were not specified, and probably only so much as showed that was stated in the report.

(*l*) *R. v. De Berenger*, 3 M. & S. 68, *ante*, p. 500.

(*m*) *R. v. Peck*, 9 A. & E. 686. 1 P. & D. 508.¹

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¹ See *C. v. Eastman*, 1 Cush. 189, 48 Am. D. 596.

the same reasons as the first; it did not state in what respect the deed was false and fraudulent, and therefore the court had only the prosecutor's general opinion upon this point, not the facts on which it was founded. (*n*)

Where an indictment alleged that an issue in an action between H. B. and G. C. was tried, and that the plaintiff recovered a verdict for the sum of 17*l.*, and that the judge certified that execution ought to issue forthwith, and that the defendants 'did conspire falsely and fraudulently to cheat and defraud the said H. B. of the fruits and advantages of the said verdict and certificate;' Lord Denman, C. J., held that the indictment was bad, as the allegation was too general, and did not convey any specific idea which the mind could lay hold of, to judge whether any unlawful act had been done or attempted. The terms used did not import in what manner the plaintiff was to be deprived of the fruits and advantages of his verdict, and it was not even alleged that the verdict would lead to any fruits and advantages. (*o*)

So where a count alleged that the defendants conspired 'by divers false, artful, and subtle stratagems and contrivances, as much as in them lay, to injure, oppress, aggrieve, and impoverish E. W. and T. W., and to cheat and defraud them of their monies;' the Court of King's Bench arrested the judgment on the ground that this count was in too general a form to be supported. (*p*) So where a count charged that the defendants did 'conspire to cheat and defraud the just and lawful creditors' of F.; Lord Tenterden, C. J., thought that the count was much too general, as it did not state what was intended to be done, or the persons to be defrauded, but refused to stop the case on this point, as, if an acquittal were directed, and the count should turn out to be good, the defendants might plead *autrefois acquit*. (*q*)

An indictment for a conspiracy to obtain goods, which states that the goods were obtained, must state whose property the goods were, or it will be insufficient. The first count alleged that the defendants, intending to cheat and defraud divers of the liege subjects of the Queen of their goods, &c., unlawfully conspired by divers false pretences to obtain from divers of the liege subjects, &c., then carrying on business in the city of London, to wit, T. Tam and D. Law, warehousemen and copartners, and E. Fennell and R. Fennell, cotton yarn manufacturers and copartners, &c., divers goods and merchandise of great value, to wit, &c., and to cheat and defraud the said liege subjects of the said goods and merchandise. The count then set out several overt acts as to the obtaining goods from the parties above named respectively, and concluded by averring that the defendants did by the means aforesaid obtain from the said T. Tam and D. Law.

(*n*) R. v. Peck, *supra*.

(*o*) R. v. Richardson, 1 M. & Rob. 402.

(*p*) R. v. Biers, 1 A. & E. 327. In *Sydeseriff v. R.*, 11 Q. B. 245, *ante*, p. 514, Wilde, C. J., in delivering the judgment of the Court of Exchequer Chamber, observed, 'Upon referring to the judgment in R. v. Biers, there seems strong reason to doubt whether it did not go wholly on the one objection to the special counts. Neither R. v. Gill, nor any other authority at all bearing

upon the point decided by it, was referred to in that judgment; and it appears distinctly, from R. v. Gompertz, 9 Q. B. 824, that R. v. Biers has never been considered by the Queen's Bench as overruling R. v. Gill.' It may therefore be questioned, whether the Court of Exchequer Chamber did not think the count in R. v. Biers, which is set out in the text, to be good.

(*q*) R. v. Fowle, 4 C. & P. 592. The defendants were acquitted.

and E. Fennell and R. Fennell, &c., the goods and merchandise aforesaid, and did cheat and defraud them thereof. The second count was similar, but omitted to state the overt acts. The third count stated the conspiracy to be to cause it to be believed that one of the defendants, who was then an uncertificated bankrupt, was not B. P., but J. P., and that he carried on an extensive shipping business, and was a man of large property, and had a large capital in the business, and by means of the said belief to obtain from divers liege subjects (not naming them) divers goods, wares, and merchandise, and to cheat and defraud the said liege subjects of the said goods, &c. The fourth count charged that the defendants unlawfully combined by divers false pretences to obtain from divers liege subjects (not naming them) divers other goods and merchandise of great value, and to cheat and defraud the said liege subjects of the said goods, &c. The defendants having been convicted, a rule was obtained to arrest the judgment for the insufficiency of the indictment in not stating that the goods, &c., which the defendants were charged with conspiring to obtain, were the property of any person, it being consistent with the statement that they were the goods, &c., of the defendants themselves; and the Court of Queen's Bench held that the indictment was bad for not stating to whom the goods belonged. That where the object charged was a conspiracy to obtain from certain persons named divers goods, and to cheat and defraud them of the same, and they were obtained, and the parties defrauded, no precedent was to be found to show that an indictment was good which omitted to state whose the goods were. The first count, therefore, was imperfect, and the objection applied more strongly to the fourth count, where the language was still more general. The conspiracy charged was to obtain divers goods and to cheat and defraud certain persons named, not with intent to cheat and defraud them of the same, though perhaps that would have made no difference, and as there was no statement to whom the goods belonged, the charge did not, of necessity, import any offence, as it was consistent with an attempt by the defendants to obtain by some means their own goods unlawfully detained from them; and to hold that the use of the words 'to cheat and defraud' necessarily implied that the goods belonged to the parties who were stated to be defrauded, would be letting in a generality, which was not shown ever to be allowed. (r)

(r) *R. v. Parker*, 3 Q. B. 292, 11 Law J. N. S. M. C. 102. See *R. v. Bullock*, Dears. C. C. 653. S. P. Although there appears at first sight to be some little discrepancy in the cases upon this point, perhaps they are not irreconcilable. The correct distinction to be drawn from them appears to be this, that where there has been merely a conspiracy for a particular purpose (*e. g.* to raise the funds), and such conspiracy has not been carried into execution, an indictment in general terms will be sufficient; but where there has not only been a conspiracy, but such conspiracy has been carried into effect, there the indictment ought to specify precisely what has been effected, as the parties injured, the property obtained,

and to whom it belonged. The reason of such a distinction is that in the one case it is impracticable to state with minuteness what never was carried beyond the intention, whereas in the other case what was actually effected may easily be stated. The case may be compared to the cases of burglary with intent to steal, and burglary accompanied by an actual stealing; in the former it is sufficient to state that the prisoner broke and entered the house with intent to steal the goods (without describing them) of one A. B.; and in the latter the goods stolen must be particularised. So where a conspiracy has been detected before it is carried into execution so far as to ascertain the parties intended to be injured by it, an indictment would be

A count alleged that the defendants did unlawfully combine, conspire, confederate, and agree together to cause and procure certain goods, wares, and merchandises, which had been and were theretofore imported into the port of London from parts beyond the seas, and in respect whereof certain duties of customs were due and payable to the Queen, to be taken away from the said port and delivered to the respective owners thereof without payment to the Queen of a great part of the duties of customs so due and payable thereon as aforesaid, with intent to defraud the Queen in her revenue of the customs; it was objected in arrest of judgment that the count was insufficient, because no description of the goods was given, by which the Court could judge, whether the goods were liable to duty. But the Court of Queen's Bench held that it was not necessary to specify the goods. It was matter of evidence what the goods were to which the conspiracy related; the parties might have conspired without knowing what they were; they might have laid their heads together to cheat the Queen of whatever customable goods they could pass. (s)

A count alleged that W. H. King, E. A. Birch, and A. D. Phillips, did 'unlawfully combine, conspire, confederate and agree together to cheat and defraud certain liege subjects of our Lady the Queen, being tradesmen, of divers large quantities of their goods and chattels:' and that E. A. Birch, in pursuance of the said conspiracy, did fraudulently order and obtain upon credit from W. A. W. and C. W. divers goods and chattels belonging to the said W. A. W. and C. W.; from F. B. and W. J., divers goods and chattels belonging to the said F. B. and W. J.; and from divers other tradesmen whose names are to the jurors unknown, divers other goods and chattels belonging to the said last mentioned persons; and that E. A. Birch, 'in further pursuance of the said conspiracy,' and in order that the said goods might be taken in execution as hereinafter mentioned, did order the said goods to be delivered at her house; and that the said goods were so delivered, and no payment made for the said goods by any of the defendants at any time; and that, 'in further pursuance of the said conspiracy,' the said E. A. Birch did procure the said goods to remain in her house until they were taken in execution as hereinafter mentioned; and that the defendants, 'in further pursuance of the said conspiracy,' did

good without naming such parties. *R. v. De Berenger*, ante, p. 500. But where the conspiracy had proceeded so far as to fix the parties intended to be injured, such parties should be expressly named, and if the object was to defraud them of *their* goods, or their goods had been actually obtained thereby, the indictment should state in the one case the intent to defraud them of *their* goods, and in the other that they were defrauded of *their* goods. This position has been fully borne out by *R. v. King*, *infra*. It may, perhaps, admit of some doubt whether the possibility of the goods belonging to the defendants in the principal case necessarily rendered the indictment bad; for as a party may be guilty of larceny in stealing his own goods, there seems no reason why parties who conspired to obtain their own goods

from another, and thereby to cheat and defraud him, under such circumstances as did not amount to larceny, should not be indictable for a conspiracy. The better ground to rest the decision upon would seem to be that the indictment did not adopt such a degree of particularity as the facts enabled the prosecutor to do, and the rules of criminal pleading require to be adopted where it is practicable. C. S. G.

(s) *R. v. Blake*, 6 Q. B. 126. This decision was before *R. v. King*, *post*, and all the reasoning in the judgment of the Exchequer Chamber tends to show that this decision was wrong, as the goods had been imported and clearly ascertained. The terms '*a great part of the duties of customs*' seem very objectionable.

falsely and fraudulently pretend that certain debts were due from the said E. A. B. to the said W. H. K. and A. D. P. respectively, and that the said W. H. K. and A. D. P., 'in further pursuance of the said conspiracy, and in order to obtain payment of such false and fictitious debts,' did commence by collusion with the said E. A. Birch separate actions against the said E. A. Birch. And that afterwards, 'in further pursuance of the said conspiracy,' judgments were collusively signed by the said W. A. K. and A. D. P. in each of the said actions for want of a plea. And that afterwards, 'in further pursuance of the said conspiracy, writs of *fiery facias* were collusively sued out upon the said judgments; by virtue of which writs the said goods were, before the expiration of the said respective times of credit, taken in execution and sold in due course of law to satisfy the fictitious debts falsely and fraudulently alleged to be due from the said E. A. Birch. And so the jurors aforesaid find that the defendants, in manner and by the means aforesaid, unlawfully did cheat and defraud the said W. A. W. and C. W., F. B. and W. J., &c. of their said goods.' The defendants were convicted, and the Court of Queen's Bench held the count good; but the judgment was reversed in the Exchequer Chamber, and Tindal, C. J., in delivering the judgment of the Court, said, 'The charge is that the defendants conspired to cheat and defraud *divers* liege subjects, being tradesmen, of their goods, &c.; and the objection is that these persons should have been designated by their Christian and surnames, or an excuse given, such as that their names are to the jurors unknown; because this allegation imports that the intention of the conspirators was to cheat certain definite individuals, who must always be described by name, or a reason given why they are not; and if the conspiracy was to cheat indefinite individuals, as for instance those whom they should afterwards deal with, or afterwards fix upon, it ought to have been described in appropriate terms, showing that the objects of the conspiracy were, at the time of making it, unascertained, as was in fact done in the case of *R. v. De Berenger*, (t) and *R. v. Peck*; (u) and it was argued that if, on the trial of this indictment, it had appeared that the intention was not to cheat certain definite individuals, but such as the conspirators should afterwards trade with or select, they would have been entitled to an acquittal; and we all agree in this view of the case, and think that the reasons assigned against the validity of this part of the indictment are correct. But then it was urged on the part of the crown that this defect in the allegation of the conspiracy was cured by referring to the whole of the indictment, the part stating the overt acts as well as that stating the conspiracy; and *R. v. Spragg*, (v) was cited as an authority that the whole ought to be read together. But if we examine the allegations in this indictment, there is no sufficient description of any act done after the conspiracy which amounts to a misdemeanor at common law. None of the overt acts are shown by proper averments to be indictable. The obtaining goods, for instance, from certain named individuals upon credit, without any averment of the use of false tokens, is not an indictable misdemeanor; and if it is said that because it is averred to

(t) 3 M. & S. 67, *ante*, p. 500.(u) 9 A. & E. 686, *ante*, p. 517.(v) 2 Burr. 993. See *ante*, p. 515, note (t), for the remarks on this case.

have been done in pursuance of the conspiracy before mentioned, it must be taken to be equivalent to an averment that the conspiracy was to cheat the named individuals of their goods, the answer is, first, that it does not necessarily follow, because the goods were obtained in pursuance of the conspiracy to cheat some persons, that the conspiracy was to cheat the persons from whom the goods were obtained; they might have been obtained from A. in the execution of an ulterior purpose to cheat B. of his goods. And secondly, if the averment is to be taken to be equivalent to one that the goods were obtained from the named individuals in pursuance of an illegal conspiracy to cheat and defraud those named individuals of their goods, it would still be defective, as not containing a *direct and positive averment* that the defendants did conspire to cheat and defraud those persons, which an indictment for a conspiracy, where the conspiracy is itself the crime, ought certainly to contain. The other allegations of what are termed overt acts are open to the same objection. In none is there complete description of a common-law misdemeanor independently of the conspiracy; and the allegation of the conspiracy is insufficient, and not direct and positive. For these reasons the judgment must be reversed.' (w)

Where a count charged that Lewis carried on the business of a dyer, and had divers vats and quantities of dye for the carrying on the business, and that the defendants were employed by Lewis as his servants in the management of his business, and that it was their duty as such servants to employ the vats and dye of Lewis for his benefit and for dyeing such materials as might belong to themselves or be intrusted to them by Lewis for those purposes, and for no other purposes and on no other materials; and that the defendants unlawfully conspired, fraudulently and without the consent of Lewis, to employ the vats and dye in dyeing materials not belonging to themselves and not intrusted to them by Lewis, and to obtain thereby to themselves large profits, and to deprive Lewis of the use and benefit of the said vats and dye; and that the defendants, in pursuance of the said conspiracy, wilfully and without the consent of Lewis, received into their possession divers large quantities of materials, and wilfully and without the consent of Lewis, at his expense and with his said vats and dye, dyed the same materials for their own profit and benefit; it was objected that the count did not show that the goods which the defendants dyed were not their own, and that it appeared by the record that they had permission to dye their own goods; but the Court of Queen's Bench held that the count was good; it was clear that the essential part of the count was the charge of a conspiracy; so that if the evidence proved the conspiracy and did not prove the overt acts alleged, viz. that the conspiracy was carried into effect, the count would have been sufficiently proved. (x)

(w) R. v. King, 7 Q. B. 782. In the argument in the Court of Queen's Bench in this case it was also objected that the conspiracy ought to have been laid to defraud divers tradesmen of their goods '*respectively*,'

but the court held that this was not necessary, and this point does not appear to have been raised in the Exchequer Chamber.¹

(x) R. v. Button, 11 Q. B. 929. There was another count similar to the above,

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¹ As to the purchase of goods by two persons without any expectation of paying

for them, see C. v. Eastman, 1 Cush. 189; 48 Am. D. 596.

The first count alleged that the defendants, intending to create discontent and disaffection amongst the subjects of the Queen, and to excite the said subjects to hatred of the government and constitution, &c., unlawfully and seditiously did conspire, &c., to create discontent and disaffection amongst the subjects of the Queen, and to excite such subjects to hatred and contempt of the government and constitution and to unlawful and seditious opposition to the government and constitution, and to stir up jealousies and ill-will between different classes of her Majesty's subjects, and especially to promote among her Majesty's subjects in Ireland feelings of ill-will and hostility towards and against her Majesty's subjects in the other parts of the United Kingdom, and especially in that part called England; and further, to excite discontent and disaffection amongst divers of her Majesty's subjects serving in the army; and further, to cause and procure, &c., divers subjects unlawfully and seditiously to meet and assemble together in large numbers, at different places in Ireland, for the unlawful and seditious purpose of obtaining, by means of the intimidation to be thereby caused, and by means of the exhibition of great physical force at such assemblies and meetings, changes and alterations in the government, laws, and constitution; and further, to bring into hatred and disrepute the courts by law established in Ireland for the administration of justice, and to diminish the confidence of the said subjects in Ireland in the administration of the law therein, with the intent to induce the subjects to withdraw the adjudication of their differences from the cognizance of the said courts, and to submit the same to the determination of other tribunals to be constituted for that purpose. The count then alleged various overt acts done in order to excite discontent with, hatred of, and disaffection to the government, laws, and constitution. The second count was exactly like the first, but omitted the overt acts. The third count alleged that the defendants, intending to create discontent and disaffection amongst the subjects of the Queen, and to excite the said subjects to hatred and contempt of the government and constitution, &c., unlawfully and seditiously did conspire, &c., to raise and create discontent and disaffection amongst the subjects of the Queen, and to excite such subjects to hatred and contempt of the government and constitution, and to unlawful and seditious opposition to the said government and constitution, and to stir up hatred, jealousies, and ill-will between different classes of the said subjects, and especially to promote amongst the said subjects in Ireland feelings of ill-will and hostility against the said subjects in other parts of the United Kingdom, and especially in that part called England; and further, to excite discontent and disaffection amongst divers subjects serving in her Majesty's army; and further, to cause and procure, &c., divers subjects

which was objected to on the ground that it did not allege any duty in the defendants not to employ the dye for their own profit; but the court held it good, as the allegation of the conspiracy was sufficient. There was

also a question as to the conspiracy having merged in the felony decided in this case.¹ But as the 14 & 15 Vict. c. 100, s. 12, has got rid of all such questions for the future, it has been omitted.

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¹ For the American law on the subject and a discussion of the case of *R. v. Button* see Bishop, i. ss. 812, 814.

to meet and assemble together in large numbers at different places in Ireland, for the unlawful and seditious purpose of obtaining, by means of the intimidation to be thereby caused, and by means of the exhibition of great physical force at such assemblies and meetings, changes in the government, laws, and constitution; and further, to bring into hatred and disrepute the courts in Ireland for the administration of justice, &c. The fourth count was the same as the third, omitting the charges as to creating discontent in the army, and the diminishing the confidence in the courts of law. The fifth count alleged that the defendants, intending to cause and create discontent and disaffection amongst the liege subjects of the Queen, and to excite the said subjects to hatred and contempt of the government and constitution, &c., unlawfully and seditiously did conspire, &c., to raise and create discontent and disaffection amongst the liege subjects of the Queen, and to excite the said subjects to hatred and contempt of the government and constitution, and to unlawful and seditious opposition to the government and constitution, and also to stir up jealousies, hatred, and ill-will between different classes of the said subjects, and especially to promote amongst the said subjects in Ireland feelings of ill-will and hostility against the subjects in the other parts of the United Kingdom, and especially in England. The sixth count alleged that the defendants unlawfully and seditiously intending, by means of intimidation and the demonstration of great physical force, to procure and effect changes to be made in the government, laws, and constitution, unlawfully and seditiously did conspire, &c., to cause, and procure, &c. divers subjects of the Queen to meet and assemble together in large numbers, at various times and at different places in Ireland, for the unlawful and seditious purpose of obtaining, by means of intimidation to be thereby caused, and by means of the exhibition and demonstration of great physical force at such assemblies and meetings, changes in the government, laws, and constitution, &c. The seventh count was like the sixth, with the addition, 'and especially, by the means aforesaid, to bring about and accomplish a dissolution of the legislative union now subsisting between Great Britain and Ireland.' The eighth count charged a conspiracy to bring the tribunals of justice into contempt, and to cause the subjects to withdraw their differences from the said tribunals, and to submit the same to other tribunals. The ninth was similar to the eighth, but substituted for withdrawing their differences, &c., 'to assume and usurp the prerogative of the Crown in the establishment of courts for the administration of the law.' The tenth count charged a conspiracy to bring into disrepute the tribunals for the administration of justice. And the eleventh count alleged that the defendants, intending by means of intimidation and demonstration of physical force, &c., by causing large numbers of persons to meet and assemble in Ireland, and by means of seditious and inflammatory speeches to be delivered to the said persons, and by means of publishing divers unlawful and seditious writings, to intimidate the Lords Spiritual and Temporal and Commons of the Parliament of the United Kingdom, and thereby to effect changes in the laws and constitution, unlawfully and seditiously did conspire, &c., to cause large numbers of persons to meet together in divers places and at divers times in Ireland, and by means of seditious speeches

to be made at the said places and times, and by means of publishing to the subjects of the Queen unlawful and seditious writings, &c., to intimidate the Lords Spiritual and Temporal and the Commons of the Parliament of the United Kingdom, and thereby to effect and bring about changes and alterations in the laws and constitution. Upon a writ of error in the House of Lords, the following question was put to the judges:—‘Are all or any, and if any, which, of the counts in the indictment bad in law? so that if such count or counts stood alone in the indictment, no judgment against the defendants could properly be entered upon them.’ And Tindal, C. J., thus delivered the answer of the judges:—‘My Lords, the answer to the question will depend upon the consideration, whether all the counts of the indictment are framed with that proper and convenient certainty, with respect to the substance of the charge of conspiracy, which the law requires; for, undoubtedly, if any of such counts are framed in so loose, uncertain, or inapt a manner, as that the defendants might have availed themselves of the insufficiency of the indictment upon a demurrer, there is nothing to prevent them from having the same advantage of the objection upon a writ of error. The crime of conspiracy is complete if two, or more than two, should agree to do an illegal thing; that is, to effect something in itself unlawful, or to effect, by unlawful means, something which in itself may be indifferent, or even lawful. That it was an offence known to the common law, and not first created by the 33 Edw. 1, st. 2, is manifest. That statute speaks of conspiracy as a term at that time well known to the law, and professes only to be ‘a definition of conspirators.’ It has accordingly always been held to be the law, that the gist of the offence of conspiracy is the bare engagement and association to break the law, whether any act be done in pursuance thereof by the conspirators or not. (y) No serious objection appears to have been made against the sufficiency of any of the counts prior to the sixth. Indeed there can be no question but that the charges contained in the first five counts do amount, in each, to the legal offence of conspiracy, and are sufficiently described therein. There can be no doubt but that the agreeing of divers persons together to raise discontent and disaffection amongst the liege subjects of the Queen, to stir up jealousies, hatred, and ill-will between different classes of her Majesty’s subjects, and especially to promote amongst her Majesty’s subjects in Ireland feelings of ill-will and hostility towards her Majesty’s subjects in other parts of the United Kingdom, and especially in England — which charges are found in each of the first five counts — do form a distinct and definite charge in each, against the several defendants, of an agreement between them to do an illegal act; and it therefore becomes unnecessary to consider the other additional objects and purposes alleged in some of these counts to have been comprised within the scope of the agreement of the several defendants. With respect, however, to the sixth and seventh counts, we all concur in opinion that they do not state the illegal purpose and design of the agreement entered into between the defendants with such proper and sufficient certainty as to lead to the necessary conclusion that it was an agreement to do an act in

(y) *R. v. Best*, 2 Lord Raym. 167, and *R. v. Edwards*, 8 Mod. R. 320, were here cited.

violation of the law. Each of those two counts does in substance state the agreement of defendants to have been 'to cause and procure divers subjects to meet together in large numbers, for the unlawful and seditious purpose of obtaining, by means of the intimidation to be thereby caused, and by means of the exhibition and demonstration of great physical force at such meetings, changes in the government, laws, and constitution of the realm.' Now, though it may be inferred from this statement, that the object of the defendants was probably illegal, yet it does not appear to us to be so alleged with sufficient certainty. The word 'intimidation' is not a technical word; it is not *vocabulum artis*, having a necessary meaning in a bad sense; it is a word in common use, employed on this occasion in its popular sense; and in order to give it any force, it ought at least to appear from the context what species of fear was intended, or upon whom such fear was intended to operate. But these counts contain no intimation whatever upon what persons this intimidation was intended to operate; it is left in complete uncertainty whether the intimidation was directed against the peaceable inhabitants of the surrounding places, against the subjects of the Queen dwelling in Ireland in general, against persons in the exercise of public authority there, or even against the legislature of the realm. Again, the mere allegation that these changes were to be obtained by the exhibition and demonstration of physical force, without any allegation that such force was to be used, or threatened to be used, seems to us to mean no more than the mere display of numbers, and consequently to carry the matter no further. Applying the same principle and mode of reasoning to the consideration of the eighth, ninth, and tenth counts, we all concur in opinion that the object and purpose of the agreement entered into by the defendants, as disclosed upon these counts, is an agreement for the performance of an act, and the attainment of an object, which is a violation of the laws of the land. We think it unnecessary to state reasons in support of the opinion that an agreement between the defendants to diminish the confidence of her Majesty's subjects in Ireland in the general administration of the law therein, or an agreement to bring into hatred and disrepute the tribunals by law established in Ireland for the administration of justice, are each and every of them agreements to effect purposes in manifest violation of the law. Upon the sufficiency of the eleventh count, no doubt whatever has been raised.' (z)

A count alleged that the defendants, having in their possession two horses, conspired by divers false pretences to obtain large sums of money from such persons as might be desirous of purchasing the said horses, and to cheat and defraud such persons of such sums of money, and that the defendants, in pursuance of the said conspiracy, made certain false pretences, which were set out; and that the defendants, in pursuance of the said conspiracy, did obtain from W. A. an order for the payment of 115*l* 10*s*. It was objected that this count was bad, because it did not show that W. A. was one of the persons who was desirous of purchasing the horses, and therefore he was not shown to be within the objects of the conspiracy; and the Recorder so held. (a)

(z) O'Connell v. R., 11 Cl. & F. 155.
The Lords all concurred in this judgment.

(a) R. v. Ward, 1 Cox, C. C. 101. If
this case is correctly reported, the decision is

An indictment for a conspiracy to conceal and embezzle the personal estate of a bankrupt under the 6 Geo. 4, c. 16 must state the petitioning creditor's debt, the trading, and the act of bankruptcy, and that the party had actually become bankrupt. (b)

Technical averment of conspiracy. — The technical averment of the agreement and conspiracy, generally used in the indictment, charges that the defendants 'did conspire, combine, confederate, and agree together;' but it is said that other words of the same import seem to be equally proper. (c) To the counts for a conspiracy may be joined such other counts as the circumstances of the case may seem to require (not charging a felony), though they do not include a charge of conspiracy. (d)

Place where the offence may be tried. — It has been holden that in an indictment for a conspiracy the venue must be laid where the conspiracy was, and not where the result of such conspiracy was put in execution. (e) But it was said by the court, that there seemed to be no reason why the crime of conspiracy, amounting only to a misdemeanor, might not be tried, wherever one distinct overt act of conspiracy was in fact committed, as well as the crime of high treason, in compassing and imagining the King's death, or in conspiring to levy war. (f) And a case was cited in which the trial proceeded upon this principle; and in which, though no proof of actual conspiracy, embracing all the several conspirators, was attempted to be given in Middlesex, where the trial took place, and though the individual actings of some of the conspirators were wholly confined to other counties than Middlesex, yet the conspiracy as against all having been proved, from the community of criminal purpose, and by their joint co-operation in forwarding the objects of it, in different places and counties, the locality required for the purpose of trial was holden to be satisfied by overt acts, done by some of them, in prosecution of the conspiracy in the county where the trial was had. (g)

The offence of conspiracy might formerly be tried by justices of peace in their Quarter Sessions. In a case where the question of their jurisdiction was raised, no authority being cited either on the one side or on the other, the court decided in favour of their jurisdiction, upon general principles, saying, that a conspiracy was a trespass, and that trespasses were indictable at sessions, though not committed with force and arms. (h) But now by the 5 & 6 Vict. c. 38, s. 1, 'neither the justices of the peace acting in and for any county, riding, division,

clearly erroneous. The count alleged that the defendants did obtain the money from W. A. 'in pursuance of the conspiracy' which is the regular mode of connecting the overt act with the conspiracy, especially where, as in this case, the overt act could not be foreseen at the time when the conspiracy was entered into. The overt act, therefore, was well laid. But even if it had been otherwise, the count was good without it; for the conspiracy was clearly well laid: and, where that is the case, an acquittal of the overt act is immaterial. R. v. Sterling, 1 Lev. 125, shows that the overt act is in such a case immaterial.

(b) R. v. Jones, 4 B. & Ad. 345. 1 N. & M. 78.

(c) 3 Chit. Crim. L. 1143. See per Lord Campbell, R. v. Hamp, *ante*, p. 499.

(d) See the judgment of Lord Ellenborough, C. J., in R. v. Johnson, 3 M. & S. 550. In R. v. Murphy, 8 C. & P. 297, counts for libel were joined.

(e) R. v. Best, 1 Salk. 174.

(f) R. v. Brisac, 4 East, R. 171.

(g) R. v. Bowes, cited in R. v. Brisac, *supra*.

(h) R. v. Rispal, 3 Burr. 1320. 1 Black. R. 368. Burn's Just. tit. *Conspiracy*, sec. 1. The point was so decided in an earlier case, R. v. Edwards, 8 Mod. 320.

or liberty, nor the recorder of any borough, shall, at any session of the peace, or at any adjournment thereof, try any person or persons, for (*inter alia*) unlawful combinations and conspiracies, except conspiracies or combinations to commit any offence which such justices or recorder respectively have or has jurisdiction to try when committed by one person.'

A count alleged that the prisoners conspired, by divers false pretences, against the form of the statute in that case made and provided, to defraud the prosecutor of his money; and it was objected that the facts ought to have been set out so as to show that the offence intended to be committed was within the jurisdiction of the sessions, by whom the indictment had been tried; but the Court of Queen's Bench held that the count sufficiently showed that the sessions had jurisdiction. (*i*)

As to an indictment for conspiracy not being preferred without previous authorization, see *ante*, p. 2.

On an indictment against the manager and secretary of a joint stock bank, the indictment containing many counts, some charging that the defendants concurred in making and publishing false statements of the affairs of the bank, and others that they conspired together to do so, the prosecutors were put to elect on which set of counts they would rely, and they having elected to rely on the counts for conspiracy, held, that it was not enough to prove that the defendants made and put forth false statements intended and calculated to deceive, unless they had entered into a precedent and fraudulent conspiracy to do so. The chief count relied upon not stating an intent to defraud any particular parties; held, that though there were auditors, whose duty it would be to discover any frauds, that was no answer to the prosecution, if the defendants were party to such conspiracy to deceive them and the directors. But, on the other hand, the jury were told that evidence that the directors were privy to all that was done was very material, with a view to negative such conspiracy, on the part of the defendants, to deceive. (*j*)

Evidence. — On a prosecution against several persons for a conspiracy, the wife of one of the defendants has been holden not to be a competent witness for the others, a joint offence being charged, and an acquittal of all the other defendants being a ground of discharge for the husband. (*k*) And so it has been held, upon an indictment against the wife of W. S. and others for a conspiracy in procuring W. S. to marry, that W. S. was not a competent witness in support of the prosecution. (*l*)

An able writer upon the law of evidence lays down the following doctrine with respect to the acts or words of one conspirator being evidence against the others. Where several persons are proved to have combined together for the same illegal purpose, any act done by one of the party, in pursuance of the original concerted plan, and with reference to the common object, is in the contemplation of

(*i*) *Latham v. R.*, 9 Cox, C. C. 516.

(*j*) *R. v. Birch*, 4 F. & F. 407. See *R. v. Barry*, 4 F. & F. 389.

(*k*) *R. v. Lockyer*, 5 Esp. N. P. R. 107. *Lord Ellenborough, C. J. R. v. Frederick*, 2 Str. 1095. 1 Phill. Evid. 74.

(*l*) *R. v. Serjeant, R. & M. N. P. R.* 352. 1 Phill. Evid. 74. See 38 & 39 Vict. c. 86, s. 11, where a husband or wife is a competent witness under that Act.

law the act of the whole party, and, therefore, the proof of such act would be evidence against any of the others who were engaged in the same conspiracy; and, further, any declarations, made by one of the party at the time of doing such illegal act, seem not only to be evidence against himself, as tending to determine the quality of the act, but to be evidence also against the rest of the party, who are as much responsible as if they had themselves done the act. But what one of the party may have been heard to say at some other time, as to the share which some of the others had in the execution of the common design, or as to the object of the conspiracy, cannot, it is conceived, be admitted as evidence to affect them on their trial for the same offence. (*m*) And, in general, proof of concert and connection must be given, before evidence is admissible of the acts or declarations of any person not in the presence of the prisoner. (*n*) It is for the court to judge whether such connection has been sufficiently established; but when that has been done, the doctrine applies that each party is an agent for the others, and that an act done by one in furtherance of the unlawful design, is in law the act of all, and that a declaration made by one of the parties, at the time of doing such an act, is evidence against the others. Thus, where Stone was indicted for treason, and one of the overt acts charged was conspiring with Jackson and others to collect intelligence, and to communicate it to the King's enemies in France, &c., after evidence had been given to connect the prisoner with Jackson in the conspiracy as charged, the Secretary of State for the Foreign department was called to prove that a letter of Jackson's, containing treasonable information, had been transmitted to him from abroad, but in a confidential way, which made it impossible for him to divulge by whom it was communicated: and such letter was received in evidence. (*o*) So, in another case, after evidence had been given of a treasonable conspiracy, in which the prisoner was concerned, it was held that papers found in the lodging of a co-conspirator, at a period subsequent to the apprehension of the prisoner, might be read in evidence, upon strong presumptive proof being given that the lodgings had not been entered by any one in the interval between the apprehension of the prisoner and the finding of the papers, and although no absolute proof had been given of their existence previous to the prisoner's apprehension. (*p*) But it seems that if such papers had not been proved to have been intimately and immediately connected with the objects of the conspiracy, they would not have been admissible; as, in the same case, a paper containing seditious questions and answers, and found in the possession of a co-conspirator, was not read in evidence, the court doubting whether it was sufficiently connected by evidence with the object of the conspiracy to render it admissible. (*q*)

(*m*) 1 Phill. on Evid. 94, 95, 7th ed. See 9th ed. 201.

(*n*) 1 East, P. C. c. 2, s. 37, p. 96. 2 Stark. Evid. 326, and 1 Phill. Evid. 477, citing the Queen's case, 2 Brod. & B. 302. R. v. Jacobs, 1 Cox, C. C. 173. R. v. Duffield, 5 Cox, C. C. 404. See R. v. Gurney, 11 Cox, C. C. 414, where defendants were indicted for a conspiracy to cheat and defraud by means of a false prospectus of a public company.

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(*o*) R. v. Stone, 6 T. R. 527.

(*p*) R. v. Watson, 2 Stark. C. 140. R. v. MacCafferty, 10 Cox, C. C. 608; R. v. Meaney, 10 Cox, C. C. 506.

(*q*) R. v. Watson, *supra*. But they held that if proof were to be given that the instrument was to be used for the purposes of the conspiracy, it would clearly be admissible.

Where, upon an indictment for conspiring to annoy a broker who distrained for church-rates, it was proved that one of the defendants, in the presence of the other, excited the persons assembled at a public meeting to go in a body to the broker's house; it was held that evidence was admissible to show that they did so go, although neither of the defendants went with them, but that evidence of what a person, who was at the meeting, said a few days after the meeting when he himself was distrained on for church-rates, was not admissible. (*r*) And where an indictment charged the defendant with conspiring with Jones, who had been previously convicted of treason, to raise insurrections and riots, and it was proved that the defendant had been a member of a Chartist association, and that Jones was also a member, and that in the evening of the 3d of November the defendant had been at Jones's house, and was heard to direct the people there assembled to go to the race-course, where Jones had gone on before with others; it was held that a direction given by Jones in the forenoon of the same day to certain parties to meet on the race-course was admissible; and it being further proved that Jones and the persons assembled on the race-course went thence to the New Inn, it was held that what Jones said at the New Inn was admissible, as it was all part of the same transaction. (*s*)

A number of persons were charged with murder committed by an act done in the course of a conspiracy for the purpose of liberating a prisoner, of which conspiracy he was cognizant: Held, that acts of that prisoner within the prison, and articles found upon him, were admissible in evidence against the persons so charged. (*t*)

On an indictment on the 11 & 12 Vict. c. 12, s. 3, which makes it a felony to compass, &c., to deprive the Queen of her crown or to levy war, &c., it appeared that the prisoners from July 26th to August 16th had attended meetings where plans for securing the people's charter and the repeal of the union were organized, and took a prominent part at those meetings: large bodies of men were formed into societies, with class leaders, &c.; some of them were selected and organized as fighting men, and an attempt at insurrection was to be made on the 16th of August; and on that night a great number of the conspirators were found at the several places of meeting previously fixed, provided with arms, &c. A witness stated that at a meeting, at which none of the prisoners were present, he received a leaf of a book from one Bezer, which was to serve as an introduction to a subsequent meeting; and on the 20th of July he attended a second meeting, and produced the leaf; the chairman compared it with a book, and the witness was admitted. The prisoners were not shown to have been parties to the conspiracy at the time. But it was held that the witness might prove what Bezer said to him when he gave him the leaf, and also what took place at the second meeting, on the ground that the prosecution had a right to go into general evidence of the nature of the combination between the persons assembled, though the prisoners might not be present. (*u*) And it having been proved that a large number of

(*r*) *R. v. Murphy*, 8 C. & P. 297, Coleridge, J.

(*s*) *R. v. Shellard*, 9 C. & P. 277, Paterson, J.

(*t*) *R. v. Desmond and others*, 11 Cox, C. C. 146.

(*u*) *R. v. Lacy*, 3 Cox, C. C. 517. Platt, B., and Williams, J., who considered *R. v. Frost*, and *R. v. Hunt* expressly in point, and refused to reserve the point. See *post*, p. 535.

armed men were found assembled at a public house on the 16th of August, the time which had been fixed for the general outbreak, but none of these men had been previously connected with the conspiracy. nor did it appear that the house had ever been recognized as a place of meeting; it was held that evidence was admissible of what was done at that public-house; because it appeared that on this day there was to be a collection of armed persons. (*v*)

On an indictment for a conspiracy to prevent workmen from continuing in their service as tin-plate workers, it appeared that the workmen had been holding shop-meetings and discussions, and the prosecutor, a manufacturer, had published a placard offering constant employment to tin-plate workers, and after that a handbill was circulated about the town, and copies of it stuck up in the windows of beer-shops and public-houses, and one of them in the window of a public-house frequented by the tin-plate workers, and another at a public-house at which one Peel, Green, and Winters, alleged conspirators, lodged, and the defendants had been continually into those houses whilst the bill was in the windows. The bill was addressed 'To the members of the several trade societies connected with the National Association of United Trades by the central committee,' and recited that the committee had been called upon for advice by the tin plate-workers of the town to enable them to obtain an established book of prices; and that communications had taken place with the prosecutor about the amount of wages, but that no arrangement could be made with him. The bill was signed by Peel as general secretary, and mentioned Green and Winters as having visited the prosecutor, but did not mention any of the defendants. Erle, J., held that the bill was not admissible as the act of the defendants, either by themselves or as published or recognized by them. 'You may make a handbill evidence against a man, if I may so say, by retrospective light arising from his conduct. If a handbill says that certain things will be done by certain persons, and that handbill is circulated, where those persons probably saw it, and they do the very thing that the handbill indicates they would do, when that is in evidence, I am of opinion that the bill would be admissible against them; but we are not at that stage yet.' (*w*) But on the trial of another indictment against Rowlands, Green, Peel, Winters, and others, arising out of the same transactions, where, in addition to the evidence in the previous case, it was proved that Rowlands had been at the Swan whilst the bill was exhibited there, and Peel had been seen going in and out, and the bill was in such a situation that he must have seen it; Erle, J., held that it was admissible. 'If it is evidence against any one of the defendants, it is admissible.' 'I believe it is admissible against those in respect of whom I draw the inference that they saw it in the window; those in respect of whom it announces any intention. Green and Winters are the two that are named in it. It purports to be an instrument by Peel, and I think there is evidence before me, from which I am of opinion that Peel had seen that instrument, and it is probable, by his not objecting to it, that he permitted his name to be used to that instrument.' 'I am clear that it is evidence as against

(*v*) *Ibid.*(*w*) *R. v. Duffield*, 5 Cox, C. C. 404.

one of the defendants, it being published in his name, and, according to the evidence, being probably seen by him.' (x)

Upon the trial of Blake on an information for a conspiracy with one Tye to pass imported goods without paying the full duty, it appeared that Tye acted as agent for the importer of the goods, and Blake as landing-waiter at the Custom-house, and that it was Tye's duty to make an entry describing the quantity and particulars of the goods necessary to determine the amount of duty. This entry is called the Perfect Entry, which is left at the Custom-house, and the particulars are there copied into the Blue-book, which was delivered to Blake, the landing-waiter, whose duty was to examine the goods, and, if he found them correspond with the particulars in the Blue-book, to write 'Correct' across the Perfect Entry, whereupon the goods would be delivered to the importer upon payment of the duties so ascertained. The goods were passed to Tye, the duty having been paid on the Perfect Entry made out by Tye, which corresponded with the entry in the Blue-book. It was then proposed to put in Tye's Day-book, and to show by Tye's own entry therein that the quantity of goods was much larger than appeared by the Perfect Entry and Blue-book, and that the importer had been charged the duties by Tye on such larger amount, and had paid them accordingly. It was objected for Blake — Tye not being on his trial — that the entry in Tye's book was not evidence against Blake; but Lord Denman, C. J., admitted the evidence; and the Court of Queen's Bench held, on a motion for a new trial, that the Day-book was evidence of something done in the course of the transaction, and was properly admitted as a step in the proof of the conspiracy. (y) Evidence was given, in the same case, to show that a cheque drawn by Tye for a certain sum, and dated after the goods were passed, had been cashed, and the proceeds traced to Blake. It was then proposed to put in evidence the counterfoil of the cheque in Tye's cheque-book, on which was written an account showing that the cheque was drawn for a sum amounting to half the profit arising from transactions, including the alleged fraud on the revenue, as manifested by the several items in that account. To this evidence a similar objection was taken, but Lord Denman, C. J., admitted it. The Court of Queen's Bench, however, held that the evidence ought not to have been admitted. The conspiracy to defraud the customs had been carried into effect before the cheque was drawn; and the writing on the counterfoil was in effect a declaration by Tye for what purpose he had drawn the cheque, and how the money was to be applied. Now no declaration of Tye could be received in evidence against Blake, which was made in Blake's absence, except it related to the furtherance of the common object; which this did not. (z)

On an indictment for conspiracy to defraud the shareholders of the British Bank by falsely representing its affairs to be prosperous, the examination of one of the defendants, which had been taken on a petition for winding up the bank after the date of the alleged conspiracy, was tendered in evidence. This examination showed that

(x) *R. v. Rowlands*, 5 Cox, C. C. 436.
It does not appear that this ruling was questioned in the Court of Queen's Bench.

(y) *R. v. Blake*, 6 Q. B. 126.
(z) *R. v. Blake*, *supra*.

this defendant was aware of the insolvency of the bank, and alleged that the other directors had the same knowledge. It was objected that this examination was not evidence of any act done in furtherance of the conspiracy; and that it was not admissible until the other defendants were connected with this defendant in the conspiracy. But Lord Campbell, C. J. (after consulting the other judges of the Queen's Bench), said, 'We are all of opinion that the deposition is admissible against this defendant, as tending to show his knowledge before and at the time of his committing the overt act, but not as against the other defendants. Therefore only such parts should be read as refer to the deponent alone.' (a)

The evidence in support of an indictment for a conspiracy is generally circumstantial; and it is not necessary to prove any direct concert, or even any meeting of the conspirators, as the actual fact of conspiracy may be collected from the collateral circumstances of the case. (b) Although the common design is the root of the charge, yet it is not necessary to prove that the defendants came together, and actually agreed in terms to have the common design, and to pursue it by common means, and so to carry it into execution, because in many cases of the most clearly established conspiracies there are no means of proving any such thing. (c) If, therefore, two persons pursue by their acts the same object, often by the same means, one performing one part of an act, and the other another part of the same act, so as to complete it, with a view to the attainment of the object they were pursuing, the jury are at liberty to draw the conclusion that they have been engaged in a conspiracy to effect that object. (d) It is a mistake to say that a conspiracy must be proved before the acts of the alleged conspirators can be given in evidence. It is competent to prove insulated acts as steps by which the conspiracy itself may be established. (e) And in a late case the jury were told that it does not happen once in a thousand times when the offence of conspiracy is tried that anybody comes before the jury to say that he was present at the time when the parties did conspire together, and when they agreed to carry out their unlawful purposes; that species of evidence is hardly ever to be adduced before a jury; but the unlawful conspiracy is to be inferred from the conduct of the parties; and if several men are seen taking several steps, all tending towards one obvious purpose, and they are seen through a continued portion of time taking steps that lead to one end, it is for the jury to say whether those persons had not combined together to bring about that end, which their conduct appears so obviously adapted to effectuate. (f) In a case where a husband, wife, and their servants, were indicted for a conspiracy to ruin the trade of the prosecutor, who was the King's card-maker, the evidence against them was, that they had at several times given money to the prosecutor's apprentices to put grease into the paste, which had spoiled the cards; but there was no

(a) *R. v. Esdaile*, 1 F. & F. 213.

(b) *R. v. Parsons*, 1 Black. R. 392.

(c) *Per Coleridge, J., R. v. Murphy*, 8 C. & P. 297. *R. v. Brittain*, 3 Cox, C. C. 76, *per Coltman, J.*

(d) *Per Coleridge, J., R. v. Murphy*, *supra*.

(e) *Per Alderson, B., Ford v. Elliott*, 4 Exch. R. 78.

(f) *Per Erle, J., R. v. Duffield*, 5 Cox, C. C. 404.

account given that ever more than one at a time was present, though it was proved they had all given money in their turns ; it was objected that this could not be a conspiracy, on the ground that several persons might do the same thing, without having any previous communication with each other. But it was ruled that the defendants being all of a family, and concerned in making of cards, it would amount to evidence of a conspiracy. (*g*) And it appears also to have been considered that if a banker permits a sum of money to be lodged at his house, to be paid over for corruptly procuring an appointment under government, he may be indicted for a conspiracy along with those who are to procure the appointment, and receive the money. (*h*)

Every person concerned in any of the criminal parts of the transaction alleged as a conspiracy may be found guilty, though there be no evidence that such persons joined in concerting the plan, or that they ever met the others, and though it is probable they never did, and though some of them only join in the latter parts of the transaction, and probably did not know of the matter until some of the prior parts of the transaction were complete. (*i*) So that if several persons meet from different motives, and then join in effecting one common and illegal object, it is a conspiracy. (*j*) Where, therefore, upon an information for a conspiracy to ruin Macklin, the actor, in his profession, it was objected that in support of the prosecution evidence should be given of a *previous* meeting of the parties accused for the purpose of confederating to carry their object into execution ; Lord Mansfield, C. J., overruled the objection, saying that if a number of persons met together for different purposes, and afterwards joined to execute one common purpose, to the injury of the person, property, profession, or character of a third party, it was a conspiracy, and it was not necessary to prove any previous consult or plan among the defendants against the person intended to be injured. (*k*)

It appears to have been held that upon an indictment for a conspiracy, where, from the nature of the case, it would be difficult to prove the privity of the parties accused, without first proving the existence of a conspiracy, the prosecutor may go into general evidence of its nature, before it is brought home to the defendants. The indictment charged the defendants, who were journeymen shoemakers, with a conspiracy to raise their wages ; and evidence was offered on the part of the prosecution of a plan for a combination amongst the journeymen shoemakers, formed and printed several years before, regulating their meetings, subscriptions, and other matters for their mutual government in forwarding their designs. This evidence was objected to by the counsel for the defendant ; but Lord Kenyon, C. J., said, that if a general conspiracy existed, general evidence might be given of its nature, and the conduct of its members, so as to implicate men who stood charged with acting upon the terms of it years after those terms had been established, and who might reside at a great distance from the place where the general plan was carried on ; and his Lordship, therefore,

(*g*) R. v. Cope, 1 Str. 144.

(*h*) R. v. Pollman, 2 Campb. 233.

(*i*) R. v. Lord Grey, 9 St. Tri. 127. R. v. Murphy, 8 C. & P. 297, Coleridge, J.

(*j*) R. v. Lee, 2 Stark. Evid. 324.

(*k*) Lee's case, 2 M'Nally, Evid. 634, as cited Rosc. Cr. Evid. 385. S. P. per Coleridge, J. R. v. Murphy, 8 C. & P. 297. See *ante*, p. 492, note (*k*).

permitted a person, who was a member of this society, to prove the printed regulations and rules of the society, and that he and others acted under them, in execution of the conspiracy charged upon the defendants, as evidence introductory to the proof that they were members of such society, and equally concerned; but he observed, that it would not be evidence to affect the defendants until they were made parties to the same conspiracy. (*l*) And in several important cases, evidence has been first given of a general conspiracy before any proof of the particular part which the accused parties have taken. (*m*)

It has also been held that the prosecutor may either prove the conspiracy, which renders the acts of the conspirators admissible in evidence, or he may prove the acts of the different persons, and thus prove the conspiracy. Where, therefore, a party met, which was joined by the prisoner the next day, it was held that directions given by one of the party on the day of their meeting as to where they were to go and for what purpose, were admissible, and the case was said to fall within *R. v. Hunt*, (*n*) where evidence of drilling at a different place two days before and hissing an obnoxious person was held receivable. (*o*)

But after such general evidence has been received the parties before the court must be affected for their share of it. And it seems that mere detached declarations and confessions of persons not defendants, not made in the prosecution of the object of the conspiracy, are not evidence to prove its existence, although consultations for the purpose, and letters written in prosecution of the design, but not sent, are admissible. (*p*) It results from the principles already stated, and it has been observed as a conclusion to which they lead, that it seems to make no difference as to the admissibility of the act or declaration of a co-conspirator against the party defendant before the Court, whether such co-conspirator be indicted or not, or tried or not with the defendant. (*q*) The evidence is admitted on the ground that the act or declaration of one is the act or declaration of both when united in one common design.

Where the indictment charged the defendants with conspiring to cause themselves to be believed persons of large property for the purpose of defrauding tradesmen, evidence was given of their having hired a house in a fashionable street, and represented themselves to one tradesman employed to furnish it as people of large fortune; and then a witness was called to prove that at a different time they had made a similar representation to another tradesman. The evidence of this witness was objected to on the ground that it was not competent to the prosecutor to prove various acts of this kind, and that he was bound to select and confine himself to one. But Lord Ellenborough, C. J., said, 'This is an indictment for a conspiracy to carry on the

(*l*) *R. v. Hammond*, 2 Esp. N. P. R. 718. Lord Kenyon referred to the cases of the state trials in the year 1745, where from the nature of the charge it was necessary to go into evidence of what was going on at Manchester and in France, Scotland, and Ireland, at the same time.

(*m*) Lord Stafford's case, 7 St. Tr. 1218. Lord W. Russell's case, 9 St. Tr. 578. Lord

Lovat's case, 18 St. Tr. 530. Hardy's case, 24 St. Tr. 129. Horne Tooke's case, 25 St. Tr. 1.

(*n*) 3 B. & Ald. 566.

(*o*) *R. v. Frost*, 9 C. & P. 129. Tindal,

C. J., Parke, B., and Williams, J.

(*p*) 2 Stark. Evid. 327.

(*q*) 2 Stark. Evid. 329.

business of common cheats, and cumulative instances are necessary to prove the offence.' (r) And, in a similar case, the same course was allowed as to acts done both in and out of the county where the indictment charged the conspiracy to have been. (s)

But where a count alleged that the defendant and others did conspire to defraud J. Donkersley *and others* of certain goods, and that in pursuance of the said conspiracy the defendant did falsely pretend to the said J. D. that he was a merchant of the name of Grantham, carrying on business at Leeds and Huddersfield; and in further prosecution of the said conspiracy, and under colour of a pretended contract with the said J. D. for the purchase of certain cloth of the goods of the said J. D. *and others*, did obtain possession of a large quantity of cloth of the goods of the said J. D. *and others*, from the said J. D., with intent to cheat the said J. D. *and others*, to the great damage of the said J. D. and others; and it appeared that J. D. had partners; and evidence was given to show an intended fraud upon that firm; and it was also proposed to give evidence of attempts made by the defendant to defraud other persons, as well as the firm of J. D. and Co., of their goods: it was objected that the word 'others' must be taken to mean others the partners of J. D.; that where the goods were stated to be the goods of J. D. and others, it could only mean others his partners, and the word could not have one meaning at one part of the count, and another at another part of the same count: The evidence was received; but, upon a case reserved, the judges held the conviction wrong. (t)

In the case of a conspiracy to raise the price of the public funds by false rumours, it was holden that the court will take judicial notice that a war exists between this country and a foreign state, such war having been recognized in different Acts of Parliament; and, therefore, that an allegation to that effect need not be proved. (u)

Where an indictment alleged that the defendants conspired falsely to accuse the prosecutor of having feloniously forged a cheque for the payment of 178*l.*, and that in execution of such conspiracy a letter was written by one of the defendants, in which he stated that he had been employed to investigate the circumstances attending the forging of a cheque for 178*l.*, and proof was given of the letter, and also of conversations referring in like manner to a cheque, which the defendants charged the prosecutor with having forged, but the cheque itself was not produced; it was objected that the cheque was so incorporated with the evidence, that the prosecutor was not entitled to prove the conversations without producing the cheque to which they referred, which it appeared from the evidence was in existence, and in the possession of the defendants. Lord Tenterden, C. J., was, however, of opinion that it was not essential to prove the contents of the cheque or to produce it, but that it was enough to take the conver-

(r) *R. v. Roberts*, 1 Campb. 399. *Ante*, p. 504.

(s) *R. v. Whitehouse*, MSS. C. S. G. 6 Cox, C. C. 38.

(t) *R. v. Steel*, 2 M. C. C. R. 246, C. & M. 337. No ground for the decision is stated, but Lord Abinger said, at the close of the argument, 'I think the counsel for the

defendant is right in saying that the word "others" must have the same meaning in the earlier part of the count as in the latter part of it; and with respect to the property of the goods, it must mean that they were the goods of J. D. and his partners.'

(u) *R. v. De Berenger*, 3 M. & S. 67. *Ante*, p. 500.

sations as they passed. And the Court of King's Bench, upon a rule to show cause why there should not be a new trial, held that it was not necessary to produce the cheque. The whole of the charge against the defendants was founded on the letter set out in the indictment, which was written by one of the defendants upon the application of the other; and they having taken upon themselves to treat as an existing thing a cheque for 178*l*., it was not necessary, on the part of the prosecutor, to produce it in evidence, even although it appeared that it actually existed. But it might be a fabrication on their part; there might be no such cheque, and then it could not be produced. (*v*)

A count alleged that the defendants, a husband, wife, and daughter, being in low and indigent circumstances, conspired to cause the husband to be reputed and believed to be a person of considerable property, and in opulent circumstances, for the purpose and with the intent of cheating and defrauding divers tradesmen who should bargain with them for the sale to the husband of goods, the property of such tradesmen, of great quantities of such goods, without paying for the same. The wife and daughter usually were together, and on some occasions represented that they were in independent circumstances, their income being interest of money coming in monthly, and in others the wife had said her husband was in independent circumstances. These statements were made in the absence of the husband; but it was proved that he either occupied the lodgings which were hired under these representations, or that the goods were delivered at the places where all the defendants lodged. Platt, B., is reported to have held that there was no evidence of any conspiracy to represent the husband as a person of considerable property. (*w*) Another count alleged the conspiracy in the same manner as the preceding, but charged the intent to be to defraud persons who should let the husband lodgings for hire, of divers large sums of money, being the sums agreed to be paid for the hire of such lodgings; and Platt, B., is reported to have held that this count was not supported, as well on the ground on which the preceding count was not supported, as because the object of the defendants was to obtain possession of the lodgings, and to deprive the landlord of the use of the rooms, but not to deprive him of the price, which was only incidental to their occupation. They had no object in depriving him of the profits of the rooms, apart from their own occupation of them. (*x*)

Two counts of an indictment charged the defendants with conspiring to obtain from the prosecutor certain bills of exchange accepted by him, amounting to a large sum of money, and to cheat and defraud him of the proceeds of the said bills; other counts charged a conspiracy to defraud the prosecutor of his monies. Evidence was given to show the obtaining of the acceptances, but it appeared that the prosecutor had not parted with any money, and there was no reason to suppose

(*v*) *R. v. Aldridge*, 1 N. & M. 776.

(*w*) *R. v. Whitehouse*, 6 Cox, C. C. 38.

(*x*) *R. v. Whitehouse*, 6 Cox, C. C. 38.

I was counsel for the crown in this case, and my recollection of it is that the case went to the jury on all the counts. The main question in the case was whether every representation made was the representation

of all. The prisoners came to the town together, lived together, and enjoyed the fruits of their frauds together; but the conspiracy could only be inferred from a great number of isolated acts, in none of which were all of the prisoners engaged. C. S. G.

that he intended to take up the acceptances, and it was not shown that the bills which he accepted were ever in his hands, except for the purpose of his writing his acceptances, they having been brought to him complete, except as to his signature. The jury having found the defendants guilty on these counts, the verdict was impeached as unsupported by the evidence, because the charge was of a conspiracy to obtain acceptances from the prosecutor, whereas he proved that the acceptances were ready written, and in possession of the defendants, or some of them, and nothing was sought but his signature; but the Court of Queen's Bench thought that this was substantially the same thing. It was only by the signature of the prosecutor that the bills became complete; and his acceptance when given, being without any consideration, was at the instant his, and in his possession. It was also urged that the entire transaction, as proved by the evidence, was at variance with the indictment, as all parties well knew that the prosecutor had no money, nor could be defrauded of any; and that the real fraud was on the prosecutor's part, to the prejudice of some expected lender of the sums mentioned in the bills, in return for acceptances of no value. But the court held that, though there might be some ground for this imputation on the prosecutor, yet it would not disprove the fraud practised upon him, by inducing him to accept bills without a corresponding advance of cash. Though there was little appearance of solvency in the prosecutor, those who fraudulently induced him to incur the liability must have speculated on some pecuniary advantage from it; and though the money could in such case only have come from his respectable friends, as he had no funds of his own, the money intended to be so procured might well be described for this purpose as his money. (y)

The expression 'false pretences' as used in indictments for conspiracy is not construed in the technical sense in which it is in indictments for obtaining property by false pretences. (z) Where, therefore, a count charged the defendants with a conspiracy by divers subtle means and false pretences to obtain goods, it was held that an actual false pretence need not be proved under this count, in the same manner as if it had been a count for obtaining property by false pretences. (a)

Absolon and Clark were indicted for conspiring to defraud a railway company by obtaining excursion tickets not transferable, and selling them to others. Absolon had sold the excursion tickets to Clark at Brighton, and Clark attempted to use them for the purpose of sending back to London some children. It did not appear how Absolon got the tickets; he had others in his possession. Wightman, J., left it to the jury to determine whether the prisoners did concert together that the tickets should be obtained and used for the purpose of defrauding the company. (b)

On an indictment for a conspiracy to cause tinplate-workers to leave their employment, it appeared that the prosecutors, in consequence of their workmen leaving their service, had employed Frenchmen; and Erle, J., held that it was not competent to prove how much the firm

(y) *R. v. Gompertz*, 9 Q. B. 824.

(z) *R. v. Hudson*, Bell, C. C. 268, *ante*,
p. 506.

(a) *R. v. Whitehouse*, 6 Cox, C. C. 38.

Platt, B.

(b) *R. v. Absolon*, 1 F. & F. 498.

had lost by these Frenchmen, as the amount of loss by any particular set of workmen was clearly unconnected with the issue whether there was a conspiracy or not; but that the sum total of the loss might be proved; for the very issue in the matter was the intention to obstruct the business, and the result of the operations was a relevant fact as to that. (c)

Where one of several defendants charged with a conspiracy has been acquitted, the record of acquittal is evidence for another defendant subsequently tried. (d)

Where an indictment charged that the defendant with divers others did conspire to prevent the workmen of one J. G. from continuing to work in a colliery; Patteson, J., held, that a conspiracy to procure the discharge of any of the workmen would support the indictment, which did not necessarily lay the intent as to all the workmen. (e)

On an indictment for a conspiracy to induce tinplate-workmen to leave their employment, it appeared that three of the defendants had come down by invitation from the tinplate-workers' association, and had held meetings with the workmen; and Erle, J., allowed a witness for the defence to be asked, 'With reference to hired men and apprentices, persons under contract to their employers, what advice did these defendants give to the men?' and also, 'Whether the witness ever heard them either use any intimidating language or threats, or recommend force of any kind?' (f)

Two persons were indicted for felony, in attempting to poison A. B., by administering certain poisonous ingredients, as set forth in the indictment. At the same time, an indictment was found against them for a conspiracy to poison the same individual by the same means. On the trial of the first indictment, the prisoners were acquitted, there being no proof that the ingredients were poisonous. Parke, J., thereupon directed an acquittal for the conspiracy also, there being no other proof of a conspiracy to poison than that by which it was attempted to establish the felony, viz., that the ingredients were poisonous. (g)

Where an indictment against A., B., C., and D., charged that they conspired together to obtain, 'viz., to the use of them the said A., B., and C., and certain other persons to the jurors unknown,' a sum of money for procuring an appointment under government; and it appeared that D. (although the money was lodged in his hands, to be paid to A. and B. when the appointment was procured), did not know that C. was to have any part of it, or was at all implicated in the transaction; it was holden, that the averment concerning the application of the money was material, though coming under a viz., and that as to D., the conspiracy was not proved as laid. (h)

Where an indictment for a conspiracy to procure false witnesses on the trial of an ejectment, at the great sessions for the county of Glamorgan, stated that at the *general* sessions of our Lord the King, holden, &c., an action of ejectment was depending, in which action J. Doe, on the demise of W. Rees and D. Terry, was the plaintiff, and

(c) *R. v. Rowlands*, 5 Cox, C. C. 436.
All the counts ended 'to the great damage' of the prosecutors.

(d) *R. v. Horne Tooke*, 1 Chitty, Burn. 823, *sed quare*. See note, *ante*, p. 512.

(e) *R. v. Bykerdyke*, 1 M. & Rob. 179.

(f) *R. v. Rowlands*, 5 Cox, C. C. 436.

(g) *Maudsley's case*, 1 Lew. 51.

(h) *R. v. Pollman*, 2 Campb. 231.

R. Thomas and T. Beavan the defendants, and it appeared that the ejectment was brought on a joint and two several demises of Rees and Terry; it was held, first, that the description of the sessions was erroneous, as it should have been at the great sessions; secondly, that there was a variance between the action described in the indictment and the action proved to have been pending. (*i*)

Where the defendants were indicted for a conspiracy to cheat any person whom they should deal with, and the conspiracy proved was to cheat A., B., and C.; Parke, B., thought the offence different, and directed an acquittal. (*j*)

Where an indictment for a conspiracy stated in the inducement that the defendants knew that the parties conspired against were the proprietors of certain licensed stage carriages, and as such proprietors liable to certain penalties, in which the drivers of such carriages should be convicted of any offence committed by the said drivers, against 'a certain Act of Parliament made and passed in the second and third years of the reign of his present Majesty, intituled, &c.' (setting out the title correctly); and that the defendants unlawfully conspired falsely to exhibit a certain information charging, &c., contrary to the form of the statute in such case made and provided; the judgment was arrested, on the ground that a statute cannot be pleaded as made in two years; for in law an Act cannot be made in two years. (*k*)

Where the counts in an indictment for a conspiracy are framed in a general form, the judge will order the prosecutor to furnish the defendants with a particular of the charges upon which he means to rely, and such particular ought to be so framed as to give the defendants the same information as would be given by a special count; but it need not state the specific acts the defendants are charged with having done, or the times or places at which such acts are alleged to have taken place. (*l*) But where a count alleges overt acts, the Court will not order particulars to be delivered, where there is no affidavit on the part of the defendant that he has no knowledge of the overt acts charged, and does not possess sufficient information to enable him to meet them. (*m*)

In the British Bank case an order had been made on the first day of the trial that particulars of Cameron's debt, which was stated to be 36,000*l.*, should be delivered to him; and it was objected that until the particulars had been given that case could not be gone into. It was answered that Cameron had had access to the accounts for some

(*i*) *R. v. Thomas*, 1 C. & P. 472, J. A. Park, J.

(*j*) Anonymous, mentioned by Parke, B., in *R. v. King*, 7 Q. B. 798.

(*k*) *R. v. Biers*, 1 A. & E. 327. The correct statement is 'a certain statute made and passed in a session of Parliament, held in the first and second years of the reign of King William the Third.' Per Patteson, J., *ibid.* *Gibbs v. Pike*, 8 M. & W. 223. S. P.

(*l*) *R. v. Hamilton*, 7 C. & P. 448. Little Dale, J., after consulting several of the other judges. *R. v. Rycroft*, 6 Cox, C. C. 76. *Williams, J., R. v. Probert, Dears.*

C. C. 32 (*a*). In Anonymous, 1 Chitty, 698, the Court of King's Bench refused to order such particulars to be given on motion, but intimated that the correct course was to apply to the prosecutor to give some information as to the particulars upon which he meant to rely in support of the indictment, and if he refused, then an application might be made to postpone the trial in order that the question might be more maturely discussed. From which it is to be inferred that the motion had been made without any previous application for particulars to the prosecutor. C. S.G.

(*m*) *R. v. Stapylton*, 8 Cox, C. C. 69.

months; and Lord Campbell, C. J., held that the crown could not be precluded from giving evidence on that part of the case. (*n*)

Upon the trial of an indictment for a conspiracy, the counsel for the prosecution has a right, before opening his case, to have any of the defendants acquitted, in order that he may call them as witnesses, and the counsel for the other defendants has no power of objecting to this being done. (*o*)

Where an indictment contained counts for a conspiracy and counts for a libel contained in a hand-bill, and there was no evidence to affect one of the two defendants as to the libel; Coleridge, J., at the close of the case for the prosecution, put the prosecutor to elect upon which charge he would go, before the defendants' counsel entered upon the defence. (*p*)

As conspiracy is an offence at common law, if parties conspire to commit an offence created by statute, they may be indicted for such conspiracy, although the statute be repealed before the indictment is preferred. (*q*)

The Court of King's Bench have refused to change the venue in an indictment for a conspiracy to destroy foxes and other vermin, on the ground that the gentlemen who were likely to serve on the jury to try the indictment were much addicted to fox-hunting. (*r*)

In one case, a point arose as to the extent to which the counsel for the prosecution in a case of conspiracy might cross-examine a witness, called by only one of several defendants. The indictment was against A., B., and C.; and after the case for the prosecution was closed, C. *only* called a witness, whom he examined as to a conversation between himself and A.; and it was ruled, that the counsel for the prosecution might cross-examine such witness as to any other conversation between A. and C., although the evidence should tend chiefly to criminate A. (*s*)

If upon an indictment for conspiracy, the jury find the defendants guilty of so much of the indictment as amounts to a misdemeanor, the Court may pass judgment upon the defendants. The defendants were indicted for conspiring falsely to indict A. B. for keeping a gaming-house, for the purpose of extorting money from the said A. B., and the jury found the defendants guilty of conspiring to indict A. B., for the purpose of extorting money, but not to indict him falsely; and it was held that enough of the indictment was found to enable the Court to give judgment; for, in criminal cases, it is sufficient for the prosecutor to prove so much of the charge as constitutes an offence punishable by law; and the jury had found the defendants guilty of conspiring to prefer an indictment for the purpose of extorting money, and that is a misdemeanor, whether the charge were or were not false. (*t*)

Where a count alleged that the defendants conspired by divers false pretences and subtle means and devices to extort from T. E. a sovereign of his monies, and to cheat him of the same, and the evidence failed to prove any false pretences; it was held that an indictable offence was charged without reference to the false pretences, and

(*n*) R. v. Esdaile, 1 F. & F. 213.

(*o*) R. v. Rowland, R. & M. N. P. R. 401, Abbott, C. J.

(*p*) R. v. Murphy, 8 C. & P. 297.

(*q*) R. v. Thompson, 16 Q. B. 832; R. v. Bunn, 12 Cox, C. C. 316.

(*r*) R. v. King, 2 Chitty Rep. 217.

(*s*) R. v. Kroehl, 2 Stark. N. P. R. 343.

(*t*) R. v. Hollingberry, 4 B. & C. 329. 6 D. & R. 345.

therefore it was not necessary to prove the false pretences, but it was sufficient to prove enough to sustain the rest of the count. (*u*)

Upon an indictment for conspiracy containing eight counts the jury found a verdict of guilty on six of the counts; there was only one conspiracy proved, but the evidence proved the allegations contained in each count: it was objected in arrest of judgment that each count charged a distinct conspiracy, and therefore as many distinct conspiracies were found as there were counts; but the Court of Queen's Bench held that the answer was, that the evidence accorded with and proved the allegations in each count, and the verdict was founded thereon; and if any count were objectionable, it must not be presumed that the defendants would ever receive any sentence in respect of any such count. (*v*)

Where a count contains only one charge of conspiracy against several defendants, the jury cannot find one of them guilty of more than one charge. Where, therefore, a count charged several defendants with conspiring to do several illegal acts, and the jury found one of them guilty of conspiring with some of the defendants to do one of the acts, and guilty of conspiring with others of the defendants to do another of the acts, it was held by the House of Lords that such finding was bad; as it amounted to finding that one defendant was guilty of two conspiracies, though the count charged only one. (*w*) So where a count charged eight defendants with one conspiracy to effect certain objects, a finding that three of the defendants were guilty generally, and that five of them were guilty of conspiring to effect some, and not guilty as to the residue of these objects, was held to be bad and repugnant; for the finding that three were guilty was a finding that they were guilty of conspiracy with the other five to effect all the objects of the conspiracy; whereas, by the finding as to the five, it appeared that those five were guilty of conspiring to effect only some of those objects. (*x*)

Where an indictment contains several counts, one of which is bad, a general judgment for the crown, where the punishment is not fixed by law, is bad; and a bad finding on a good count is no more a warrant for a judgment on that count than a bad count. Where, therefore, an indictment for conspiracy contained some good and some bad counts, and on some of the good counts there were bad findings, and there was a judgment against each defendant that for 'his offences aforesaid' he should be imprisoned for a certain term, it was held by the House of Lords that each count must be considered as charging a separate offence, and that the terms 'his offences aforesaid' must be treated as extending to all the counts on which he had been found guilty; and as some of the counts and some of the findings were bad, the judgment was altogether erroneous. (*y*)

Punishment. — In former times, persons convicted of a conspiracy at the suit of the King to accuse another person of a capital offence, were liable to receive what was called the *villanous* judgment, that is, to

(*u*) *R. v. Yates*, 6 Cox, C. C. 441. Crompton, J., after consulting Coleridge, J. See *R. v. Hudson*, Bell, C. C. 263, *ante*, p. 506.

(*v*) *R. v. Gompertz*, 9 Q. B. 824. It should have been added that it must not be

presumed that the court would do more than impose a sentence for the one offence.

(*w*) *O'Connell v. R.*, 11 Cl. & F. 155.

(*x*) *O'Connell v. R.*, 11 Cl. & F. 155.

(*y*) *Ibid.*

lose their *liberam legem*, whereby they were discredited and disabled as jurors or witnesses; to forfeit their goods and chattels and lands for life; to have those lands wasted, their houses razed, their trees rooted up, and their bodies committed to prison. (z) But this judgment was not inflicted upon those who were convicted only of conspiracies of a less aggravated kind, at the suit of the party: and for some time past it appears to have been the better opinion, that the villanous judgment is by long disuse become obsolete, not having been pronounced for some ages; and that the punishment for conspiracies in general is, as in the case of other misdemeanors, by fine, imprisonment, and sureties for the good behaviour at the discretion of the Court. (a)

By the 14 & 15 Vict. c. 100, s. 29, whenever any person shall be convicted of any conspiracy to cheat or defraud, or to extort money or goods, or falsely to accuse of any crime, or to obstruct, prevent, pervert, or defeat the course of public justice, the Court may award imprisonment for any term now warranted by law, and hard labour during the whole or any part of such imprisonment.

By the 24 & 25 Vict. c. 100, s. 4, provision is made for the punishment of conspiracies to murder.

In conclusion of this chapter, it may be mentioned, that after a conviction for a conspiracy, the defendants must be present in Court when a motion is made on their behalf, in arrest of judgment. (d) And also that upon a motion for a new trial, after such conviction, all the defendants must be present. (e) And it is not a sufficient excuse for absence, that they are in custody on civil process; but if they were in custody on criminal process, the case would be different, for then they might be charged with the conspiracy also. (f) But where an indictment has been removed into the Court of King's Bench, after verdict, but before judgment, and set down for argument, it does not appear to be necessary that the defendants should appear in Court upon the argument, the proceeding being in the nature of a special verdict, and the party not being considered as convicted, until after the Court have determined upon the verdict. (g) A new trial cannot be granted as to one conspirator without granting it as to all who are convicted, though the ground on which the new trial is granted applies only to the one conspirator. (h) But where some are acquitted and some convicted, a new trial may be granted as to the latter, without disturbing the verdict as to the former. (h)

(z) 1 Hawk. P. C. c. 72, s. 9. 4 Black. Com. 136.

(a) *Id. ibid.* The pillory was also very commonly a part of the punishment until such punishment was abolished by the 56 Geo. 3, c. 138. In a case where the defendants were convicted on an information for a conspiracy to take away the character of one Kempe, and accuse him of murder, by pretended conversations and communications with a ghost that answered by knocking and scratching in Cock-lane, &c., they received the following judgment: Richard Parsons (the father of the child, who was the principal agent in the pretended communication), to stand thrice in the pillory, and be imprisoned two years; Eliz. Parsons, the mother, to be imprisoned one year; Mary Fraser, a

servant, who was aiding and assisting, was sent to the house of correction to hard labour for six months; Moore, the curate of the parish, and one James, were discharged on paying the prosecutor 300*l.* and his costs, which were nearly as much more. Brown, who had published a narrative, and one Day, the printer of a newspaper, had previously made their peace with the prosecutor.

(d) *R. v. Spragg*, 2 Burr. 929. 1 Black. R. 209.

(e) *R. v. Teal*, 11 East, 307. *R. v. Askew*, 3 M. & S. 9. *R. v. Lord Cochrane*, 3 M. & S. 10.

(f) *R. v. Hollingberry*, 4 B. & C. 329. 6 D. & R. 345.

(g) *R. v. Nicholls*, 2 Str. 1227.

(h) *R. v. Gompertz*, 9 Q. B. 824.

The Trade Union Act, 1871, and the Conspiracy and Protection of Property Act, 1875.¹

The earlier statutes relating to the combination of workmen were repealed by the 5 Geo. 4, c. 95. This Act was repealed by the 6 Geo. 4, c. 129, and other provisions were enacted in lieu thereof. This Act was amended by subsequent Acts. All these Acts are now repealed by 34 & 35 Vict. c. 32.

By "The Trade Union Act, 1871," (34 & 35 Vict. c. 31,) — (i)

Sec. 2. 'The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful, so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise.' (j)

Sec. 3. 'The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust.'

Sec. 5. 'The following Acts, that is to say:—

- (1) The Friendly Societies' Acts, 1855 and 1858, and the Acts amending the same; (k)
- (2) The Industrial and Provident Societies' Act, 1867, and any Act amending the same; and
- (3) The Companies' Acts, 1862 and 1867,

shall not apply to any trade union, and the registration of any trade union under any of the said Acts shall be void, and the deposit of the rules of any trade union made under the Friendly Societies' Acts, 1855 and 1858, and the Acts amending the same, before the passing of this Act, shall cease to be of any effect.' (l)

Sec. 6 provides for the registry of trade unions.

By Sec. 9. 'The trustees of any trade union registered under this Act, or any other officer of such trade union who may be authorized so to do by the rules thereof, are hereby empowered to bring or defend, or cause to be brought or defended, any action, suit, prosecution, or complaint in any court of law or equity touching or concerning the property, right, or claim to property of the trade union, and shall and may in all cases concerning the real or personal property of such trade union, sue and be sued, plead and be impleaded, in any court of law or equity, in their proper names, without other description than the title of their office; and no such action, suit, prosecution, or complaint shall be discontinued or shall abate by the death or removal from office of such persons or any of them, but the same shall and may be proceeded in

(i) This Act is amended by 39 & 40 Vict. c. 22.

(j) See *R. v. Bunn*, 12 Cox, C. C. 316.

(k) By 39 & 40 Vict. c. 22, s. 2, a trade union, whether registered or unregistered, which insures or pays money on the death

of a child under ten years of age, shall be deemed to be within the provisions of sec. 28 of the Friendly Societies Act, 1875.

(l) See *Farrer v. Close*, 38 L. J. M. C. 132; see 38 & 39 Vict. c. 22.

AMERICAN NOTE.

¹ In America it has been laid down that every association is criminal whose object is to raise or depress the price of labour beyond what it would bring if it were left without

artificial excitement. *C. v. Carlisle*, Journ. of Juris. 235; *S. v. Donaldson*, 3 Vroom, 151.

by their successor or successors as if such death, resignation, or removal had not taken place; and such successors shall pay or receive the like costs as if the action, suit, prosecution, or complaint had been commenced in their names for the benefit of or to be reimbursed from the funds of such trade union, and the summons to be issued to such trustee or other officer may be served by leaving the same at the registered office of the trade union.'

Sec. 18. 'If any person with intent to mislead or defraud gives to any member of a trade union registered under this Act, or to any person intending or applying to become a member of such trade union, a copy of any rules or of any alterations or amendments of the same other than those respectively which exist for the time being, on the pretence that the same are the existing rules of such trade union, or that there are no other rules of such trade union, or if any person with the intent aforesaid gives a copy of any rules to any person on the pretence that such rules are the rules of a trade union registered under this Act which is not so registered, every person so offending shall be deemed guilty of a misdemeanor.'

Sec. 23. 'In this Act (*m*) the term 'trade union,' means such combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, as would, if this Act had not passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade: Provided that this Act shall not affect —

1. Any agreement between partners as to their own business;
2. Any agreement between an employer and those employed by him as to such employment;
3. Any agreement in consideration of the sale of the goodwill of a business or of instruction in any profession, trade, or handicraft.'

By the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), —

Sec. 3. 'An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime.

Nothing in this section shall exempt from punishment any persons guilty of a conspiracy for which a punishment is awarded by any Act of Parliament.

Nothing in this section shall affect the law relating to riot, unlawful assembly, breach of the peace, or sedition, or any offence against the State or the Sovereign.

(*m*) By 39 & 40 Vict. c. 22, s. 16, so much of the above 23rd section as defines the term 'trade union,' except the proviso qualifying such definition, is hereby repealed, and in lieu thereof be it enacted as follows: The term 'trade union' means any combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between workmen and workmen,

or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, whether such combination would or would not, if the principal Act had not been passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade.

A crime for the purposes of this section means an offence punishable on indictment, or an offence which is punishable on summary conviction and for the commission of which the offender is liable, under the statute making the offence punishable, to be imprisoned either absolutely or at the discretion of the Court, as an alternative for some other punishment.

Where a person is convicted of any such agreement or combination as aforesaid to do or procure to be done an act which is punishable only on summary conviction, and is sentenced to imprisonment, the imprisonment shall not exceed three months, or such longer time, if any, as may have been prescribed by the statute for the punishment of the said act when committed by one person.'

By Sec. 4. 'Where a person employed by a municipal authority or by any company or contractor upon whom is imposed by Act of Parliament the duty, or who have otherwise assumed the duty of supplying any city, borough, town, or place, or any part thereof, with gas or water, wilfully and maliciously (*n*) breaks a contract of service with that authority or company or contractor, knowing or having reasonable cause to believe that the probable consequences of his so doing, either alone or in combination with others, will be to deprive the inhabitants of that city, borough, town, place, or part, wholly or to a great extent of their supply of gas or water, he shall, on conviction thereof by a court of summary jurisdiction or on indictment as hereinafter mentioned, be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labour.

Every such municipal authority, company, or contractor as is mentioned in this section shall cause to be posted up, at the gasworks or waterworks, as the case may be, belonging to such authority or company or contractor, a printed copy of this section in some conspicuous place where the same may be conveniently read by the persons employed, and as often as such copy becomes defaced, obliterated, or destroyed, shall cause it to be renewed with all reasonable despatch.

If any municipal authority or company or contractor make default in complying with the provisions of this section in relation to such notice as aforesaid, they or he shall incur on summary conviction a penalty not exceeding five pounds for every day during which such default continues, and every person who unlawfully injures, defaces, or covers up any notice so posted up as aforesaid in pursuance of this Act, shall be liable on summary conviction to a penalty not exceeding forty shillings.

By Sec. 5. 'Where any person wilfully and maliciously (*o*) breaks a contract of service or of hiring, knowing or having reasonable cause to believe that the probable consequences of his so doing, either alone or in combination with others, will be to endanger human life, or cause serious bodily injury, or to expose valuable property, whether real or personal, to destruction or serious injury, he shall, on conviction thereof by a court of summary jurisdiction or on indictment as hereinafter mentioned, be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labour.'

(*n*) See sec. 15.

(*o*) See sec. 15, *post*.

By Sec. 6. 'Where a master, being legally liable to provide for his servant or apprentice necessary food, clothing, medical aid, or lodging, wilfully and without lawful excuse refuses or neglects to provide the same, whereby the health of the servant or apprentice is or is likely to be seriously or permanently injured, he shall on summary conviction be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding six months, with or without hard labour.' (*p*)

By Sec. 7. 'Every person who, with a view to compel (*q*) any other person to abstain from doing or to do any act (*r*) which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority,—

1. Uses violence to or intimidates (*s*) such other person or his wife or children, or injures his property; or,
2. Persistently follows (*t*) such other person about from place to place; or,
3. Hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof; or,
4. Watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place; (*u*) or
5. Follows such other person with two or more other persons in a disorderly manner in or through any street or road,

shall, on conviction thereof by a court of summary jurisdiction or on indictment as hereinafter mentioned, be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labour. Attending at or near the house or place where a person resides, or works, or carries on business, or happens to be, or the approach to such house or place, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section.' (*v*)

By Sec. 8. 'Where in any Act relating to employers or workmen a pecuniary penalty is imposed in respect of any offence under such Act, and no power is given to reduce such penalty, the justices or court having jurisdiction in respect of such offence may, if they think it just so to do, impose by way of penalty in respect of such offence any sum not less than one fourth of the penalty imposed by such Act.'

By Sec. 9. 'Where a person is accused before a Court of summary

(*p*) As to liability of a master to provide food, &c., for servant or apprentice, see *post*.

(*q*) See *R. v. Hibbert*, 13 Cox, C. C. 82, where it was laid down by Cleasby, B., that if picketing were carried on with the intention to coerce, and in such a manner and to such an extent as to excite apprehension and annoyance, it was criminal. See also *per* Huddleston, B., in *R. v. Bauld*, 13 Cox, 282.

(*r*) The acts must it seems be specified in the indictment. *R. v. McKenzie* (1892), 2 Q. B. 519.

(*s*) As to the meaning of this word, see *Gibson v. Lawson*, *post*.

(*t*) As to what is persistently following see *Smith v. Thomasson*, 16 Cox, C. C. 740.

(*u*) This is what is known as 'picketing.' See *R. v. Druitt*, 10 Cox, C. C. 593; *R. v. Hibbert*, *supra*.

(*v*) See *R. v. Bunn*, 12 Cox, C. C. 316; *R. v. Shepherd*, 11 Cox, C. C. 325. It is lawful for workmen, peaceably and in a reasonable and proper manner, to endeavour to persuade other workmen who have not acted with them, to do so. They must not infringe the provisions of this enactment, see *R. v. Druitt*, 10 Cox, C. C. 593, *per* Bramwell, B. See however as to these cases *Gibson v. Lawson*, *post*, p. 548.

jurisdiction of any offence made punishable by this Act, and for which penalty amounting to twenty pounds, or imprisonment, is imposed, the accused may, on appearing before the Court of summary jurisdiction, declare that he objects to being tried for such offence by a Court of summary jurisdiction, and thereupon the Court of summary jurisdiction may deal with the case in all respects as if the accused were charged with an indictable offence and not an offence punishable on summary conviction, and the offence may be prosecuted on indictment accordingly.'

By Sec. 11. 'Provided, that upon the hearing and determining of any indictment or information under sections four, five, and six of this Act, the respective parties to the contract of service, their husbands or wives, shall be deemed and considered as competent witnesses.' (*w*)

By Sec. 15. 'The word 'maliciously' used in reference to any offence under this Act shall be construed in the same manner as it is required by the 24 & 25 Vict. c. 97, s. 58, (*x*) to be construed in reference to any offence committed under such last-mentioned Act.'

By Sec. 16. 'Nothing in this Act shall apply to seamen or to apprentices to the sea service.'

The meaning of intimidation under this Act has been very fully discussed by the Court for Crown Cases Reserved, in three cases which recently came before them, and in which the judgment of the Court (Lord Coleridge, C. J., Mathew, Cave, A. L. Smith, and Charles, JJ.) was delivered by Lord Coleridge, C. J.

In *Gibson v. Lawson* (1891, 2 Q. B. 545), Lord Coleridge, C. J., said: 'The respondent was employed as a fitter in the yard of an iron ship-building company; the appellant was employed in the same capacity in the same yard. The respondent was a member of a society called the Amalgamated Society; the appellant a member of a society called the National Society. On Dec. 3, 1890, a meeting of the Amalgamated Society was held, at which it was resolved that the members of that society would strike unless the appellant left his society and joined theirs. The respondent communicated this resolution to the foreman of the shipbuilding company, who communicated it to the appellants. Thereupon the appellant had an interview with the respondent. In the result the respondent informed the appellant that the Amalgamated Society were determined to carry their resolution into effect, but gave him till the morning of Saturday, December 6th, to make up his mind. The appellant adhered to his own society, and the shipbuilding company, in order to avoid a strike, dismissed him from their yard. It is expressly found in the case that no violence or threats of violence to person or property were used to the appellant, but he swore that he "was afraid because of what the respondent had said that he would lose work, and would not get employment anywhere where the Amalgamated Society predominated numerically over his own society." These are the whole of the material facts, and on these facts the magistrates dismissed the summons, and we think rightly.

'The summons was issued under 38 & 39 Vict. c. 86, s. 7. The third

(*w*) As to a husband or wife being incompetent as a witness for or against each other, see Vol. III., *Evidence*.

(*x*) The Act relates to malicious injuries to property.

section of that Act distinctly legalizes strikes in the broadest terms, subject to the exceptions enumerated in the fourth and fifth sections, which immediately follow, and are almost in the nature of provisos upon the third. The sixth section is on a subject altogether alien from the present question; and then comes the seventh, upon which we have to decide. It is true that the Act before us is one of a series of Acts dealing with subjects the same as or cognate to those dealt with in the Act itself. Many of these are expressly repealed by the seventeenth section, and amongst them 34 & 35 Vict. c. 32, is wholly repealed. The Act 34 & 35 Vict. c. 32, was passed in 1871, after therefore the charge to the jury by the present Lord Bramwell, in *R. v. Druitt*, 10 Cox, C. C. 592, which was in 1867.

‘Whether the Act was produced by the charge it is profitless to inquire. The last proviso of the first section is plainly inconsistent with the charge, and still more inconsistent with the language of Crompton and Hill, JJ., who, in *Hilton v. Eckersley*, 6 E. & S. 47, and *Walsby v. Anley*, 30 L. J. M. C. 121, had the one declared and the other suggested that strikes were *per se* criminal at common law; and still further with the somewhat rhetorical language of Sir William Erle, who describes a strike as “the power of evil in remorseless activity, destroying those relations between employers and employed on which comfort and peace depend, bringing guilt and misery on the workmen and ruin on their employers” (Erle on Trade Unions, p. 85). The statute 34 & 35 Vict. c. 32, is not indeed conceived in any weak spirit of tenderness to workmen, but the second subsection of the first section limits “intimidation” in that subsection to such intimidation as would justify a magistrate in binding over the intimidator to keep the peace towards the person intimidated, — in other words, to such intimidation as implies a threat of personal violence. Of such intimidation there is in this case no evidence whatever; but it is truly said that this statute is repealed, and is of importance only so far as its objects and language may throw light upon the existing statute, under which this summons was issued. It seems clear, however, that, looking at the course of legislation, and keeping in mind the changing temper of the times on this subject, the word “intimidate” in the seventh section of the later Act cannot reasonably be construed in a wider and severer sense than the same word in the second subsection of the first section of the earlier Act. “Intimidate” is not, as has been often said by judges of authority, a term of art; it is a word of common speech and every-day use, and it must receive therefore a reasonable and sensible interpretation, according to the circumstances of the cases as they arise from time to time. We do not propose to attempt an exhaustive definition of the word, nor a complete enumeration of the cases to which it may be properly, nor of those to which it may be improperly applied. It is enough for us to say that in this case it appears to us all that there was nothing which, under any reasonable construction of the word “intimidate,” could be brought within it. Whether the action of the Amalgamated Society was morally right or not is a matter on which we express no opinion, because it is not the question before us. It seems to us that it was not illegal, within the words of the Act of Parliament under which the summons was issued. This, however, does not entirely dis-

pose of the question, for we were very properly reminded of the cases of *R. v. Druitt*, 10 Cox, C. C. 592, and *R. v. Bunn*, 12 Cox, C. C. 316, in which Lord Bramwell and Lord Esher (then Bramwell, B., and Brett, J.) are both said to have held that the statutes on the subject have in no way interfered with or altered the common law, and that strikes and combinations expressly legalized by statute may yet be treated as indictable conspiracies at common law, and may be punished by imprisonment with hard labour. Neither of those cases is very satisfactorily reported; in neither was there any motive for questioning the *dicta* of the judges: in the one tried by Lord Esher there was no opportunity, in consequence of the prisoner having been acquitted on all the counts to which the alleged ruling applied. We are well aware of the great authority of the judges by whom the above cases were decided, but we are unable to concur in these *dicta*, and, speaking with all deference, we think they are not law. It seems to us that to hold that the very same acts which are expressly legalized by statute remain nevertheless crimes punishable by the common law is contrary to good sense and elementary principle, and that the reports therefore cannot be correct. If the *dicta* are law, they render the statutes passed on these subjects practically inoperative; these statutes might as well not have been passed. The *dicta* are criticised in detail, and with great ability, in Wright, J.'s, excellent work on the law of Criminal Conspiracies and Agreements, pp. 50-59. It is difficult to withhold assent from the statements and reasonings contained in those pages, and it seems to us that the law concerning combinations in reference to trade disputes is contained in 38 & 39 Vict. c. 86, and in the statutes referred to in it, and that acts which are not indictable under that statute are not now, if indeed they ever were, indictable at common law. There remains to be considered only the case of *Curran v. Treleaven*, in which the Recorder of Plymouth affirmed the conviction by magistrates, who had convicted the secretaries of three trades unions in Plymouth for having intimidated Mr. Treleaven, a shipowner in that town, within the meaning of the Act 38 & 39 Vict. c. 86, s. 7, subs. 1. The circumstances were very much like those in the last case on which we have just decided. In order to prevent the employment by Mr. Treleaven of non-union men, the three secretaries told him that if he did not cease to employ non-union men, they would call off from their employment by him all the members of their respective unions. Mr. Treleaven refused compliance with their demands, and thereupon the secretaries called off their respective union men, who in obedience to the call struck work. The facts are stated to us as follows by the learned Recorder, in the case which he has submitted to us: "On October the 14th there was a meeting of the union, at which it was resolved to adopt the course which the defendants had stated at their interview would be adopted, and accordingly on the 15th the defendants, in the presence of Mr. Treleaven, whom they had asked to attend, made the following statement to Mr. Treleaven's workmen and others, who were assembled at the wharf: 'Inasmuch as Mr. Treleaven still insists on employing non-union men, we, your officials, call upon all union men to leave their work. Use no violence, use no immoderate language, but quietly cease work and go home.' The orders thus given were obeyed, and the union men who were unloading Mr.

Treleaven's ships immediately ceased unloading them, although they had not completed the work that they were under contract to perform." He also found, amongst other facts, or rather he has expressed his opinion upon the two following facts or points in these words (amongst other points not necessary to be considered with reference to the particular question of intimidation): "That the defendants did not desire or intend that any violence should be used or injury done to Mr. Treleaven or his property; that it was not proved that their words or acts were calculated directly to cause any such violence or injury, although I am of opinion that Mr. Treleaven was not unreasonably afraid that such violence or injury might occur from the action of the members of the unions in consequence of the strike, but against the wishes and intentions of the defendants; that the defendants had no ill will against Mr. Treleaven personally, but acted with the object of obliging all the labourers to join the unions as a means of getting employment, and of obtaining for the members of the unions a monopoly of the labour of the port." He held, as the result of a very careful and able examination of the statutes and authorities, that the facts above stated constituted intimidation within the words of the section, and that the appellants were properly convicted by the magistrates of intimidating. We are unable to agree with him, as we said in an earlier part of the judgment. We do not propose to enter upon an exhaustive enumeration of all the possible acts which do and of those which do not constitute intimidation within the section; but we say that to tell an employer that if he employs workmen of a certain sort, the workmen of another sort in his employ will be told to leave him, and tell the men when the employer will not give way to leave their work, use no violence, use no immoderate language, but quietly cease to work and go home (we quote the words of the Recorder), is certainly not intimidation within any reasonable sense of the statute.

'Two further observations are necessary in order to make our judgment complete and effective. We do not think that the legislature intended, by the change of words in the first subsection of the seventh section of 38 & 39 Vict. c. 86, to send the Courts back to 6 Geo. 4, c. 129, for an interpretation of the word "intimidate," although the later statute did repeal 34 & 35 Vict. c. 32, which limited intimidation to cases which would justify a magistrate in binding over the party to keep the peace. There is indeed much to be said for the view entertained by my learned brother Cave, and acted upon by him (as mentioned by the Recorder in his judgment), in a case tried before him at Liverpool, namely, that "intimidation" in 38 & 39 Vict. c. 86, must still be limited to threats of personal violence as enacted by 34 & 35 Vict. c. 32. It may become necessary to decide this point in time to come; it is not now, and we confine ourselves to the negative statement that 6 Geo. 4, c. 129, is not now on this subject the governing statute. The other point is this: The Recorder held that, though an agreement to strike to benefit themselves would be now a lawful agreement, a strike which would have the effect of injuring an employer is illegal, and indictable at common law. He cites in support of his view, some phrases from the judgments of the Lords Justices in the case of the *Mogul Steamship Co. v. McGregor and others*, 23 Q.

B. D. 598, but, with deference, he has somewhat misapprehended the point of these observations. It is true that where the object is injury, if the injury is effected an action will lie for the malicious conspiracy which has effected it; and therefore it may be indictable. But it was pointed out in some detail by the Court of first instance that where the object is to benefit oneself, it can seldom, perhaps it can never, be effected without some consequent loss or injury to some one else. In trade, in commerce, even in a profession, what is one man's gain is another's loss; and where the object is not malicious the mere fact that the effect is injurious does not make the agreement either illegal or actionable, and therefore it is not indictable. The Recorder finds that there was no malice in fact; and this finding is inconsistent with the conclusion that the agreement was either criminal or unlawful. For these reasons we are of opinion that the judgment of the Recorder cannot be sustained, that it must accordingly be reversed, and the conviction quashed.'

Some cases upon the repealed statutes will be found in the appendix at the end of this volume.

CHAPTER THE TWENTY-FIFTH.

OF RIOTS, ROUTS, AND UNLAWFUL ASSEMBLIES.

THE distinction between these offences appears to be, that a *riot* is a tumultuous meeting of persons upon some purpose which they *actually execute* with violence; a *rout* is a similar meeting upon a purpose which, if executed, would make them rioters, and which they actually make *a motion to execute*; and an *unlawful assembly* is a *mere assembly* of persons upon a purpose which, if executed, would make them rioters, but which they *do not execute nor make any motion to execute*. (a) These offences may be treated of more at large in the order in which they have been mentioned.

Riot. — I. A riot is described to be a tumultuous disturbance of the peace by *three persons or more*,¹ assembling together of their own authority, with an intent mutually to assist one another against any who shall oppose them in the execution of some enterprise of a private nature, and afterwards actually executing the same, in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful. (b)²

(a) 1 Hawk. P. C. c. 65, ss. 1, 8, 9. 3 Inst. 176. 4 Black. Com. 146.

(b) 1 Hawk. P. C. c. 65, s. 1. *Three persons or more* is the correct description of the number of persons necessary to constitute a riotous meeting; but it should be observed, that in Hawkins (c. 65, ss. 2, 5, 7) the words 'more than three persons' are three times over inserted instead of 'three persons or more;' which in Burn's Just. tit. *Riot*, s. 1, is remarked as an instance that, in a variety of matter, it is impossible for the mind of man to be always equally attentive. The description of riot stated in the text, and taken from the work of Mr. Serjeant Hawkins, is submitted as that which would

probably be deemed most correct at the present time. It should be observed, however, that riot has been described differently by high authority. In *R. v. Soley* and others, 11 Mod. 116, Holt, C. J., said, 'The books are obscure in the definition of riots. I take it, it is not necessary to say they assembled for that purpose, but there must be an unlawful assembly; and as to what act will make a riot, or trespass, such an act as will make a trespass will make a riot. If a number of men assemble with arms, *in terrorem populi*, though *no act is done*, it is a riot. If three come out of an alehouse, and go armed, it is a riot.' See also *R. v. Cunningham-Graham*, 16 Cox, C. C. 420.

AMERICAN NOTES.

¹ In Indiana, Illinois, and Georgia, riots are defined by statutes not greatly differing from the common-law definition. In Illinois and Georgia, however, two can make a riot. It was also held that two white men and a negro could make a riot. *S. v. Jackson*, 1 Speers, 13; *S. v. Thackham*, 1 Bay, 358; *S. v. Calder*, 2 McCord, 462, and probably two men and the wife of one may make a riot, though the point has not been decided. *Bishop*, ii. s. 1144. Where two out of three were inactive it seems there could be no riot. *Scott v. U. S.*, Morris, 142; *Hardebeck v. S.*, 10 Ind. 459; *S. v. Kuhman*, 5 Mo. Ap. 587; but in Maine it was decided that where

two are active and one only present and abetting, there was a riot. *S. v. Straw*, 33 Ma. 554. It seems that to constitute a "rout" or an "unlawful assembly" three at least must be present. *Bishop*, ii. ss. 1186, 1256.

² See *C. v. Runnells*, 10 Mass. 518; *P. v. Craig*, Addis. 191; *Hardebeck v. S.*, 10 Ind. 459; *C. v. Gebney*, 2 Allen, 150. The act of the rioters need not be the fulfilment of an unlawful purpose. *S. v. Blair*, 13 Rich. (Law) 93, nor need they carry out their intentions. *Newby v. T.*, 1 Oregon, 163.

In some cases, in which the law authorizes force, it is not only lawful, but also commendable, to make use of it; as for a sheriff or constable, or perhaps even for a private person, to assemble a competent number of people in order with force to suppress rebels, or enemies, or rioters; and afterwards with such force actually to suppress them; or for a justice of peace, who has a just cause to fear a violent resistance, to raise the *posse*, in order to remove a force in making an entry into, or detaining of, lands. Also it seems to be the duty of a sheriff, or other minister of justice, having the execution of the King's writs, and being resisted in endeavouring to execute them, to raise such a power as may effectually enable them to overpower any such resistance; yet it is said not to be lawful for them to raise a force for the execution of a civil process, unless they find a resistance; and it is certain that they are highly punishable for using any needless outrage or violence. (*c*)

It seems to be agreed, that the injury or grievance complained of, and intended to be revenged or remedied by a riotous assembly, must relate to some *private quarrel* only; as the enclosing of lands in which the inhabitants of a town claim a right of common, or gaining the possession of tenements the title whereof is in dispute, or such like matters relating to the interests or disputes of particular persons, in no way concerning the public. The proceedings of a riotous assembly on a public or general account, as to redress grievances, pull down all inclosures, or to reform religion, and also resisting the King's forces, if sent to keep the peace, may amount to overt acts of high treason by levying war against the King. (*d*)

It seems to be clearly agreed that in every riot there must be some such circumstances either of actual force or violence, or at least of an apparent tendency thereto, as are naturally apt to strike a terror into the people; as the show of armour, threatening speeches, or turbulent gestures; for every such offence must be laid to be done *in terrorem populi*. (*e*) But it is not necessary, in order to constitute this crime, that personal violence should have been committed. (*f*) If sufficient force be used to terrify a single person, it is enough, though no other persons are near enough to be within reach of the alarm. Four persons went to a cottage, in which was one old man; one of them began to knock down the end of the cottage with an axe, and knocked part of the woodwork against the old man; he then caught the old man by the collar, and said, 'Come, you must go out of the house,' and he did go out, and the prisoners pulled the house to the ground, except the chimney; the jury were told that if such force was used by the four prisoners as to terrify the old man, they might find that there was a riot, and this direction was held right. (*g*)

Upon these principles, assemblies at wakes, or other festival times, or meetings for the exercise of common sports or diversions, as bull-baiting, wrestling, and such like, are not riotous. (*h*) And upon the

(*c*) 1 Hawk. P. C. c. 65, s. 2. 19 Vin. Abr. tit. *Riots*, &c. (A.) 4.

(*d*) 4 Black. Com. 147. 1 Hawk. P. C. c. 65, s. 6.

(*e*) 1 Hawk. P. C. c. 65, s. 5.

(*f*) Per Mansfield, C. J., in *Clifford v. Brandon*, 2 Campb. 369.

(*g*) *R. v. Phillips*, 2 M. C. C. 252. S. C. as *R. v. Langford*, C. & M. 602.

(*h*) 1 Hawk. P. C. c. 65, s. 5. But see in 2 Chit. Crim. L. 494, an indictment said to have been drawn in the year 1797, by a very eminent pleader, for the purpose of suppressing an ancient custom of kicking

same ground also it seems to follow that it is possible for three persons or more to assemble together with an intention to execute a wrongful act, and also actually to perform their intended enterprise, without being rioters; as if a man assemble a number of persons to carry away a piece of timber or other thing to which he claims a right, and which cannot be carried away without a number of persons, this will not of itself be a riot, if the number of persons are not more than are necessary for the purpose; and if there are no threatening words used, nor any other disturbance of the peace; even though another man has better right to the thing carried away, and the act therefore is wrong and unlawful. (i) Where on an indictment for a riot it appeared that two men were fighting amidst a great crowd, and that some persons were aiding and assisting; but on some peace officers appearing the fight ceased, and the fighters quietly yielded to the officers: Alderson, B., held that this was not a riot. (j) Much more may any person, in a peaceable manner, assemble a fit number of persons to do any lawful thing; as to remove any common nuisance, or any nuisance to his own house or land. And he may do this before any prejudice is received from the nuisance, and may also enter into another man's ground for the purpose. Thus, where a man having erected a weir across a common navigable river, divers persons assembled with spades and other instruments necessary for removing it, and dug a trench in the land of the man who made the weir in order to turn the water and the better to remove it, and thus removed the nuisance, it was holden not to be a forcible entry nor a riot. (k)

But if there be violence and tumult, it makes no difference whether the act intended to be done by the persons assembled be of itself lawful or unlawful; from whence it follows that if three or more persons assist a man to make a forcible entry into lands to which one of them has a good right of entry; or if the like number, in a violent and tumultuous manner, join together in removing a nuisance or other thing, which may be lawfully done in a peaceable manner, they are as properly rioters as if the act intended to be done by them were ever so unlawful. (l) And if in removing a nuisance the persons assembled use any threatening words (such as, they will do it though they die for it, or the like,) or in any other way behave in apparent disturbance of the peace, it seems to be a riot. (m) If a large body of men assemble themselves together for the purpose of obtaining any particular end, and conduct themselves in a turbulent manner, either accompanied with acts of violence, or with threats and intimidation calculated to excite the terror and alarm of the Queen's subjects, this is

about foot-balls on a Shrove-Tuesday, at Kingston-upon-Thames. The first count is for riotously kicking about a foot-ball in the town of Kingston; and the second, for a common nuisance in kicking about a foot-ball in the said town. And in *Sir Antony Ashley's case*, 1 Roll. R. 109, Coke, C. J., said that the *stage-players* might be indicted for a riot and unlawful assembly; and see Dalt. Just. c. 136, (citing Roll. R.) that if such players, by their shows occasion an extraordinary and unusual concourse of people to see them act their tricks, this is an unlaw-

ful assembly and riot, for which they may be indicted and fined. 19 Vin. Abr. tit. *Riots, &c.* (A.) 8.

(i) 1 Hawk. P. C. c. 65, s. 5. R. v. Soley, 11 Mod. 117. Dalt. c. 137. Burn's Just. tit. *Riots*, s. 1.

(j) R. v. Hunt, 1 Cox, C. C. 177.

(k) Dalt. c. 137. Burn, tit. *Riot*, s. 1.

(l) 1 Hawk. P. C. c. 65, s. 7, per *cur.* in 12 Mod. 648, Anon. R. v. Hughes, M. & M. 178, note (a).

(m) Dalt. c. 137. Burn's Just. tit. *Riot*, s. 1.

in itself a riot, whether the end and object proposed be a just and legitimate one or not. (*n*)

But the violence and tumult must in some degree be premeditated.¹ For if a number of persons, being met together at a fair, market, or any other lawful or innocent occasion, happen on a sudden quarrel to fall together by the ears, it seems to be agreed that they are not guilty of a riot, but only of a sudden affray, of which none are guilty but those who actually engage in it; because the design of their meeting was innocent and lawful, and the subsequent breach of the peace happened unexpectedly, without any previous intention. (*o*) But if there be any predetermined purpose of acting with violence and tumult, the conduct of the parties may be deemed riotous. As where it was held that, although the audience in a public theatre have a right to express the feelings excited at the moment by the performance, and in this manner to applaud or to hiss any piece which is represented, or any performer who exhibits himself on the stage; yet if a number of persons, having come to the theatre with a predetermined purpose of interrupting the performance, for this purpose make a great noise and disturbance, so as to render the actors entirely inaudible, though without offering personal violence to any individual, or doing any injury to the house, they are guilty of a riot. (*p*)

Even though the parties may have assembled for an innocent purpose in the first instance, yet if they afterwards, upon a dispute happening to arise amongst them, form themselves into parties, with promises of mutual assistance, and then make an affray, it is said that they are guilty of a riot, because upon their confederating together with an intention to break the peace, they may as properly be said to be assembled together for that purpose from the time of such confederacy, as if their first coming had been on such a design;² and it seems to be clear that if in an assembly of persons met together on any lawful occasion whatsoever, a sudden proposal should be started of going together in a body to pull down a house, or inclosure, or to do any other act of violence, to the disturbance of the public peace, and such motion be agreed to, and executed accordingly, the persons concerned cannot but be rioters; because their associating themselves together, for such a new purpose, is in no way extenuated by their having met at first upon another. (*q*)

If any person seeing others actually engaged in a riot, joins himself to them and assists them therein, he is as much a rioter as if he had

(*n*) Per Tindal, C. J., in his charge to the Stafford grand jury, A. D. 1842, C. & M. 661.

(*o*) 1 Hawk. P. C. c. 65, s. 3.

(*p*) Clifford v. Brandon, 2 Campb. 358.

See Gregory v. the Duke of Brunswick, 6 M. & G. 953. 3 C. B. 481. 1 C. & K. 24. R. v. Leigh, Ann. Reg. for 1775, p. 117.³

(*q*) 1 Hawk. P. C. c. 65, s. 3. See R. v. Burns, 16 Cox, C. C. 355.

AMERICAN NOTES.

¹ Mr. Bishop, Vol. ii. s. 1152 says it is a mistake to say that the tumult must be premeditated, and it is contrary to American authority, P. v. Judson, 11 Daly, N. Y.; and persons may commit a riot though only intending a frolic. S. v. Alexander, 7 Rich. 5.

² See Bishop, ii. s. 308, note 6.

³ It seems to have been thought that before there can be a riot there must be an unlawful assembly to begin with, S. v. Stalcup, 1 Ira. 30, 35 Am. D. 772; but this is not so now in America any more than in England. S. v. Cole, 2 McCord, 117; S. v. Snow, 18 Me. 346.

at first assembled with them for the same purpose, inasmuch as he has no pretence that he came innocently into the company, but appears to have joined himself to them with an intention of seconding them in the execution of their unlawful enterprise;¹ and it would be endless, as well as superfluous, to examine whether every particular person engaged in a riot were in truth one of the first assembly, or actually had a previous knowledge of the design. (*r*) And the law is that if any person encourages, or promotes, or takes part in riots, whether by words, signs, or gestures, or by wearing the badge or ensign of the rioters, he is himself to be considered a rioter; for in this case all are principals. (*s*) It has been ruled, however, that if three or more, being lawfully assembled, quarrel, and the party fall on one of their own company, this is no riot; but that if it be on a stranger, the very moment the quarrel begins, they begin to be an unlawful assembly, and their concurrence is evidence of an evil intention in them that concur, so that it is a riot in them that act, and in no more. (*t*) The *inciting* persons to assemble in a riotous manner appears also to have been considered as an indictable offence. (*u*)

The defendants were charged in an indictment 'that they at Trafalgar Square with great numbers of other persons assembled and met together, and that they being wicked, malicious and seditious persons, wickedly, maliciously and seditiously contriving and intending the peace of our said lady the Queen, and of this realm, and of the liege subjects of our said lady the Queen, to disquiet and disturb, and the liege subjects of our said lady the Queen; to incite and to move to contempt, hatred, and dislike of the government established by law within this realm, and to incite and to move and persuade great numbers of the liege subjects of our said lady the Queen, to insurrections, riots, tumults, and breaches of the peace, and to stir up jealousies, hatred, and ill-will between different classes of the said liege subjects, and to prevent by force and arms the execution of the laws of this realm and the preservation of the public peace, on the day and in the year aforesaid, in the presence and hearing of divers of the liege subjects of our Lady the Queen, to wit, the persons assembled together as aforesaid in Trafalgar Square as aforesaid and within the jurisdiction of the said court, in a certain speech and discourse by him the said John Burns, then addressed to the said liege subjects so then assembled together as aforesaid, unlawfully, wickedly, maliciously, and seditiously, openly, and publicly did publish, utter, pronounce, and de-

(*r*) *Id. ibid.*

(*s*) By Mansfield, C. J., in *Clifford v. Brandon*, 2 Campb. 370. And see *R. v. Royce*, 4 Burr. 2073, and the second and third resolution in the *Sissinghurst* house case, 1 Hale, 463. *R. v. Sharpe*, 3 Cox, C. C. 238. *R. v. Atkinson*, 11 Cox, C. C. 330.

(*t*) 19 Vin. Abr. tit. *Riots, &c.* (A.) 15. *R. v. Ellis*, 2 Salk. 595.

(*u*) See a precedent, Cro. Circ. Comp. 420 (8th edit.), the first count of which is for *inciting* persons to assemble, and that in consequence of such incitement they did so; and the second count states the inciting, and omits the assembling in consequence of it. See a similar precedent in 2 Chit. Crim. L. 506, and the principles stated, *ante*, p. 195, *et seq.*²

AMERICAN NOTES.

¹ See *S. v. McBride*, 19 Mo. 239. See also *Bishop i. a* 632.

² Mere presence and not assisting in sup-

pressing the riot will not render a person guilty of a riot. *Pennsylvania v. Craig*, Addison, 190; *S. v. McBride*, 19 Mo. 239.

clare, and cause to be published, uttered, pronounced, and declared, with a loud voice of and concerning the government as established by law within this realm, and of and concerning the Commons House of Parliament, and the members thereof, and of and concerning divers liege subjects of our said lady the Queen, whose names are to the jurors aforesaid unknown, amongst other words and matters, the false, wicked, seditious, and inflammatory words and matter following, that is to say: [The words complained of were here set out] against the peace of our lady the Queen, her crown and dignity.'

Another count charged the defendants with a conspiracy to speak seditious words and incite to sedition.

Cave, J., in charging the jury, said: 'It is now my duty to explain to you the rules of law which ought to govern you in considering this case, and also to summarise shortly for your benefit the evidence which has been given, so that you may have the less difficulty in applying the principles of the law to that evidence. There is undoubtedly no question at law of the right of meeting in public, and the right of free discussion is also perfectly unlimited, with the exception, of course, that it must not be used for the purpose of inciting to a breach of the peace or to a violation of the law. The law upon the question of what is seditious and what is not is to be found stated very clearly in a book by Stephen, J., who has undoubtedly a greater knowledge of criminal law than any other judge who sits upon the bench, and what he has said upon the subject of sedition was submitted to the other judges, who some time back were engaged with him in drafting a criminal code, and upon their report the commissioners say that his statement of law appears to them to be stated accurately as it exists at present. So that that statement has not only the authority of Stephen, J., but also the authority of the judges who were associated with him in preparing the criminal code. This is what he says on seditious words and libels: "Every one commits a misdemeanor who publishes verbally or otherwise words or any document with a seditious intention. If the matter so published consists of words spoken, the offence is called the speaking of seditious words." That is what we have to deal with to-day. "If the matter so published is contained in anything capable of being a libel the offence is called the publication of seditious libel." (v) The next question that one asks is this: There are two offences, one is the offence of speaking seditious words, and the other offence is the publication of a seditious libel. It is obviously important to know what is meant by the word "sedition," and Stephen, J., proceeds in a subsequent article to give a definition of it. He says: "A seditious intention is an intention to bring into hatred or contempt, or to excite disaffection against the person of her Majesty, her heirs, or successors, or the government and constitution of the United Kingdom, as by law established, or either House of Parliament or the administration of justice, or to excite her Majesty's subjects to attempt otherwise than by lawful means the alteration of any matter in Church or State as by law established, or to raise discontent or disaffection amongst her Majesty's subjects or to promote feelings of ill-will and hostility between different classes of such

subjects." Stephen, J., goes on to point out what sort of intention is not seditious. "An intention to show that her Majesty has been misled or mistaken in her measures, or to point out errors or defects in the government or constitution as by law established, with a view to their reformation, or to excite her Majesty's subjects to attempt by lawful means the alteration of any matter in Church or State as by law established, or to point out, in order to their removal, matters which are producing, or have a tendency to produce feelings of hatred and ill-will between classes of her Majesty's subjects, is not a seditious intention." (*w*) So there he gives in these two classes what is and what is not sedition. Now, the seditious intentions which it is alleged existed in the minds of the prisoners in this case, are: First, an intention to excite her Majesty's subjects to attempt otherwise than by lawful means the alteration of some matter in Church or State as by law established; and secondly, to promote feelings of hostility between different classes of her Majesty's subjects. This is necessarily somewhat vague and general, particularly the second portion, which says it is a seditious intention to intend to promote feelings of ill-will and hostility between different classes of her Majesty's subjects. I should rather prefer to say, that the intention to promote feelings of ill-will and hostility between different classes of her Majesty's subjects may be a seditious intention according to circumstances, and of those circumstances, the jury are the judges; and I put this question to the Attorney-General in the course of the case: "Suppose a man were to write a letter to the papers attacking bakers and butchers generally with reference to the high prices of bread or meat, and imputing to them that they were in a conspiracy to keep up high prices,— would that be a seditious libel, being written and not spoken?" To which the Attorney-General gave me the only answer which it was clearly possible to give under the circumstances: "That must depend upon the circumstances." I, sitting here as a judge, cannot go nearer than that. Any intention to excite ill-will and hostility between different classes of her Majesty's subjects may be a seditious intention; whether in a particular case this is a seditious intention or not, the jury must judge and decide in their own minds, taking into consideration the whole of the circumstances of the case. You may not unnaturally say that that is a somewhat vague statement of the law, and ask by what principle shall we be governed in deciding when an intention to excite ill-will and hostility is seditious, and when it is not. For your guidance, I will read to you what was said by Fitzgerald, J., in the case of *R. v. Sullivan* (*x*), which was a prosecution for a seditious libel, the only difference between the two cases being, of course, that while seditious speeches are spoken a seditious libel is written, but in each of them the adjective "seditious" occurs, and what is a seditious intention in one case will equally be a seditious intention in the other. He said: "As such prosecutions are unusual, I think it necessary in the first instance to define sedition and point out what is a seditious libel. Sedition is a crime against society, nearly allied to that of treason, and it frequently precedes treason by a short interval." It

(*w*) Stephen, *Digest of Criminal Law*, Art. 93. (*x*) 11 Cox, C. C. 44.

has been said very truly that there is no such offence as sedition itself, but it takes the form of seditious language either written or spoken, and it is in that sense of course that the learned judge's words are intended to be understood. "Sedition itself is a comprehensive term, and it embraces all those practices, whether by word, deed, or writing, which are calculated to disturb the tranquillity of the state, and lead ignorant persons to endeavour to subvert the government and the laws of the Empire. The objects of sedition generally are to induce discontent and insurrection, and to stir up opposition to the government, and bring the administration of justice into contempt; and the very tendency of sedition is to incite the people to insurrection and rebellion. Sedition has been described as disloyalty in action, and the law considers as seditious all those practices which have for their object to excite discontent or disaffection, to create public disturbances, or to lead to civil war; to bring into hatred or contempt the sovereign or the government, the laws or constitution of the realm, and generally all endeavours to promote public disorder." Then a little further on he says: "Words may be of a seditious character, but they might arise from sudden heat, be heard only by a few, create no lasting impression, and differ in malignity and permanent effects from writings. Sir Michael Foster said of the latter: 'Seditious writings are permanent things, and if published they scatter the poison far and wide.' They are acts of deliberation, capable of satisfactory proof, and not ordinarily liable to misconstruction; at least they are submitted to the judgment of the court naked and undisguised, as they came out of the author's hands. That points to the nature of the distinction between seditious writings and words, and also points to the difference in the effect which they have, and the extent to which that effect goes, though of course in regard to seditious words, there may be a very great distinction between words uttered to two or three companions in social intercourse, and words uttered to a large multitude." That language the learned judge spoke when he was charging the grand jury upon the subject. When he came to sum up the case to the jury who were actually trying it, after a true bill had been found, he said, and perhaps this is more apposite in showing the spirit in which you ought to deal with the present case so far as you can. "I invite you to deal with the case, which is a grave and important case, in a fair, free, and liberal spirit. In dealing with the articles you should not pause upon an objectionable sentence here, or a strong word there. It is not mere strong language, such as 'desecrated a court of justice,' or tall language, or turgid language that should influence you. You should, I repeat, deal with the articles in a free, fair, and liberal manner. You should recollect that to public political articles great latitude is given. Dealing as they do with the affairs of the day, such articles if written in a fair spirit, and *bona fide*, often result in the production of great public good. Therefore I advise and recommend you to deal with these publications in a spirit of freedom, and not to view them with an eye of narrow criticism. Again, I say you should not look merely to a strong word or a strong phrase, but to the whole article, and so regarding each article, you should recollect that you are the guardians of the liberty of the press and that whilst you will check its abuse, you will preserve its freedom.

You will recollect how valuable a blessing the liberty of the press is to all of us, and sure I am, that that liberty will meet no injury, suffer no diminution at your hands. Viewing the case in a free, bold, manly and generous spirit toward the defendant, if you come to the conclusion that the publications indicted are not seditious libels, or were not published in the sense imputed to them, you are bound, and I ask you in the name of free discussion, to find a verdict for the defendant. I need not remind you of the worn-out topic to extend to the defendant the benefit of the doubt. If on the other hand, on the whole spirit and import of these articles, you are obliged to come to the conclusions that they are seditious libels, and that their necessary consequences are to excite contempt of Her Majesty's Government, or to bring the administration of the law into contempt and impair its functions, — if you come to that conclusion either as to the articles or prints, or any of them, then it becomes your duty honestly and fearlessly to find a verdict of conviction upon such counts as you believe are proved." Now, that language was used, as I have said, in reference to a seditious libel, but changing the language so as to apply it to a speech, the principles thus laid down are clearly applicable to the case which you have now got before you. And, — although as a judge I can tell you no more than that the intention to incite ill-will amongst the different classes of Her Majesty's subjects may be seditious, and that it is for you to decide, — I confess I should, if I were sitting amongst you as a jurymen, go on to say something of this kind which you would or would not listen to, according as you found it to be quite in reason. It is not a matter of law which you are bound to take from me, but it is merely a matter which you would say to each other; if you think that these defendants, from the whole matter laid before you, had a seditious intention to incite the people to violence, to create public disturbances and disorder, then undoubtedly you ought to find them guilty. If from any sinister motive, as, for instance notoriety, or for the purpose of personal gain, they desired to bring the people into conflict with the authorities, or to incite them tumultuously and disorderly to damage the property of any unoffending citizen, you ought undoubtedly to find them guilty. On the other hand, if you come to the conclusion that they were actuated by an honest desire to alleviate the misery of the unemployed, — if they had a real *bona fide* desire to bring that misery before the public by constitutional and legal means, you should not be too swift to mark any hasty or ill-considered expression which they might utter in the excitement of the moment. Some persons are more led on, more open to excitement than others, and one of the defendants, Burns, even when he was defending himself before you, so prone was he to feeling strongly what he does feel, could not refrain from saying that he was unable to see misery and degradation without being moved to strong language and strong action. I mention that to you to show you the kind of man he is, and for the purpose of seeing (if you come to the conclusion that he was honestly endeavouring to call the attention of the authorities to this misery, and honestly endeavouring to keep within the limits of the law and the constitution) that you should not be too strong to mark if he made use of an ill-considered, or too strong an expression. Now, I come to the particular charge which is made

against these men. It divides itself roughly into two heads. There is, first, the charge that they uttered certain words upon the occasion of this demonstration, and that is separated into nine counts, and then there comes a general charge which involves the whole of them, namely, that they agreed together before they went to this meeting that they would make speeches with the intention of exciting the people to disorder. I am unable to agree entirely with the Attorney-General when he says that the real charge is that, though these men did not incite or contemplate disorder, yet as it was the natural consequence of the words they used, they are responsible for it. In order to make out the offence of speaking seditious words, there must be a criminal intent upon the part of the accused, they must be words spoken with a seditious intent, and although it is a good working rule, to say that a man must be taken to intend the natural consequence of his acts, and it is very proper to ask a jury to infer, if there is nothing to show the contrary, that he did intend the natural consequences of his acts, yet, if it is shown from other circumstances, that he did not actually intend them, I do not see how you can ask a jury to act upon what has then become a legal fiction. I am glad to say that with regard to this matter, I have the authority again of Stephen, J., who, in his *History of the Criminal Law*, has dealt with this very point; he deals with it in reference to the question of seditious libel. He says, (y) "To make the criminality of an act dependent upon the intention with which it is done, is advisable in those cases only in which the intent essential to the crime is capable of being clearly defined and readily inferred from the facts. Wounding, with intent to do grievous bodily harm, breaking into a house with intent to commit a felony, abduction with intent to marry or defile, are instances of such offences. Even in these cases, however, the introduction of the term 'intent' occasionally led either to a failure of justice or to the employment of something approaching to a legal fiction in order to avoid it. The maxim that a man intends the natural consequences of his acts is usually true, but it may be used as a way of saying that, because reckless indifference to probable consequences is morally as bad as an intention to produce those consequences, the two things ought to be called by the same name, and this is at least an approach to a legal fiction. It is one thing to write with a distinct intention to produce disturbances, and another to write violently and recklessly matter likely to produce disturbances." Now, if you apply that last sentence to the speaking of words, of course it is precisely applicable to the case now before you. It is one thing to speak with the distinct intention to produce disturbances, and another thing to speak recklessly and violently of what is likely to produce disturbances. I must, however, notwithstanding what I have said upon that subject, go on to tell you that it is not at all necessary to the offence of uttering seditious words that an actual riot should follow, that there should be an actual disturbance of the public peace; it is the uttering with the intent which is the offence, not the consequences which follow, and which have really nothing to do with the offence. A man cannot escape from the

(y) *History of the Criminal Law of England*, vol. 2, p. 359.

consequences of uttering words with the intent to excite people to violence solely because the persons to whom they are addressed may be too wise or too temperate to be seduced into that violence. That has, however, no important bearing in this case. If you come to the conclusion that language was used by the defendants or any of them upon the occasion of that meeting in Trafalgar Square, and that it was their intention to excite the people to violence to a breach of the law, why then that would undoubtedly be the uttering of seditious words. And I apprehend that the Attorney-General was anxious to fortify himself with this, that the actual disturbances were the natural consequence of what was said, and for perhaps more than one reason. In the first place the Government undoubtedly declined to prosecute on the assumption that the defendants had actually incited to the particular disturbances, and although that as I have said is not at all necessary or essential to the procuring of a conviction, yet undoubtedly that is the moral justification, so to say, the grounds upon which the Government do place the action which they take, and therefore if they can show, or if you are satisfied that these disturbances although not contemplated by the defendants, were the natural consequence of their acts, although that has nothing at all to do with the charge which we are engaged in investigating, yet it does affect in some way the position which the Government desire to take up. There is another point however which does affect the question which you have to try, and it is this, as to the language used by the defendant, Was it used with the intention to produce violence? As something no doubt may be gathered from the effect which was actually produced, there does come a point when one must say, "This was so violent and reckless that it is impossible to conceive that the man who uttered this did not intend the consequence which must ensue from it." Again, there is another passage of Stephen, J.'s book, where he says, (z) "If a meeting is held for the purpose of speaking seditious words to those who may attend it, those who take part in that design are guilty of a seditious conspiracy." Now in order to have a conspiracy you must have an agreement formed beforehand between the parties in that conspiracy, that they will hold or have a meeting, and that the words there spoken shall be words of sedition. As I have said, I do not see any evidence that at all points to any such conspiracy, and I certainly should recommend you strongly not to pay any further attention to that part of the case. But the Attorney-General says, and very properly, although there may have been no previous conspiracy, yet when people do go to a meeting there are circumstances under which a man may be responsible not only for what he says, but also for what some one else says. Now what are those circumstances? Stephen, J., says: "If at a meeting lawfully convened seditious words are spoken, of such a nature as are likely to produce a breach of the peace, that meeting may become unlawful, and all those who speak the words undoubtedly are guilty of uttering seditious words, and those who do anything to help those who speak to produce upon the hearers the natural effect of the words spoken." You must do something more than stand by and say nothing; if you express approval of the

(z) History of the Criminal Law of England, vol. 2, p. 386.

statements of speakers who utter seditious language that equally will do; if you make a speech calculated to help that part of the speech made by some one else, and which excited to disorder; if you do anything to help that part of the effect upon the hearers, then undoubtedly you will be guilty of uttering seditious words just as if you spoke them yourself. But there must be something of that kind. If one man uses seditious words at a meeting, those who stand by and do nothing, although they do not reprobate them, are not guilty of uttering seditious words. Those even who make a speech themselves are not guilty of uttering seditious words unless you can gather from the language they use that they are endeavouring to assist the other man in carrying out that portion of his speech, and by that course endeavouring to assist him in causing his words, which excite to disorder, to produce their natural effect upon the people.' [The learned judge then reviewed the evidence given on the part of the prosecution and the defence, and pointed out that there was considerable difficulty in separating and apportioning the different elements which contributed to the riots, that public meetings and public discussions always attracted together numbers of rough persons, members of criminal classes and other persons not dishonest, but noisy and disorderly, and who would take advantage of the absence of the police to break windows and street lamps, and do other mischief of that kind, and that it was impossible to say that any disorder that arose was necessarily due to speeches made by persons who were themselves orderly, because of the presence of the disorderly elements of the crowd who had collected together, and, in conclusion, said :] 'I must now leave you to apply the principles of law I have laid down to the facts which have been laid before you. I have to remind you of what you are asked to say. What you are asked to decide on is whether the prisoners — all of them, or some of them, and if some of them, which of them — did upon this occasion, in Trafalgar Square, incite the people whom they were addressing to redress their grievance by violence. Did they intentionally incite ill-will between different classes in such a way as to be likely to lead to a disturbance of the public peace? I have already told you that you must take a broad and even a generous view of the whole of the case presented to you. You must not attach too much importance to isolated phrases, but you must look at the general gist of the matter. You must consider the object which took them there, the way they set about attaining it, and you must also consider to some extent, as throwing some light upon your decision, whether the riots which actually took place were the natural consequences of speeches delivered on that occasion. I cannot conclude without expressing my sense of the extreme folly of those who seek to incite the people to violence. And for this reason: There has been no period of history where violence was so practically useless. The Government being in the hands of the people, none can hope to carry out by force views which he might be able to effect by prudence and consistency, and by legal and legitimate means. And therefore, to incite people to use force is to expose foolish men, and men who do not see the danger they run, to a conflict with the author-

ities with the certainty that they will have to pay with grievous loss of life.' (a)

The jury returned a verdict of Not Guilty.

Statutes relating to riot.—Concerning some acts done in a tumultuous and riotous manner, especial provision is made by particular statutes. By the 24 & 25 Vict. c. 97, s. 11, 'If any persons riotously and tumultuously assembled together to the disturbance of the public peace shall unlawfully and with force demolish, or pull down, or destroy, or begin to demolish, pull down, or destroy any church, chapel, meeting-house, or other place of Divine worship, or any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malt-house, hop-oast, barn, granary, *shed, hovel, or fold*, or any building or erection used *in farming land*, or in carrying on any trade or manufacture, or any branch thereof, *or any building other than such as are in this section before mentioned, belonging to the Queen, or to any county, riding, division, city, borough, poor-law union, parish, or place, or belonging to any university, or college, or hall of any university, or to any inn of court, or devoted or dedicated to public use or ornament, or erected or maintained by public subscription or contribution*, or any machinery, whether fixed or movable, prepared for or employed in any manufacture or in any branch thereof, or any steam-engine or other engine for sinking, working, *ventilating*, or draining any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggon-way, or trunk for conveying minerals from any mine, every such offender shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.' (b)

Sec. 12. 'If any persons, riotously and tumultuously assembled together to the disturbance of the public peace, shall unlawfully and with force injure or damage any such church, chapel, meeting-house, place of Divine worship, house, stable, coach-house, outhouse, warehouse, office, shop, mill, malt-house, hop-oast, barn, granary, shed, hovel, fold, building, erection, machinery, engine, staith, bridge, waggon-way, or trunk, as is in the last preceding section mentioned, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour: provided that if upon the trial of any person for any felony in the last preceding section mentioned the jury shall not be satisfied that such person is guilty thereof, but shall be satisfied that he is guilty of any offence in this section mentioned, then the jury may find him guilty thereof, and he may be punished accordingly.'

This clause is new, and is intended to provide both for cases where there is no sufficient evidence of an intention to proceed to the total

(a) *R. v. Burns*, 16 Cox, C. C. 355.

(b) This clause is taken from the 7 & 8 Geo. 4, c. 30, s. 8. There were similar en-

actments in the 23 & 24 Geo. 3, c. 20, ss. 7, 8 (1.), and 27 Geo. 3, c. 15, s. 5 (1.).

Repealed by 24 & 25 V. c. 95

demolition of the house, &c., (c) and also for cases where no such intent ever existed, provided there be a riot, and injury done, within the terms of the clause.

The latter part of the clause enables the jury, who try an indictment for any felony mentioned in the preceding section, to convict of the offence created by this clause if they are not satisfied that an offence within the preceding clause is satisfactorily proved. It is still necessary, however, with a view to the trial of cases under the preceding clause, to mention the decisions on the former clause in the 7 & 8 Geo. 4, c. 30, s. 8.

If rioters, after proceeding a certain length, leave off of their own accord before the act of demolition be completed, that is evidence from which a jury may infer that they did not intend to demolish the house.

A party of rioters came to a house about midnight, and in a riotous manner burst open the door, broke some of the furniture, all the windows, and one of the window-frames, and then went away, there being nothing to hinder them from doing more damage; it was held that, although the breaking and damage done was a sufficient beginning to demolish the house, yet unless the jury were satisfied that the ultimate object was to destroy the house, and that if they had carried their intentions into full effect, they would, in point of fact, have demolished it, it was not a beginning to demolish within the 7 & 8 Geo. 4, c. 30, s. 8. (d)

A party of coal-whippers having a feeling of ill-will to a coal-lumper, who paid less than the usual wages, created a mob, riotously went to the house where he kept his pay-table, cried out that they would murder him, threw stones, brick-bats, &c., broke windows and partitions, and threw down part of a wall in a yard, and continued, after his escape, throwing stones at the house, till they were compelled to desist by the threats of the police; it was held that this case was distinguishable from *R. v. Thomas*, because the mob did not leave off voluntarily, but after the threats of the police, and that they might be convicted of beginning to demolish the house, though their principal object was to injure the lumper, provided it was also their object to demolish the house. (e) The beginning to pull down means not simply a demolition of a *part*, but a part with an intent to demolish the whole. The prisoners were indicted for beginning to demolish a building used in carrying on a trade. It appeared that they began by breaking the windows and doors, and having afterwards entered the house, they set fire to the furniture, but no part of the house was burnt. Parke, J., told the jury 'the beginning to pull down means not simply a demolition of a part, but a part with an intent to demolish the whole. It is for you to say if the prisoners meant to stop where they did, and do no more; because if they did, they are not guilty; but if they intended, when they broke the windows and doors, to go

(c) In order to support a conviction under s. 11 it must be shown that the rioters intended totally to destroy the house attacked. *Drake v. Foottitt*, 7 Q. B. D. 201. See *R. v. Howell*, *post*, p. 568.

(d) *R. v. Thomas*, MS. C. S. G., and 4 C. & P. 237, Littledale, J. See also *R. v.*

Howell, 9 C. & P. 437. *R. v. Price*, 5 C. & P. 510, where the persons committing the outrage only intended to get possession of a person who had entered the house.

(e) *R. v. Batt*, 6 C. & P. 329, Gurney, B., decided under the 7 & 8 Geo. 4, c. 30, s. 8.

farther, and destroy the house, then they are guilty of a capital offence. If they had the full means of going farther, and were not interrupted, but left off of their own accord, it is evidence from which you may judge that they meant the work of demolition to stop where it did. If you think that they originally came there without intent to demolish, and the setting fire to the furniture was an afterthought, but with that intent, then you must acquit, because no part of the house having been burnt, there was no beginning to destroy the house. If they came originally without such intent, but had afterwards set fire to the house, then the offence would be arson. If you have doubts whether they originally came with a purpose to demolish, you may use the setting fire to the furniture under such circumstances, and in such manner, as that the necessary consequence, if not for timely interference, would have been the burning of the house, as evidence to show that they had such intent, although they began to demolish in another manner. (f) Upon an indictment under the 7 & 8 Geo. 4, c. 30, s. 8, for riotously and tumultuously assembling together, and beginning to demolish a house, the jury could not convict unless they were satisfied that the prisoners intended to leave the house no house at all in fact; for if they intended to leave it still a house, though in a state however dilapidated, they were not guilty of the offence. To have left off the work of devastation without interruption would lead to the inference that the prisoners did not intend to destroy the house; but even if they were interrupted, the question still remained, what was their ultimate intention? If they had been some time at their work of ruin before they were interrupted, it was for the jury to say, looking to the nature of the things which they had destroyed, whether their purpose was to demolish the house itself. (g)

Although setting fire to a house is a substantive felony, yet if fire is made the means of attempting to destroy a house, it is as much a beginning to demolish as if any other mode of destruction were resorted to, and the indictment may be for that offence (i).

If a person forms part of a riotous assembly at the time the act of demolition commences, or if he wilfully joins such riotous assembly, so as to co-operate with them whilst the act of demolition is going on, and before it is completed, in either case he comes within the description of the offence, although he may not have assisted with his own hand in the demolition of the building. (j) Where a house was demolished by rioters by means of fire, which was lighted before one o'clock in the night, and there was no evidence to show that the prisoner was present at the time when the house was set on fire, but it was proved that he was there between two and three o'clock whilst the house was burning, and whilst the mob, who set it on fire, were still there; it was held that the prisoner was properly convicted as a principal. For although it was possible, if this had been an indictment for burning the house, that the prisoner could not have been convicted as a principal, yet this was an offence under an enactment that made it felony if per-

(f) *Ashton's case*, 1 Lewin, 296, Parke, J.

(g) *R. v. Adams*, C. & M. 299, Coleridge, J.

(i) *R. v. Simpson*, C. & M. 669. *R. v. Harris*, C. & M. 661, Tindal, C. J., Parke, and Rolfe, BB.

(j) Per Tindal, C. J., Bristol Special Commission, 5 C. & P. 265, note.

sons riotously and tumultuously assembled together to the disturbance of the public peace, and when so assembled destroyed a house; therefore it was not simply the fact of destroying a house by fire, but it was the combined fact of riotously assembling together and whilst the riot continued demolishing the house. Now to make a party guilty of that, he must be shown to be one of those who were present at the offence, or he could not be aiding or abetting. But as it was not only the burning, but also the riotously assembling together, the whole of the prisoner's conduct on that day was left to the jury; and it was distinctly left to them that unless they were satisfied that the prisoner had by his language excited the mob to the act which was the subject-matter of the inquiry, and afterwards been present at it, he was not guilty. (*k*)

Upon an indictment on the 7 & 8 Geo. 4, c. 30, s. 8, for riotously and feloniously demolishing a house, it was a sufficient demolishing of the house if it were so far destroyed as to be no longer a house; and the fact that the rioters left the chimney standing made no difference. (*l*)

In order to prove that there was a beginning to demolish the house, it must be proved that some part of the freehold was destroyed; it is not therefore sufficient to prove that the window-shutters were demolished. (*m*)

The 7 & 8 Geo. 4, c. 30, s. 8, not having given any definition of what should be a riot within the meaning of that enactment, the common-law definition of a riot was resorted to, and, in such a case, if *any one* of Her Majesty's subjects were terrified, this was a sufficient terror and alarm to substantiate that part of the charge. (*n*)

If persons riotously assembled and demolished a house, *really believing* that it was the property of one of them, and acted *bona fide* in the assertion of a supposed right, this was not a felonious demolition of the house within the 7 & 8 Geo. 4, c. 30, s. 8, even though there were a riot. (*o*)

The 33 Geo. 3, c. 67, s. 1, reciting that seamen, keelmen, &c. had of late assembled themselves in great numbers, and had committed many acts of violence; and that such practices, if continued, might occasion great loss and damage to individuals, and injure the trade and navigation of the kingdom, enacts, 'that if any seamen, keelmen, casters, ship-carpenters, or other persons, riotously assembled together to the number of three or more, shall unlawfully and with force prevent, hinder, or obstruct, the loading or unloading, or the sailing or navigating, of any ship, keel, or other vessel, or shall unlawfully and with force board any ship, keel, or other vessel, with intent to prevent, hinder, or obstruct, the loading or unloading or the sailing or navigating of such ship, keel, or other vessel, every seaman, keelman, caster, ship-carpenter, and other person' (being lawfully convicted of any of the offences aforesaid upon any indictment found in any court of oyer and terminer, or general or quarter sessions of the peace for

(*k*) *R. v. Simpson*, C. & M. 669, Tindal, C. J., Parke, B., and Rolfe, B. The prisoner was indicted under the 7 & 8 Geo. 4, c. 30, s. 8.

(*l*) *R. v. Phillips*, 2 M. C. C. 252. S. C. *R. v. Langford*, C. & M. 602.

(*m*) *Ibid.*

(*n*) *Ibid.*

(*o*) *R. v. Howell*, 9 C. & P. 487, Little-dale, J.

the county, division, district, &c., wherein the offence was committed), shall be committed either to the common gaol or to the house of correction for the same county, &c., there to continue and to be kept to hard labour for any term not exceeding twelve calendar months, nor less than six calendar months. By sec. 4, the Act shall not extend to any act, deed, &c., done in the service, or by the authority of his Majesty. By sec. 7, offences committed on the high seas shall be triable in any session of oyer and terminer, &c., for the trial of offences committed on the high seas within the jurisdiction of the Admiralty. And by sec. 8, the prosecution for any of the said offences is to be commenced within twelve calendar months after the offence committed. (*p*)

Women are punishable as rioters; but infants under the age of discretion are not. (*q*)

Routs.—II. By some books the notion of a *roust* is confined to such assemblies only as are occasioned by some grievance common to all the company; as the enclosure of land in which they all claim a right of common, &c. But, according to the general opinion, it seems to be a disturbance of the peace by persons assembling together with an intention to do a thing, which, if it be executed, will make them rioters, and actually making a motion towards the execution of their purpose. In fact, it generally agrees in all the particulars with a riot, except only in this, that it may be a complete offence without the execution of the intended enterprise. (*r*) And it seems, by the recitals in several statutes, that if people assemble themselves, and afterwards proceed, ride, go forth, or move by instigation of one or several conducting them, this is a *roust*; inasmuch as they move and proceed in rout and number. (*s*)

Unlawful assemblies.¹—III. An unlawful assembly, according to the common opinion, is a disturbance of the peace by persons barely assembling together with an intention to do a thing which, if it were executed, would make them rioters, but neither actually executing it nor making a motion toward its execution. Mr. Serjeant Hawkins, however, thinks this much too narrow an opinion; and that any meeting of great numbers of people with such circumstances of terror as cannot but endanger the public peace, and raise fears and jealousies among the King's subjects, seems properly to be called an *unlawful assembly*. As where great numbers complaining of a common grievance meet together, armed in a warlike manner, in order to consult together concerning the most proper means for the recovery of their interests: for no one can foresee what may be the event of such an

(*p*) This statute was made perpetual by 41 Geo. 3, c. 19.

(*q*) 1 Hawk. P. C. c. 65, s. 14. *Ante*, p. 114, *et seq.* But an infant above the age of discretion is punishable. The course of the Crown Office is for infants, though under the age of eighteen, to appear by attorney,

and not by guardian. *R. v. Tanner*, 2 Lord Raym. 1284.

(*r*) 1 Hawk. P. C. c. 65, s. 8.

(*s*) 19 Vin. Abr. tit. *Riots, &c.* (A.) 2. referring to 18 Edw. 3, c. 1, 13 Hen. 4, c. ult., and 2 Hen. 5, c. 8.

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¹ In some States there have been statutes passed defining this offence. In New York the threatened act must be one 'tending towards a breach of the peace or an injury to

person or property, or any unlawful act.' See *P. v. Most*, 128 N. Y. 108. As to Nebraska, see *Meese v. S.*, 15 Neb. 558.

assembly. (t) So in some cases it has been ruled that an assembly of great numbers of persons, which from its general appearance and accompanying circumstances is calculated to excite terror, alarm, and consternation, is generally criminal and unlawful. (u) And it has been laid down by a learned judge, that 'any meeting assembled under such circumstances as, according to the opinion of rational and firm men are likely to produce danger to the tranquillity and peace of the neighbourhood, is an unlawful assembly : ' and in viewing this question, the jury should take into their consideration the way in which the meetings were held, the hour at which they met, and the language used by the persons assembled, and by those who addressed them : and then consider whether firm and rational men, having their families and property there, would have reasonable ground to fear a breach of the peace, as the alarm must not be merely such as would frighten any foolish or timid person, but must be such as would alarm persons of reasonable firmness and courage. (v) And all persons who join an assembly of this kind, disregarding its probable effect and the alarm and consternation which are likely to ensue, and all who give countenance and support to it, are criminal parties. (w)

The difference between a riot and unlawful assembly is this : if the parties assemble in a tumultuous manner, and actually execute their purpose with violence, it is a riot ; but if they merely meet upon a purpose which, if executed, would make them rioters, and having done nothing, they separate without carrying their purpose into effect, it is an unlawful assembly. (x)

An assembly of a man's friends for the defence of his person against those who threaten to beat him if he go to such a market, &c., is unlawful ; for he who is in fear of such insults must provide for his safety by demanding the surety of the peace against the persons by whom he is threatened, and not make use of such violent methods, which cannot but be attended with the danger of raising tumults and disorders to the disturbance of the public peace. But an assembly of a man's friends in his own house, for the defence of the possession of it against such as threaten to make an unlawful entry, or for the defence of his person against such as threaten to beat him in his house, is indulged by law ; for a man's house is looked upon as his castle. (y) He is not, however, to arm himself and assemble his friends in defence of his close. (z)

An assembly of persons to witness a prize fight is an unlawful

(t) 1 Hawk. P. C. c. 65, s. 9. There may be an unlawful assembly if the people assemble themselves together for an ill purpose *contra pacem*, though they do nothing, Br. tit. *Riots*, pl. 4. Lord Coke speaks of an unlawful assembly as being when three or more assemble themselves together to commit a riot or rout, and do not do it. 3 Inst. 176. R. v. McNaughten, 14 Cox, C. C. 576. See also per Charles, J. R., v. Cunningsham Grahame, 16 Cox, C. C. 420.

(u) Per Bayley, J., in R. v. Hunt, York Spring Assizes, 1820 ; and per Holroyd, J., in Redford v. Birley, Lancaster Spring Assizes, 1822, 3 Stark. N. P. C. 76.

(v) R. v. Vincent, 9 C. & P. 91, Alder-

son, B. See R. v. Neale, 9 C. & P. 431, Littledale, J.

(w) Per Holroyd, J., Redford v. Birley, *supra*.

(x) Per Patteson, J. R. v. Birt, 5 C. & P. 154.

(y) 1 Hawk. P. C. c. 65, ss. 9, 10. 19 Vin. Abr. tit. *Riots*, &c. (A.) 5, 6. And by Holt, C. J., in R. v. Soley, 11 Mod. 116, though a man may ride with arms, yet he cannot take two with him to defend himself, even though his life is threatened ; for he is in the protection of the law, which is sufficient for his defence.

(z) By Heath, J., R. v. the Bishop of Bangor, Shrewsbury Summer Assizes, 1796.

assembly, and every one present and countenancing the fight is guilty of an offence. (a) Where sixteen persons, with their faces blackened, and armed with guns and sticks, met at a house at night, intending to go out for the purpose of night poaching, Holroyd, J., held, that it was impossible that a meeting to go out with faces thus disguised, at night, and under such circumstances, could be other than an unlawful assembly. (b)

A meeting of the Salvation Army in the open street with the knowledge that the meeting would be opposed, and with good reason to suppose that such opposition would result in a breach of the peace, has been held not to be an unlawful assembly. (c)

The conspiring of several persons to meet together for the purpose of disturbing the peace and tranquillity of the realm, of exciting discontent and disaffection, and of exciting the King's subjects to hatred of the government and constitution, may be prosecuted by an indictment for a conspiracy. (d)

Unlawful assemblies and seditious meetings having in many instances appeared to threaten the public tranquillity and the security of the government, several statutes have been passed for the purpose of their more immediate and effectual suppression.¹

The 1 Geo. 1. st. 2, c. 5, s. 1, reciting that many rebellious riots and tumults had been in divers parts of the kingdom, to the disturbance of the public peace and the endangering of his Majesty's person and government, and that the punishments provided by the laws then in being were not adequate to such heinous offences; for the preventing and suppressing such riots and tumults, and for the more speedy and effectual punishing the offenders, enacts, 'that if any persons to the number of *twelve* or more, being unlawfully, riotously, and tumultuously assembled together, to the disturbance of the public peace, and being required or commanded by any one or more justice or justices of the peace, or by the sheriff of the county, or his under-sheriff, or by the mayor, bailiff or bailiffs, or other head officer, or justice of the peace of any city or town corporate, where such assembly shall be, by proclamation to be made in the King's name, in the form hereinafter directed, to disperse themselves, and peaceably to depart to their habitations or to their lawful business, shall, to the number of twelve or more (notwithstanding such proclamation made), unlawfully, riotously, and tumultuously remain or continue together by the space of one hour after such command or request made by proclamation, and then such continuing together to the number of twelve or more, after such command or request made by proclamation, shall be adjudged felony without benefit of clergy, and the offenders therein shall be adjudged felons, and shall suffer death as in case of felony without benefit of clergy.' (e)

(a) *R. v. Billingham*, 2 C. & P. 234, Burrough, J. See *R. v. Perkins*, 4 C. & P. 537, per Patteson, J.

(b) *R. v. Brodribb*, 6 C. & P. 571, *ante*, p. 285.

(c) *Beatty v. Gillbanks*, 9 Q. B. D. 308; *R. v. Markson*, 17 Cox, C. C. 483.

(d) *R. v. Hunt*, 3 B. & A. 566.

(e) See *post*, as to the present punishment.

AMERICAN NOTE.

¹ These statutes do not appear to be acted on in America. See Bishop i. s. 534.

Sec. 2. 'The justice of the peace, or other person authorized by the Act to make the proclamation, shall, among the said rioters, or as near to them as he can safely come, with a loud voice command, or cause to be commanded, silence to be while proclamation is making, and after that shall openly and with loud voice make, or cause to be made, proclamation in these words, or like in effect: 'Our sovereign lord the King chargeth and commandeth all persons being assembled, immediately to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, upon the pains contained in the Act made in the first year of King George, for preventing tumults and riotous assemblies. God save the King.' And every justice, sheriff, &c., within the limits of their respective jurisdictions, are authorized and required, on notice or knowledge of any such unlawful assembly of twelve or more persons, to resort to the place, and there to make or cause such proclamation to be made.'

Sec. 3. 'If the persons so unlawfully, riotously and tumultuously assembled, or twelve or more of them, after such proclamation, shall continue together and not disperse themselves within one hour, it shall be lawful for every justice, sheriff, or under-sheriff of the county where such assembly shall be, and for every constable or other peace-officer within such county, and for every mayor, justice, sheriff, bailiff, and other head officer, constable, and other peace officer of any city or town where such assembly shall be, and for such other persons as shall be commanded to be assisting under any such justice, sheriff, or under-sheriff, mayor, bailiff, or other head officer (who are hereby authorized to command all his Majesty's subjects of age and ability to be assisting to them therein) to seize and apprehend such persons so unlawfully, riotously, and tumultuously continuing together after proclamation made; and they are hereby required so to do. And they shall carry the persons so apprehended before one or more of his Majesty's justices of the peace of the county or place where such persons shall be so apprehended, in order to their being proceeded against according to law. And the section also enacts, that if any of the persons so assembled shall happen to be killed, maimed, or hurt, in the dispersing, seizing, or apprehending them, or in the endeavour to do so, by reason of their resisting, then every such justice, &c., constable, or other peace officer, and all persons being aiding and assisting to them, shall be free, discharged, and indemnified concerning such killing, maiming, or hurting.'

Sec. 5. 'If any person or persons do, or shall, with force and arms, wilfully and knowingly oppose, obstruct, or in any manner wilfully and knowingly let, hinder, or hurt, any person or persons that shall begin to proclaim, or go to proclaim, according to the proclamation hereby directed to be made, whereby such proclamation shall not be made, that then every such opposing, obstructing, letting, hindering, or hurting, such person or persons, so beginning or going to make such proclamation as aforesaid, shall be adjudged felony without benefit of clergy; and the offenders therein shall be adjudged felons, and shall suffer death, as in case of felony, without benefit of clergy; and that also every such person or persons being so unlawfully, riotously, and tumultuously assembled, to the number of twelve, as aforesaid, or more, to whom proclamation should or ought to have been made, if

the same had not been hindered, as aforesaid, shall likewise, in case they or any of them, to the number of twelve or more, shall continue together, and not disperse themselves within one hour after such let or hindrance so made, having knowledge of such let or hindrance so made, shall be adjudged felons, and shall suffer death as in case of felony, without benefit of clergy.' (*f*)

Sec. 8. The prosecution for any offence against the Act is to be commenced within twelve months after the offence committed. (*g*)

The 1 Vict. c. 91, recites sec. 1 & 5 of this Act, and provides that, after the 1st of October, 1837, any person convicted of any of the said offences shall not suffer death, but be liable to transportation (*h*) for life, or for any term not less than fifteen (*i*) years, or imprisonment, with or without hard labour, in the common gaol or house of correction, for any term not exceeding three years, and solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year. (*j*)

The 1 Geo. 1, st. 2, c. 5, contains no provisions as to principals in the second degree, or accessories; there may, however, be such principals and accessories. The principals in the second degree and accessories before the fact are punishable as principals in the first degree; (*k*) and the accessories after the fact are punishable with imprisonment for not exceeding two years, with or without hard labour, in the common gaol or house of correction. (*l*)

If the magistrate omit the words 'God save the King,' the proclamation is insufficient. (*m*) If an indictment upon sec. 1, in setting out the proclamation, omit the words 'of the reign of,' which were contained in the proclamation read, this is a fatal variance. (*n*) The hour is to be computed from the first reading of the proclamation. Where, therefore, a magistrate read the proclamation a second and third time before an hour had elapsed from the time of his reading it the first time, and it was objected that the second and third readings must be considered as new warnings, and as if the former readings were abandoned, it was held that the second, or any subsequent reading of the proclamation, did not at all do away with the effect of the first reading, and that the hour was to be computed from the time of the first reading of the proclamation. (*n*)

If there be such an assembly that there would have been a riot, if the parties had carried their purpose into effect, it is within the Act. (*n*)

Upon an indictment under sec. 1, it was not proved that the prisoner was among the mob during the whole of the hour, but he was

(*f*) See *infra*, as to the present punishment.

(*g*) By s. 9, sheriffs, &c., in Scotland, shall have the same power for putting the Act in execution as justices, &c., have here: and offenders in Scotland shall suffer death, and confiscation of movables. This statute is commonly called the *Riot Act*; and is required by s. 7 to be openly read at every quarter sessions and at every leet or law day.

(*h*) Penal servitude by the 20 & 21 Vict. c. 3, s. 2.

(*i*) Not less than three years' penal servitude. See *ante*, p. 79.

(*j*) See the sections, *ante*, p. 258.

(*k*) *R. v. Royce*, 4 Burr. 2073. 24 & 25 Vict. c. 94, s. 1, *ante*, p. 180.

(*l*) 24 & 25 Vict. c. 94, s. 4, *ante*, p. 182.

(*m*) *R. v. Child*, 4 C. & P. 442, Vaughan, B., and Alderson, J.

(*n*) *R. v. Woolcock*, 5 C. & P. 516. Patteson, J.

proved to have been there at various times during the hour; it was held that it was a question for the jury, upon all the circumstances, whether he did substantially continue making part of the assembly for the hour; for although he might have occasion to separate himself for a minute or two, yet if in substance he was there during the hour he would not be thereby excused. (*o*)

A riot is not the less a riot, nor an illegal meeting the less an illegal meeting, because the Riot Act has not been read, the effect of that being to make the parties guilty of a statutory offence if they do not disperse within an hour; but if that proclamation be not read, the common-law offence remains. (*p*)

By the 39 Geo. 3, c. 79, (*q*) s. 1, reciting that divers societies had been instituted in this kingdom and in Ireland, of a new and dangerous nature, inconsistent with public tranquillity and with the existence of regular government, particularly certain societies calling themselves '*Societies of United Englishmen, United Scotsmen, United Britons, United Irishmen, and The London Corresponding Society*,' and that it was expedient and necessary that all such societies, and all societies of the like nature, should be utterly suppressed and prohibited, as unlawful combinations and confederacies, highly dangerous to the peace and tranquillity of these kingdoms, and to the constitution of the government thereof, as by law established, it is enacted, 'That all the said societies of *United Englishmen, United Scotsmen, United Irishmen, and United Britons*, and the said society commonly called the *London Corresponding Society*, and all other societies called *Corresponding Societies*, of any other city, town, or place, shall be, and the same are hereby utterly suppressed and prohibited, as being unlawful combinations and confederacies against the government of our sovereign lord the King, and against the peace and security of his Majesty's liege subjects.'

Sec. 2. 'The said societies, and every other society when established or hereafter to be established, the members whereof shall, according to the rules thereof, or to any provision or agreement for that purpose, be required or admitted to take any oath or engagement, which shall be an unlawful oath or engagement, within the intent or meaning of the 37 Geo. 3, c. 123, (*r*) or to take any oath not required nor authorized by law; and every society the members whereof, or any of them, shall take, or in any manner bind themselves by any such oath or engagement, on becoming, or in consequence of being members of such society: and every society, the members whereof shall take, subscribe, or assent to any test or declaration not required by law, or not authorized in manner hereinafter mentioned; and every society of which the names of the members, or any of them,

(*o*) *R. v. James*, Gloucester Summer Assizes, 1831. MS. C. S. G. Patteson, J.

(*p*) *R. v. Fursey*, 6 C. & P. 81, Gaselee and Parke, JJ.

(*q*) Sec. 4, s. 11, from 'save' to the end of that section, and ss. 12 & 39 of this Act, are repealed by 34 & 35 Vict. c. 116. By 32 & 33 Vict. c. 24, the above Act, 39 Geo. 3, c. 79, is repealed in part, viz., ss. 15 to 33, both inclusive, and so much of ss. 34 to 39 as relates to the above-mentioned sec-

tions. By the second schedule of 32 & 33 Vict. c. 24, 'No person shall be prosecuted or sued for any penalty imposed by this Act (39 Geo. 3, c. 79) unless such prosecution shall be commenced or such action shall be brought within three calendar months next after such penalty shall have been incurred.' As to the recovery and application of these penalties see the above schedule. See 39 Geo. 3, c. 79, s. 34.

(*r*) *Ante*, p. 404, *et seq.*

shall be kept secret from the society at large, or which shall have any committee, or select body so chosen or appointed, that the members constituting the same shall not be known by the society at large, to be members of such committee, or select body; or which shall have any president, &c., or other officer, so chosen and appointed, that the election or appointment shall not be known to the society at large, or of which the names of all the members, and of all committees or select bodies of members, and of all presidents, &c., shall not be entered in a book to be kept for that purpose, and open to the inspection of all the members; and every society which shall be composed of different divisions or branches, or of different parts, acting in any manner separately or distinct from each other, or of which any part shall have any separate or distinct president, &c., or other officer, elected or appointed by, or for such part, or to act as an officer for such part: shall be deemed and taken to be *unlawful combinations and confederacies.* (s) And further, that every person who shall directly or indirectly maintain correspondence or intercourse with any such society, or with any division, branch, committee, or other select body, president, &c., or other officer, or member thereof as such, or who shall by contribution of money or otherwise, aid, abet, or support such society, or any members or officers thereof, as such, shall be deemed guilty of an unlawful combination and confederacy.'

The Act does not extend to declarations approved by two justices, and registered with the clerk of the peace; but such approbation shall only remain valid till the next general session, unless the same shall be confirmed by the major part of the justices at such general session. (t) And it does not extend to the meetings of societies, or lodges of Freemasons, which, before the passing of the Act, had been usually held, under the denomination of 'Lodges of Freemasons,' and in conformity to the rules prevailing among such societies; (u) provided that there be a certificate of two of the members upon oath, that such society or lodge had been usually held under such denomination, and in conformity to such rules; the certificate duly attested, &c., being, within two months after the passing of the Act, deposited with the clerk of the peace, with whom also the name or denomination of the society or lodge, and the usual place and time of meeting, and the names and descriptions of the members are to be registered yearly. (v) The clerk of the peace is required to enrol such certificate and registry, and to lay the same once in every year before the general session of the justices; and the justices may, upon complaint upon oath, that the continuance of the meetings of any such lodge or society is likely to be injurious to the public peace and good order, direct them to be discontinued; and any such meeting, held notwithstanding such order of discontinuance, and before the same shall, by the like authority, be revoked, shall be deemed *an unlawful combination and confederacy* under the provisions of the Act. (w)

(s) By the 57 Geo. 3, c. 19, s. 27, this enactment is not to extend to meetings of Quakers, or to any meeting or society for purposes of a religious or charitable nature only, and in which no other matter shall be discussed.

(t) 39 Geo. 3, c. 79, s. 3.

(u) Sec. 5.

(v) Sec. 6.

(w) By 38 & 39 Vict. c. 60 (The Friendly Societies Act, 1875), s. 15, registered societies shall be entitled to the following privileges: No society, or meeting of a society shall be affected by any of the provisions of the Acts

But the justice or justices, before whom any person shall be convicted of any unlawful combination or confederacy, may mitigate the punishment, so as it be not thereby reduced to less than one-third of the punishment by the Act directed to be inflicted, whether by imprisonment or fine. (a) And it is provided, that any person who shall be convicted or acquitted by any justice, upon a summary prosecution, shall not afterwards be prosecuted by indictment, or otherwise, for the same offence; and in like manner that any person convicted, or acquitted, upon an indictment, shall not afterwards be prosecuted before any justice in a summary way. (b) But the Act is not to extend to prevent any prosecution, by indictment or otherwise, for anything which shall be an offence within the intent and meaning of the Act, unless the offender shall have been prosecuted for such offence under the Act, and convicted or acquitted of such offence. (c)

The 60 Geo. 3 & 1 Geo. 4, c. 1, (d) s. 1, reciting that 'in some parts of the United Kingdom men clandestinely and unlawfully assembled had practised military training and exercise, to the great terror and alarm of his Majesty's peaceable and loyal subjects, and the imminent danger of the public peace,' enacts 'that all meetings and assemblies of persons for the purpose of training or drilling themselves, or of being trained or drilled to the use of arms, or for the purpose of practising military exercise, movements, or evolutions, without any lawful authority from his Majesty, or the lieutenant, or two justices of the peace of the county or riding, or of any stewardry, by commission or otherwise, for so doing shall be, and the same are hereby prohibited as dangerous to the peace and security of his Majesty's liege subjects, and of his government; and every person who shall be present at, or attend any such meeting or assembly for the purpose of training and drilling any other person or persons, to the use of arms, or the practice of military exercise, movements, or evolutions, or who shall train or drill any other person or persons to the use of arms, or the practice of military exercise, movements, or evolutions, or who shall aid or assist therein, being legally convicted thereof, shall be liable to be transported (e) for any term not exceeding seven (f) years, or to be punished by imprisonment not exceeding two years, at the discretion of the Court in which such conviction shall be had; and every person who shall attend or be present at any such meeting or assembly as aforesaid, for the purpose of being, or who shall at any such meeting or assembly be trained or drilled to the use of arms, or the practice of military exercise, movements, or evolutions, being legally convicted thereof, shall be liable to be punished by fine and imprisonment, not

of the 39 Geo. 3, c. 79, or the 57 Geo. 3, c. 19, if in such society, or at such meeting, no business is transacted other than that which directly and immediately relates to the objects of the society as declared in the registered rules thereof, but such society and all officers of the same shall, on request in writing by two justices of the peace, give full information to such justices of the nature, objects, proceedings, and practices of the society, in default whereof the provisions of the Acts in this section referred to shall, so far as applicable, be in force in respect of such society. The word 'society' is ex-

tended by 39 & 40 Vict. c. 32, s. 6, to a registered branch.

(a) 39 Geo. 3, c. 79, s. 9.

(b) Sec. 10.

(c) 39 Geo. 3, c. 79, s. 11.

(d) Sec. 5, from 'and the venue' to 'thereupon,' so far as relates to Ireland, and s. 8 of this Act are repealed by 36 & 37 Vict. c. 91.

(e) Penal servitude by the 20 & 21 Vict. c. 3, s. 2.

(f) And not less than three years. See 54 & 55 Vict. c. 69.

exceeding two years, at the discretion of the Court in which such conviction shall be had.' (g)

Where an indictment alleged that there was an unlawful meeting of the defendant and of divers other persons unknown, for the purpose of unlawfully practising military exercise, and which persons so met and assembled were there without any lawful authority of the Queen, &c., and that the defendant was present at and unlawfully did attend the said meeting for the purpose of unlawfully training and drilling divers persons unknown to the practice of military exercise; Maule, J., held that the indictment was not bad for charging two offences. (h)

An indictment upon this Act should aver that the meeting was for the purpose of training and drilling, or of being trained and drilled to the use of arms, or for the purpose of practising military exercises, movements, or evolutions, and that the meeting was held without any lawful authority from her Majesty, or the lieutenant, or two justices of the peace, &c., by commission or otherwise. (i)

The 57 Geo. 3, c. 19, and 60 Geo. 3 & 1 Geo. 4, c. 6, contained many enactments relating to assemblies of persons, collected for the purpose, or under the pretext of deliberating on public grievances, and of agreeing on petitions and addresses to the throne, or to the houses of Parliament, which were only temporary enactments, and appear to have now expired, or been repealed. (j)

But the 57 Geo. 3, c. 19, contains also several enactments relating to meetings and assemblies of persons which are not of a limited duration.

Sec. 23, reciting, that it is highly inexpedient that public meetings or assemblies should be held near the houses of Parliament, or near the courts of justice in Westminster Hall, on certain days, enacts, that it shall not be lawful for any person to convene, or to give any notice for convening, any meeting consisting of more than fifty persons, or for any number of persons exceeding fifty to meet in any street, square, or open place, in the city or liberties of Westminster, or county of Middlesex, within the distance of a mile from the gate of Westminster Hall (except such parts of the parish of St. Paul's, Covent Garden, as are within such distance), for the purpose of considering of or preparing any petition, &c., for alteration of matters in church or state, on any day on which the two houses, or either house of Parliament, shall meet and sit, nor on any day on which the courts shall sit in Westminster Hall. And that if any meeting or assembly for such purposes shall be assembled or holden on such day, it shall be deemed an *unlawful assembly*. But there is a provision that the enactment shall not apply to any meeting for the election of members of Parliament, or to persons attending upon the business of either house of Parliament, or any of the said courts.

Sec. 24 recites, that divers societies and clubs had been instituted in the metropolis, and in various parts of the kingdom, of a dangerous

(g) Sec. 2 provides for the dispersion of persons so assembled, or for their detention and giving bail. By secs. 5 & 6, actions for anything done in pursuance of the Act must be commenced within six months. And by sec. 7 prosecutions for offences against the provisions of the Act must be commenced

within six months after the offence committed.

(h) *R. v. Hunt*, 3 Cox, C. C. 215.

(i) *Gogarty v. R.*, 3 Cox, C. C. 306, Q. B. (Ireland).

(j) See 36 & 37 Vict. c. 91.

nature and tendency, inconsistent with the public tranquillity and the existence of the established government, laws, and constitution, of the kingdom; and that the members of many such societies or clubs had taken unlawful oaths and engagements of fidelity and secrecy, and had taken or subscribed or assented to illegal tests and declarations; and that many of these societies or clubs appointed or employed committees, delegates, &c., to confer or correspond with other societies or clubs, and to induce other persons to become members; and by such means maintained an influence over large bodies of men, and deluded many ignorant and unwary persons into the commission of acts highly criminal: and recites also, that certain societies or clubs, calling themselves *Spenceans*, or *Spencean Philanthropists*, professed for their object the confiscation and division of the land, and the extinction of the funded property of the kingdom; and that it was expedient and necessary that they should be utterly suppressed and prohibited as unlawful combinations and confederacies highly dangerous to the peace and tranquillity of the kingdom, and to the constitution of its government; and then it enacts, 'that all societies or clubs calling themselves *Spenceans*, or *Spencean Philanthropists*, and all other societies or clubs, by whatever name or description the same are called or known, who hold and profess, or who shall hold and profess, the same objects and doctrines, shall be, and the same are hereby utterly suppressed and prohibited, as being *unlawful combinations and confederacies* against the government of our sovereign lord the King, and against the peace and security of his Majesty's liege subjects.'

Sec. 25. 'All and every the said societies or clubs, and also all and every other society or club now established, or hereafter to be established, the members whereof shall be required or admitted to take any oath or engagement which shall be an unlawful engagement within the meaning of the 37 Geo. 3, c. 123, (k) or within the meaning of the 52 Geo. 3, c. 104, (l) or to take any oath not required or authorized by law; and every society or club, the members whereof, or any of them, shall take, or in any manner bind themselves by any such oath or engagement, on becoming, or in order to become, or in consequence of being a member or members of such society or club; and every society or club, the members or any member whereof shall be required or admitted to take, subscribe, or assent to, or shall take, subscribe, or assent to, any test or declaration not required or authorized by law, in whatever manner or form such taking or assenting shall be performed, whether by words, signs, or otherwise, either on becoming or in order to become, or in consequence of being a member or members of any such society or club; and every society or club that shall elect, appoint, nominate, or employ any committee, delegate or delegates, representative or representatives, missionary or missionaries, to meet, confer, or communicate with any other society, or club, or with any committee, delegate, or delegates, representative or representatives, missionary or missionaries, of such other society or club, or to induce or persuade any person or persons to become members thereof, shall be deemed and taken to be *unlawful combinations and confederacies*, within the meaning of the 39 Geo. 3, c. 79, (m) and shall and may be prosecuted,

(k) *Ante*, p. 404.

(l) *Ante*, p. 574.

(m) *Ante*, p. 574, *et seq.*

proceeded against, and punished, according to the provisions of the said Act; and every person who, from and after the passing of this Act shall become a member of any such society or club, or who, after the passing of this Act, shall act as a member thereof, and every person who, from and after the passing of this Act, shall directly or indirectly maintain correspondence or intercourse with any such society or club, or with any committee or delegate, representative or missionary, or with any officer or member thereof, as such, or who shall, by contribution of money, or otherwise, aid, abet, or support such society or club, or any members or officers thereof, as such, shall be deemed guilty of an unlawful combination and confederacy within the intent and meaning of the 39 Geo. 3, c. 79, and shall and may be proceeded against, prosecuted, and punished, according to the provisions of the said Act, with regard to the prosecution and punishment of unlawful combinations and confederacies. (n)

Nothing contained in this Act is to extend to lodges of Freemasons, complying with the regulations of the 39 Geo. 3, c. 79, (o) nor to any declaration approved and subscribed by two or more justices of the peace, and confirmed by the major part of the justices at a general session, or at a general quarter-sessions of the peace, pursuant to the regulations in the said Act of the 39 Geo. 3, c. 79; (o) nor to meeting of *Quakers*; nor to any meeting or society for purposes of a religious or charitable nature only, and in which no other matter or business shall be discussed. (p)

Any person knowingly permitting any meeting of any society, or club, declared by this Act to be an unlawful combination or confederacy, or of any division or committee of such society or club, to be held in any place belonging to him, or in his possession or occupation, is made liable, for the first offence, to a forfeiture of five pounds; and for any offence committed after the conviction for such first offence is to be deemed guilty of an *unlawful combination and confederacy* in breach of this Act. (q) And two justices, upon evidence on oath that any such meeting, or any meeting for any seditious purpose, has been held at any house, &c., licensed for the sale of liquors, with the knowledge and consent of the persons keeping such house, &c., may adjudge the licence to be forfeited. (r)

The thirtieth and three following sections relate to the recovery of the pecuniary penalties, which may be incurred under the Act, their application and the limitation of actions against justices, &c., for anything done in pursuance of the Act. Penalties exceeding £20 may be received by action of debt; and those not exceeding £20 may be recovered before a justice in a summary way. (s)

By sec. 35, nothing contained in the Act shall be deemed to take away, or abridge, any provision already made by the law of the realm, for the suppression or punishment of any offence described in the Act.

(n) *Ante*, p. 575.

(o) *Ante*, p. 575.

(p) 57 Geo. 3, c. 19, s. 26. See note (w), *ante*, p. 575.

(q) Id. s. 28. S. 13 of the 39 Geo. 3, c. 79, is nearly similar.

(r) Id. s. 29. S. 14 of the 39 Geo. 3, c. 79, is similar, except that it does not contain the words 'with the knowledge and consent of the person keeping such house.' &c.

(s) See note, *ante*, p. 575.

Sec. 36, provides that no person prosecuted and convicted, or acquitted, of any offence against the Act, shall be liable to be again prosecuted for the same offence.

By sec. 37, where any proceeding or prosecution shall be instituted for any offence against the 39 Geo. 3, c. 79, or this Act, either by action or information, before any justice or justices, or otherwise, the attorney-general in England, or the lord-advocate in Scotland, may order them to be stayed; and, in case of any judgment or conviction, one of his Majesty's principal secretaries of state may, by an order under his hand, stay the execution of such judgment or conviction, or mitigate, or remit, any fine or forfeiture, or any part thereof. (*t*)

Several statutes have been passed for the purpose of regulating places used for delivering lectures, and holding debates: but the enactments contained in them are for the most part of limited duration. Many of the sections of the 36 Geo. 3, c. 8, were intended to remedy the evil occasioned by persons who, under pretence of delivering lectures and discourses on public grievances, delivered lectures and discourses, and held debates, tending to stir up hatred and contempt of the King's person and government, and of the constitution: but this statute was limited to a duration of three years from the passing of the Act, and until the end of the then next session of Parliament. (*u*) It is referred to in the 39 Geo. 3, c. 79, s. 15, which enactment is repealed by the 32 & 33 Vict. c. 24.

The law recognises no right of public meeting in any public thoroughfare, a public thoroughfare being dedicated to the public for no other purpose than that of providing a means for the public of passing and repassing along it. A place of public resort is analogous to a public thoroughfare, and although the public may often have held meetings in a place of public resort, without interruption by those who have the control of such place, yet the public have no right to hold meetings there for the purpose of discussing any question, whether social, political, or religious.

A magistrate, being responsible for order in the district over which he has control, and the Commissioner of the Police for the Metropolis being the officer mainly responsible for the preservation of peace and order in the metropolis, if a magistrate or such commissioner lazily, stupidly, or negligently fails to take the precautions necessary to preserve order, he can be proceeded against in a criminal court, and be called upon to answer for his neglect of duty. Such an officer is therefore fully justified in issuing a public notice to the effect that public meetings will not be permitted to take place in any place of public resort under his control, when he has reasonable grounds for believing that a breach of the public peace is likely to result from holding public meeting in such places. A public meeting held at a place of public resort after the publication of such a notice is not, however, rendered unlawful merely by reason of such publication.

Where, therefore, the defendants had resisted the police by endeavouring to break through their ranks in order to take part in a public meeting in Trafalgar Square, a place of public resort within the metropolis, which meeting had been prohibited by the Commissioner of

(*t*) Sec. 39. The Act does not extend to Ireland.

(*u*) See 32 & 33 Vict. c. 24.

Police for the Metropolis, and the holding of which the police had received orders to prevent, it was held by Charles, J., that by the operation of 7 & 8 Vict. c. 60, 14 & 15 Vict. c. 42, and 2 & 3 Vict. c. 47, Trafalgar Square is placed under the control and supervision of the police in the same manner as any street, thoroughfare, or public place, and that, whether the defendants were guilty of participating in a riotous assembly depended upon whether they, with others who were following them, or who, as they expected, would follow them, approached the square with the intention of holding a meeting, come what might, or merely approached it with the intention of requesting to be allowed to hold a meeting, and of departing if their request was refused.

He further held, that if the jury were satisfied that the defendants headed a mob with the intention of getting to a place of public resort if they could, and by doing so endangered the public peace and alarmed reasonable people, they would be justified in finding them guilty of rioting. (*v*)

Tumultuous petitioning. — The 13 Car. 2, c. 5, reciting the mischiefs of *tumultuous petitioning*, enacts that no person shall solicit or procure the getting of hands or other consent of any persons above the number of twenty, to any petition, &c., to the King or the houses of Parliament, for alteration of matters established by law in church or state, unless the matter thereof shall have been first consented unto and ordered by three justices, or by the major part of the grand jury of the county, &c., at the assizes or quarter sessions; or, in London, by the lord mayor, aldermen, and common council: and that no person shall repair to his Majesty or the houses of Parliament, upon pretence of presenting or delivering any petition, &c., accompanied with excessive number of people, nor at any one time with above the number of ten persons, upon pain of incurring a penalty not exceeding one hundred pounds, and three months' imprisonment for every offence; such offence to be prosecuted in the Court of King's Bench, or at the assizes or quarter sessions, within six months, and proved by two credible witnesses. (*w*) But there is a proviso, that the Act shall not hinder persons, not exceeding twenty in number, from presenting any public or private grievance or complaint to any member of Parliament, or to the King, for any remedy to be thereupon had: nor extend to any address to his Majesty by the members of the houses of Parliament, during the sitting of Parliament. (*x*)

Suppression of riots: By common law. — The common law, and also several more ancient statutes than those which have been mentioned, authorize proceedings for the restraining and suppression of riots. By the common law the sheriff, under-sheriff, constable, or any other peace officer, may, and ought to do, all that in them lies towards the suppressing of a riot, and may command

(*v*) *R. v. Cunninghame Graham*, 16 Cox, C. C. 420. See also as to Trafalgar Square, *Ex parte Lewis*, 16 Cox, C. C. 449.

(*w*) 13 Car. 2, st. 1, c. 5, s. 2.

(*x*) 13 Car. 2, st. 1, c. 5, s. 3. By 1 Will. & M. sess. 2, c. 2, s. 1, art. 5, usually styled the Bill of Rights, it is enacted, 'That it is the right of the subjects to petition the King, and that all commitments and prose-

cutions for such petitioning are illegal.' It was contended, that this article had virtually repealed the statute 13 Car. 2, c. 5, but Lord Mansfield declared it to be the unanimous opinion of the Court, that neither that nor any other Act of Parliament had repealed it, and that it was in full force. *R. v. Lord George Gordon*, Dougl. 571.

all other persons to assist them; and by the common law also any private person may lawfully endeavour to appease such disturbances by staying the persons engaged from executing their purpose, and also by stopping others coming to join them. (y) It has been holden also, that private persons may arm themselves in order to suppress a riot; (z) from whence it seems clearly to follow that they may also make use of arms in suppressing it, if there be a necessity. However, it may be very hazardous for private persons to proceed to these extremities; and such violent methods seem only proper against such riots as savour of rebellion. (a) But if a felony be about to be committed, the interference of private persons will be justifiable; for a private person may do anything to prevent the perpetration of a felony. (b)

Upon an information against the Mayor of Bristol for neglect of duty in not suppressing the Bristol riots in 1831, which was tried at the bar of the King's Bench, it was laid down that the general rules of law require of magistrates, that at the time of riots, they should keep the peace, restrain the rioters, and pursue and take them; and to enable them to do this, they may call on all the King's subjects to assist them, which they are bound to do upon reasonable warning; and in point of law, a magistrate would be justified in giving firearms to those who thus came to assist him, but it would be imprudent in him to give them to those who might not know their use, and who might be under no control, and who, not being used to act together, might be cut off from the rest of the force, and the arms, by those means, get into the hands of the rioters. (c)

It is no part of the duty of a magistrate to go out and head the constables, or to marshal and arrange them; neither is it any part of his duty to hire men to assist him in putting down a riot; nor to keep a body of men, as a reserve, to act as occasion may require; neither is he bound to call out the Chelsea Pensioners, any more than any of the rest of the King's subjects; nor is it any part of his duty to give any orders respecting the firearms in gunsmiths' shops. Nor is a magistrate bound to ride with the military: if he gives the military officer orders to act, that is all that is required of him. (d)

(y) 1 Hawk. P. C. c. 65, s. 11.

(z) Case of arms, Poph. 121. Kel. 76.

(a) 1 Hawk. P. C. c. 65, s. 11.

(b) By Chambre, J., in *Handcock v. Baker*, 2 Bos. & Pul. 265.

(c) *R. v. Pinney*, 5 C. & P. 254. 3 B. & Ad. 946, Littledale, Parke, and Taunton, JJ.; and see *R. v. Kennet*, 5 C. & P. 282.

(d) *R. v. Pinney*, *ibid.* The duties of private persons, soldiers, sheriffs, and peace officers in such cases were expounded by Tindal, C. J., in his charge to the Bristol grand jury [1832, 5 C. & P. 261] as follows: — 'By the common law every private person may lawfully endeavour of his own authority, and without any warrant or sanction of the magistrate, to suppress a riot by every means in his power. He may disperse, or assist in dispersing, those who are assembled; he may stay those who are engaged in it from executing their purpose;

he may stop and prevent others whom he shall see coming up from joining the rest; and not only has he the authority, but it is his bounden duty as a good subject of the King to perform this to the utmost of his ability. If the riot be general and dangerous, he may arm himself against the evil doers to keep the peace.' 'It would undoubtedly be more prudent to attend, and be assistant to the justices, sheriffs, or other ministers of the King in doing this; for the presence and authority of the magistrate would restrain the proceeding to such extremities until the danger were sufficiently immediate, or until some felony was either committed, or could not be prevented without recourse to arms; and at all events the assistance given by men who act in subordination and concert with the civil magistrate will be more effectual to attain the object proposed than any efforts, however well intended, of separated and dis-

Suppression of riots: By statute.—The 34 Edw. 3, c. 1, empowers justices of the peace to restrain and arrest rioters; and, having been construed liberally, it has been resolved, that a single justice may arrest persons riotously assembled, and may also authorize others to arrest them by a parol command. By the 13 Hen. 4, c. 7, s. 1, the justices of the peace, three or two of them at the least, and the sheriff or under-sheriff of the county where any riot, assembly, or rout of people against the law shall be made, shall come with the power of the county (if need be) to arrest them; and shall arrest them; and shall have power to record that which they shall find so done in their presence against the law: and by such record the offenders shall be convicted in the same manner as is contained in the statute of forcible entries. (e) In the interpretation of this statute it has been holden, that all persons, noblemen and others, except women, clergymen, persons decrepit, and infants under fifteen, are bound to attend the justices in suppressing a riot, upon pain of fine and imprisonment; and that any battery, wounding, or killing the rioters, that may happen in suppressing the riot, is justifiable. (f)

Indictment.—An indictment for a riot must show that there was

united individuals. But if the occasion demands immediate action, and no opportunity is given for procuring the advice or sanction of the magistrate, it is the duty of every subject to act for himself, and upon his own responsibility in suppressing a riotous and tumultuous assembly; and he may be assured that whatever is honestly done by him in the execution of that object will be supported and justified by the common law. The law acknowledges no distinction in this respect between the soldier and the private individual. The soldier is still a citizen, lying under the same obligation, and invested with the same authority to preserve the peace of the King as any other subject. If the one is bound to attend the call of the civil magistrate, so is the other; if the one may interfere for that purpose when the occasion demands it, without the requisition of the magistrate, so may the other too; if the one may employ arms for that purpose, when arms are necessary, the soldier may do the same. Undoubtedly the same exercise of discretion which requires the private subject to act in subordination to and in aid of the magistrate, rather than upon his own authority, before recourse is had to arms, ought to operate in a stronger degree with a military force. But where the danger is pressing and immediate, where a felony has actually been committed, or cannot otherwise be prevented, and from the circumstances of the case no opportunity is offered of obtaining a requisition from the proper authorities, the military subjects of the King not only may, but are bound to do their utmost, of their own authority, to prevent the perpetration of outrage, to put down riot and tumult, and to preserve the

lives and property of the people. Still further, by the common law, not only is each private subject bound to exert himself to the utmost, but every sheriff, constable, and other peace officer, is called upon to do all that in them lies for the suppression of riot, and each has authority to command all other subjects of the King to assist him in that undertaking. By an early statute (13 Hen. 4, c. 7) any two justices, with the sheriff or under-sheriff of the county, may come with the power of the county, if need be, to arrest any rioters, and shall arrest them; and they have power to record that which they see done in their presence against the law; by which record the offenders shall be convicted, and may afterwards be brought to punishment. And here I must distinctly observe, that it is not left to the choice or will of the subject, as some have erroneously supposed, to attend or not to the call of the magistrate, as they think proper, but every man is bound, when called upon, under pain of fine and imprisonment, to yield a ready and implicit obedience to the call of the magistrate, and to do his utmost in assisting him to suppress any tumultuous assembly.' See *R. v. Neale*, 9 C. & P. 431, per Littledale, J.

(e) 5 R. 2, st. 1, c. 7.

(f) 4 Blac. Com. 146, 147. 1 Hale, 495. The 17 R. 2, c. 8, and 2 Hen. 5, c. 8, relate also to summary proceedings of justices, &c., in cases of riots, which it is not thought necessary to mention further in this work. The different statutes and the construction put upon them may be seen in 1 Hawk. P. C. c. 65, s. 14, *et seq.* and Burn's Just. tit. *Riots, &c.* See *R. v. Gulston*, 2 Lord Raym. 1210.

an unlawful assembly of more than two persons. (*g*) In a case where six persons being indicted for a riot, two of them died without being tried, two were acquitted, and the other two were found guilty, the Court refused to arrest the judgment, saying, that as the jury had found two persons to be guilty of a riot, it must have been together with those two who had never been tried, as it could not otherwise have been a riot. (*h*) But two persons only cannot be guilty of a riot. (*i*) Where the offence was special and laid as a riot, the *riotose* extending to all the facts, and a battery of an individual stated in the indictment being but part of the riot: it was held that the defendants being acquitted of the riot were acquitted of the whole of which they were indicted. But it was also held, that if the indictment had been, that the defendants, with *divers other* disturbers of the peace, had committed this riot and battery, the defendants might have been found guilty of the battery. (*j*)

Before the 14 & 15 Vict. c. 100, s. 24, it was ruled in one case that an indictment for a riot should conclude *in terrorem populi*: (*k*) but in another case before that Act it was ruled that if such an indictment charged the defendants with a riot and cutting down fences, they might be convicted of an unlawful assembly, notwithstanding the want of such a conclusion. (*l*) An indictment upon the 1 Geo. 1, st. 2, c. 5, s. 1, for remaining assembled one hour after proclamation has been made, need not charge the riot to have been *in terrorem populi*. (*m*)

Evidence. — Upon an indictment against H. Hunt and others, for a conspiracy, and unlawful meeting together with persons unknown, for the purpose of exciting discontent and disaffection, at which meeting H. Hunt was the chairman, it was holden, that resolutions passed at a former meeting assembled a short time before, in a distant place, but at which H. Hunt also presided, and the avowed object of which meeting was the same as that of the meeting mentioned in the indictment, were admissible in evidence, to show the intention of H. Hunt in assembling and attending the meeting in question. And it was holden that a copy of these resolutions delivered by H. Hunt to the witness at the time of the former meeting, as the resolutions then intended to be proposed, and which corresponded with those which the witness heard read from a written paper, was admissible, without producing the original. (*n*)

In the same case it appeared, that large bodies of men had come to the meeting in question from a distance, marching in regular order resembling a military march: and it was holden to be admissible evidence, to show the character and intention of the meeting, that within two days of the time at which it took place considerable numbers

(*g*) R. v. Soley, 2 Salk. 593, 594.¹

(*h*) R. v. Scott and another, 3 Burr. 1262.

(*i*) R. v. Sadbury and others, 1 Lord Raym. 484; and see 19 Vin. Abr. tit. *Riots* (E.) 1.

(*j*) R. v. Sadbury and others, 1 Lord Raym. 484. S. C. 2 Salk. 593, and 12 Mod. 262. 19 Vin. Abr. tit. *Riots* (E.) 6.

(*k*) R. v. Hughes, 4 C. & P. 373, J. A. Park, J. But see the 14 & 15 Vict. c. 100, s. 24.

(*l*) R. v. Cox, 4 C. & P. 538, Patteson, J.

(*m*) R. v. James, 5 C. & P. 153, Patteson, J., MS. C. S. G. S. C.

(*n*) R. v. Hunt, 3 B. & A. 566.

AMERICAN NOTE.

¹ See however Georgia Statutes, *Rachels v. S.*, 51 Ga. 374. *S. v. Kempf*, 26 Mo. 429.

were seen training and drilling before daybreak, at a place from which one of these bodies had come to the meeting, and that, upon their discovering the persons who saw them, they ill-treated them, and forced one of them to take an oath never to be a king's man again. And it was also admitted as evidence for the same purpose, that another body of men in their progress to the meeting, on passing the house of the person who had been so ill-treated, expressed their disapprobation of his conduct by hissing. (*o*)

It was decided in this case, that parol evidence of inscriptions and devices on banners and flags displayed at a meeting is admissible without producing the originals. (*p*)

And that upon the indictment in question evidence of the supposed misconduct of those who dispersed the meeting was not admissible. (*q*)

Where the question was, with what intention a great number of persons assembled to drill, declarations made by those assembled and in the act of drilling, and further declarations made by others who were proceeding to the place, and solicitations made by them to others to accompany them declaratory of their object, were held to be admissible in evidence for the purpose of showing their object. (*r*)¹ And in general, evidence is admissible to show that the meeting caused alarm and apprehension, and to prove information given to the civil authorities, and the measures taken by them in consequence of such information. (*s*)

It was held by the judges, (*t*) on the second commission of 1830, 1831, at Salisbury, that the prisoners must first be identified as forming part of the crowd before the riot is proved, and the fifteen judges confirmed the holding of the special commission. (*u*) But this is a very inconvenient course, and causing much waste of time by recalling witnesses; and it has since been held that in riot, the prosecutor is entitled to prove the acts of any of the rioters before he connects the others with the riot, (*v*) and this is in conformity with the practice in cases of conspiracy. (*w*)

Where several were indicted for a riot, it was moved, that the prosecutor might name two or three, and try it against them, and that the rest might enter into a rule to plead not guilty (*guilty if the others were found guilty*); and a rule was made accordingly; this being to prevent the charges in putting them all to plead. (*x*)

The *punishment* for offences of the nature of riots, routs, or unlawful assemblies, at common law, is fine and imprisonment, in proportion to the circumstances of the offence: (*y*) and formerly, in cases of great enormity, it appears that the offenders were sometimes punished with

(<i>o</i>) Id. <i>ibid</i> .	1 Lew. 300, where the same course was adopted.
(<i>p</i>) Id. <i>ibid</i> .	(<i>v</i>) R. v. Cooper, Stafford Summer Ass.
(<i>q</i>) Id. <i>ibid</i> .	1850. Williams, J. MSS. C. S. G.
(<i>r</i>) Redford v. Birley, <i>cor.</i> Holroyd, J.,	(<i>w</i>) See <i>ante</i> , p. 491, 'Conspiracy.'
3 Stark. N. P. C. 76.	(<i>x</i>) R. v. Middlemore, 6 Mod. 212.
(<i>s</i>) Id. <i>ibid</i> .	(<i>y</i>) 1 Hawk. P. C. c. 65, s. 12.
(<i>t</i>) Vaughan, B., Parke and Alderson, JJ.	
(<i>u</i>) Per Alderson, B., in Nicholson's case,	

AMERICAN NOTE.

¹ As to the admissibility of this evidence in America see *Patten v. P.*, 18 Mich. 314. 100 Am. D. 173.

the pillory; (z) but such punishment is now taken away by the 56 Geo. 3, c. 138.

And by the 3 Geo. 4, c. 114, whenever any person shall be convicted of a riot, 'it shall and may be lawful for the Court before which any such offender shall be convicted, or which by law is authorized to pass sentence upon any such offender, to award and order, if such Court shall think fit, sentence of imprisonment, with hard labour, for any term, not exceeding the term for which such Court may now imprison for such offences, either in addition to or in lieu of any other punishment which may be inflicted on any such offenders, by any law in force before the passing of this Act; and every such offender shall thereupon suffer such sentence, in such place, and for such time as aforesaid, as such Court shall think fit to direct.'

(z) *Id. ibid.*

CHAPTER THE TWENTY-SIXTH.

OF AFFRAYS.

Affrays are the fighting of two or more persons in some public place,¹ to the terror of his Majesty's subjects. (a) The derivation of the word *affray* is from the French *affrayer*, to terrify; and as in a legal sense it is taken for a public offence to the terror of the people, it seems clearly to follow that there may be an assault which will not amount to an affray; as where it happens in a private place, out of the hearing or seeing of any except the parties concerned, in which case it cannot be said to be the terror of the people. (b) Thus, where two of the prisoners had fought together amidst a great crowd of persons, and the others were present aiding and assisting, at a place a considerable distance from any highway, and the fight ceased on the appearance of some peace officers, it was held that this was not an affray; for an affray must occur in some public place, and this was to all intents and purposes a private one. (c) And there may be an affray which will not amount to a riot, though many persons be engaged in it: as if a number of persons, being met together at a fair or market, or on any other lawful or innocent occasion, happen on a sudden quarrel to fall together by the ears, it seems agreed that they will not be guilty of a riot, but only of a sudden affray, of which none are guilty but those who actually engage in it; and this on the ground of the design of their meeting being innocent and lawful, and the subsequent breach of the peace happening unexpectedly without any previous intention. (d) An affray differs also from a riot in this, that *two* persons only may be guilty of it: whereas three persons at least are necessary to constitute a riot, as has been shown in the preceding chapter.

An affray may be much aggravated by the circumstances under which it takes place, either — first, in respect of its dangerous ten-

(a) 4 Blac. Com. 144. 3 Inst. 158. Burn's Just. tit. *Affray*, I.

(b) 1 Hawk. P. C. c. 63, s. 1. In 3 Inst. 158, it is said that an affray is a public offence to the terror of the King's subjects; and is an English word, and so called because it affrighteth and maketh men afraid; and it is inquirable in a leet as a common nuisance.

(c) R. v. Hunt, 1 Cox, C. C. 177. Alderson, B. If all the persons present went

to see the fight, they were all guilty of an assault; R. v. Perkins, 4 C. & P. 537, Patteson, J. An assembly for a prize fight is clearly an unlawful assembly, and where there is resistance to lawful authority exercised for the purpose of putting a stop to it, the offence may amount to an affray, or even a riot. R. v. Billingham, 2 C. & P. 234, Burrough, J.

(d) 1 Hawk. P. C. c. 65, s. 3.

AMERICAN NOTE.

¹ As to what is a public place in America see Taylor v. S., 22 Ala. 15. Words, however violent, cannot constitute an affray.

Hawkins v. S., 13 Geo. 322; O'Neill v. S., 16 Ala. 65, but as to provocative language see S. v. Perry, 5 Jones (Law), 9.

dency; secondly, in respect of the persons against whom it is committed; or thirdly, in respect of the place in which it happens.

An affray may receive an aggravation from its dangerous tendency; as where persons coolly and deliberately engage in a duel which cannot but be attended with the apparent danger of murder, and is not only an open defiance of the law, but carries with it a direct contempt of the justice of the nation, putting men under the necessity of righting themselves. (e) And an affray may receive an aggravation from the persons against whom it is committed; as where the officers of justice are violently disturbed in the due execution of their office, by the rescue of a person legally arrested, or the bare attempt to make such a rescue; the ministers of the law being under its more immediate protection. (f) And further, an affray may receive an aggravation from the place in which it is committed; it is therefore severely punishable when committed in the King's courts, or even in the palace yard near those courts; and it is highly finable when made in the presence of any of the King's inferior courts of justice. (g) And, upon the same account also, affrays in a church or church-yard have always been esteemed very heinous offences, as being very great indignities to the Divine Majesty, to whose worship and service such places are immediately dedicated. (h)

It is said, that no quarrelsome or threatening words whatsoever can amount to an affray; and that no one can justify laying his hands on those who shall barely quarrel with angry words, without coming to blows: but it seems that a constable may, at the request of the party threatened, carry the person who threatens to beat him before a justice, in order to find sureties. And granting that no bare words, in the judgment of law, carry in them so much terror as to amount to an affray, yet it seems certain that in some cases there may be an affray where there is no actual violence; as where persons arm themselves with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people, which is said to have been always an offence at common law, and is strictly prohibited by several statutes. (i)

The principal of these statutes is 2 Edw. 3. c. 3, sometimes spoken of as the statute of Northampton. It enacts, that no man, of what condition soever, except the King's servants in his presence, and his ministers in executing their office, and such as be in their company assisting them, and also upon a cry made for arms to keep the peace, shall come before the King's justices or other of the King's ministers doing their office, with force and arms, nor bring any force in affray of peace, (j) nor go nor ride armed, by night or day, in fairs or markets, or in the presence of the King's justices, or other ministers, or else-

(e) 1 Hawk. P. C. c. 63, s. 21. This would apply to such duels as were fought in ancient times; and to such as have been occasionally heard of, in more modern days, in neighbouring countries, fought amidst a number of spectators.

(f) 1 Hawk. P. C. c. 63, s. 22. And see *post*, chap. on *Rescue*.

(g) 1 Hawk. P. C. c. 21, ss. 6, 10; c. 63, s. 23. As to striking in the courts of justice, see *post*, *Aggravated Assaults*.

(h) 1 Hawk. P. C. c. 63, s. 23. And see *post*. *Of Disturbances in Places of Public Worship*.

(i) *Id.* *ibid.* ss. 2, 4.

(j) The words of the statute are *en affrais de la pees*. But Lord Coke, in 3 Inst. 158, cites it as *en affraier de la pais*; and observes, that the writ grounded upon the statute says *in quorundam de populo terrorem*, and that therefore the printed book (*en affray de la peace*) should be amended.

where; upon pain to forfeit their armour to the King, and their bodies to prison at the King's pleasure. The statute also provides, that the King's justices in their presence, sheriffs, and other ministers in their bailiwicks, lords of franchises and their bailiffs in the same, and mayors and bailiffs of cities and boroughs within the same, and borough-holders, constables, and wardens of the peace within their wards, shall have power to execute the Act; and that the judges of assize may inquire and punish such officers as have not done that which pertained to their office. (*k*)

In the exposition of the 2 Edw. 3, c. 3, it has been holden, that no wearing of arms is within its meaning, unless it be accompanied with such circumstances as are apt to terrify the people; from whence it seems clearly to follow, that persons of quality are in no danger of offending against the statute by wearing common weapons, or having their usual number of attendants with them for their ornament or defence, in such places, and upon such occasions, in which it is the common fashion to make use of them, without causing the least suspicion of an intention to commit any act of violence, or disturbance of the peace. (*l*) And no person is within the intention of the statute who arms himself to suppress dangerous rioters, rebels, or enemies, and endeavours to suppress or resist such disturbers of the peace and quiet of the realm. (*m*) But a man cannot excuse wearing such armour in public by alleging that a person threatened him, and that he wears it for the safety of his person from the assault: though no one will incur the penalty of the statute for assembling his neighbours and friends in his own house, against those who threaten to do him any violence therein, because a man's house is as his castle. (*n*)

It may be useful to mention shortly the acts which may be done for the suppression of an affray, by a private person, by a constable, or by a justice of peace.

Suppression of affrays by a private person. — It seems to be agreed, that any one who sees others fighting may lawfully part them, and also stay them till the heat be over, and then deliver them to the constable, who may carry them before a justice of peace, in order to their finding sureties for the peace. (*o*) Any person present may arrest the affrayer at the moment of the affray, and detain him till his passion has cooled and his desire to break the peace has ceased, and then deliver him to a peace officer; and so any person may arrest an affrayer after the actual violence is over, but whilst he shows a disposition to renew it. Both cases fall within the same principle, which is that for the sake of the preservation of the peace, any individual who sees it broken, may restrain the liberty of him

(*k*) The 7 R. 2, c. 13, and 20 R. 2, c. 1, enforcing this Act, are repealed by the 19 & 20 Vict. c. 64.

(*l*) 1 Hawk. P. C. c. 63, s. 9.

(*m*) *Id.* s. 10.

(*n*) *Id.* s. 8, and see in ss. 5, 6, 7, as to the proceedings of justices, &c., executing the Act.

(*o*) 1 Hawk. P. C. c. 63, s. 11. Where it is said that from hence it seems clearly to follow, that if a man receive a hurt from either party, in thus endeavouring to pre-

serve the peace, he shall have his remedy by an action against him; and that upon the same ground it seems equally reasonable that if he unavoidably happen to hurt either party, in thus doing what the law both allows and commends, he may well justify it; inasmuch as he is no way in fault, and the damage done to the other was occasioned by a laudable intention to do him a kindness. See particularly the charge of Tindal, C. J., to the Bristol grand jury, *ante*, p. 582, note (*d*).

whom he sees breaking it, so long as his conduct shows that the public peace is likely to be endangered by his acts. In truth, whilst those are assembled together who have committed acts of violence, and the danger of their renewal continues, the affray itself may be said to continue: and during the affray, the constable may, not merely on his own view, but on the information and complaint of another, arrest the offenders, and of course the person so complaining is justified in giving the charge to the constable. (*p*) And it seems to be clear that if either party be dangerously wounded in such an affray, and a stander by, endeavouring to arrest the other, be not able to take him without hurting or even wounding him, yet he is in no way liable to be punished, inasmuch as he is bound, under pain of fine and imprisonment, to arrest such an offender, and either detain him till it appear whether the party will live or die, or carry him before a justice of peace. (*q*)

Suppression of affrays by a constable. — A constable is not only empowered, as all private persons are, to part an affray which *happens in his presence*, but is also bound, at his peril, to use his best endeavours for this purpose: (*r*) and not only to do his utmost himself, but also to demand the assistance of others, which, if they refuse to give him, they are punishable with fine and imprisonment. In order to support an indictment against a person for refusing to aid and assist a constable in the execution of his duty in quelling a riot, it is necessary to prove: first, that the constable actually saw a breach of the peace committed by two or more persons; secondly, that there was a reasonable necessity for the constable calling upon other persons for their assistance and support; and lastly, that the defendant was duly called upon to render his assistance, and that, without any physical impossibility or lawful excuse, he refused to give it; and whether the aid of the defendant, if given, would have proved sufficient or useful, is not the question or criterion. (*s*) And it is laid down in the books, that if an affray be in a house, the constable may break open the doors to preserve the peace; and if affrayers fly to a house, and he follow with fresh suit, he may break open the doors to take them. (*t*) And so far is the constable intrusted with a power over all actual affrays, that though he himself is a sufferer by them, and therefore liable to be objected against, as likely to be partial in his own cause, yet he may suppress; and therefore if an assault be made upon him, he may not only defend himself but also imprison the offender in the same manner as if he were in no way a party. (*u*) It is said also, that if a constable see persons either actually engaged in an affray, as by striking, or offering to strike, by drawing their weapons, &c., or upon the very point of entering upon an affray, as where one shall threaten to kill, wound, or beat another, he may

(*p*) See *Timothy v. Simpson*, 5 Tyrw. 244. 1 C. M. & R. 757.

(*q*) 1 Hawk. P. C. c. 63, s. 12, § Inst. 158.

(*r*) See the charge of Tindal, C. J., *ante*, p. 582, note (*d*).

(*s*) *R. v. Brown*, C. & M. 314. See *R. v. Sherlock*, 35 L. J. M. C. 92.

(*t*) 1 Hawk. P. C. c. 63, ss. 13, 16. But, *qu.*, if a constable can safely break open the doors of a dwelling house in such case, without a magistrate's warrant. At least, it should seem, there must be some circumstances of extraordinary violence in the affray to justify him in so doing.

(*u*) *Id. ibid.* s. 15.

either carry the offender before a justice of the peace, to the end that such justice may compel him to find sureties for the peace, &c., or he may imprison him of his own authority for a reasonable time till the heat be over, and also afterwards detain him till he find such surety by obligation. But it seems that he has no power to imprison such an offender in any other manner, or for any other purpose; for he cannot justify the committing an affrayer to gaol till he shall be punished for his offence; and it is said that he ought not to lay hands on those who barely contend with hot words, without any threats of personal hurt: and that all which he can do in such a case is to command them, under pain of imprisonment, to avoid fighting. (v)

It has been doubted whether a private individual, who has seen an affray committed, may give in charge to a constable who has not; and whether such constable may, therefore, take into his custody the affrayers, or either of them, in order to be carried before a justice, after the affray has entirely ceased, after the offenders have quitted the place where it was committed, and there was no danger of renewal; (w) but it seems now to be settled that a constable has no power to arrest a man for an affray done *out of his own view*, without a warrant from a justice of peace, (x) unless a felony be done or likely to be done: for it is the proper business of a constable to preserve the peace, not to punish the breach of it; and where a breach of the peace has been committed, and is over, the constable must proceed in the same way as any other person, namely, by obtaining a warrant from a magistrate. (y) It is said (see *ante*, p. 392) that he may carry those before a justice of peace who were arrested by such as were present at an affray, and delivered by them into his hands. (z) Where the plaintiff

(v) 1 Hawk. P. C. c. 63, s. 14.

(w) See *Timothy v. Simpson*, 5 Tyrw. 244. S. C. 1 C. M. & R. 757. The Court did not decide the question. They observed, 'the power of a constable to take into his custody, upon a reasonable information of a private person under such circumstances, and of that person to give in charge, must be correlative. Now, as to the authority of a constable, it is perfectly clear that he is not entitled to arrest in order himself to take sureties of the peace, for he cannot administer an oath. *Sharrock v. Hannemer*, Cro. Eliz. 375, Owen, 105, S. C. *nom.* *Scarrett v. Tanner*. But whether he has that power in order to take before a magistrate, that he may take sureties of the peace, is a question on which the authorities differ. Lord Hale seems to have been of opinion that a constable has this power, 2 H. P. C. 89, and the same rule has been laid down at Nisi Prius by Lord Mansfield, in a case referred to in 2 East, 306, and by Buller, J., in two others, one quoted in the same place, and another cited in 3 Campb. N. P. 421. On the other hand, there is a dictum to the contrary in Brooke's Abridgment, tit. *Faux Imprisonment*, which is referred to and adopted by Lord Coke in 2 Inst. 52; and Lord Holt, in 2 Lord Ray. 1301, R. v. Tooley, expresses the same opinion. Eyre, C. J., in *Coupey v. Henley*, 1 Esp. C. N. P. 540, does the same, and

many of the text-books state that to be the law. Burn's Just. 258, tit. *Arrest*, 26th edit. Bac. Abr. (D.) tit. *Trespass*, 53. 2 East, P. C. 506. Hawk. P. C. b. 2, c. 13, s. 8.

(z) *Cook v. Nethercote*, 6 C. & P. 741, Alderson, B. *Fox v. Gaunt*, 3 B. & Ad. 798. R. v. Curvan, R. & M. C. C. R. 132. R. v. Bright, 4 C. & P. 387. R. v. Light, D. & B. C. C. 332. R. v. Walker, Dears. C. C. 358. See these cases, *post*, and *Cohen v. Huskisson*, 2 M. & W. 477. *Baynes v. Brewster*, 2 Q. B. 375. *Webster v. Watts*, 11 Q. B. 311.

(y) *Cook v. Nethercote*, *supra*. See the 2 & 3 Vict. c. 47, s. 65, the Metropolitan Police Act, as to the apprehension of persons on a charge of aggravated assault committed out of sight of a policeman.

(z) 1 Hawk. P. C. c. 63, s. 17, citing Lamb. 131, and Dalt. c. 8. Dalton says, 'every private man, being present, may stay the affrayers till their heat be over, and then deliver them to the constables to imprison them till they find surety for the peace': which seems to imply that they may take them before a justice, in order that they may find such sureties: and as it seems that the private individual might take them for that purpose before a justice, it is but reasonable that the constables should have the authority to take them likewise. See *ante*, p. 589.

was imprisoned by a constable in a cell on a false charge of assault, and the defendant, another constable, on hearing the charge from a third constable, without inquiry into the facts, took the plaintiff before the magistrates, it was held that the defendant, in order to justify himself, was bound to show that the charge was well founded, and having failed to do so, was liable to an action of trespass. (a)

Suppression of affrays by a justice of peace. — There is no doubt but that a justice of peace may and must do all such things for the suppression of an affray, which private men or constables are either enabled or required by the law to do: but it is said that he cannot, without a warrant, authorize the arrest of any person for an affray out of his view. Yet it seems clear, that in such case he may make his warrant to bring the offender before him, in order to compel him to find sureties for the peace. (b)

Punishment of affrays. — The punishment of common affrays is by fine and imprisonment; the measure of which must be regulated by the circumstances of the case: for where there is any material aggravation, the punishment will be proportionably increased. (c)

(a) *Griffin v. Coleman*, 4 H. & N. 265.

(b) 1 Hawk. P. C. c. 63, s. 19.

(c) 4 Blac. Com. 145. 1 Hawk. P. C. c. 63, s. 20.

CHAPTER THE TWENTY-SEVENTH.

OF CHALLENGING TO FIGHT.

It is a very high offence to challenge another, either by word or letter, to fight a duel, or to be the messenger of such a challenge, or even barely to endeavour to provoke another to send a challenge, or to fight; as by dispersing letters, for that purpose, full of reflections, and insinuating a desire to fight. (a) And it will be no excuse for a party so offending that he has received provocation: for as, if one person should kill another, in a deliberate duel, under the provocation of charges against his character and conduct ever so grievous, it will be murder in him and his second; the bare incitement to fight, though under such provocation, is in itself a very high misdemeanor, though no consequence ensue thereon against the peace. (b) Where, after a prisoner had been convicted, his brother went to the house of the foreman of the jury, and challenged him to mortal combat, it was held that this was a high contempt of the Court before which the trial was held, and punishable as such. (c)

The offence of endeavouring to provoke another to send a challenge to fight was much considered in one case, in which it was held to be an indictable misdemeanor: and more especially as such provocation was given in a letter containing libellous matter, and as the prefatory part of the indictment alleged that the defendant intended to do the party bodily harm, and to break the King's peace. (d) And the sending such letter was held to be an act done towards the procuring the commission of the misdemeanor meant to be accomplished. (e) In this case, with respect to the *intent* of the defendant, the rule was adopted that where an evil intent accompanying an act is necessary to constitute such act a crime, the intent must be alleged in the indictment and proved; though it is sufficient to allege it in the prefatory part of the indictment: but that where the act is in itself unlawful, the law infers an evil intent; and the allegation of such intent is merely matter of form, and need not be proved by extrinsic evidence on the part of the prosecution. (f)

(a) 1 Hawk. P. C. c. 63, s. 3. 3 Inst. 158. 4 Blac. Com. 150. Hick's case, Hob. 215.

(b) R. v. Rice, 3 East, 581.

(c) R. v. Martin, 5 Cox, C. C. 356, Pigot, C. B., and Penefather, B. Martin was adjudged to a month's imprisonment, and to find sureties for keeping the peace for seven years.

(d) R. v. Phillips, 6 East, 464. The letter was: 'Sir, — It will, I conclude, from the description you give of your feelings and

ideas with respect to insult, in a letter to Mr. Jones, of last Monday's date, be sufficient for me to tell you, that in the whole of the Carmarthenshire election business, as far as it relates to me, you have behaved like a blackguard. I shall expect to hear from you on this subject, and will punctually attend to any appointment you may think proper to make.

(e) See *ante*, pp. 195, 196.

(f) R. v. Phillips, 6 East, 470 to 475.

It has been considered that mere words of provocation, as 'liar' and 'knave,' though motives and *mediate* provocation for a breach of the peace, yet do not tend *immediately* to the breach of the peace, like a challenge to fight, or a threatening to beat another. (*g*) But words which directly tend to a breach of the peace may be indictable; as if one man challenge another by words; (*h*) and if it can be proved that the words used were intended to provoke the party to whom they were addressed to give a challenge, the case would seem to fall within the same rule. (*i*)

In a case where a person wrote a letter with intent to provoke a challenge, sealed it up, and put it into the twopenny post-office in a street in Westminster, addressed to the prosecutor in the city of London, by whom it was there received; Lord Ellenborough, C. J., held that the defendant might be indicted in Middlesex, as there was a sufficient publication in that county by putting the letter into the post-office there, with the intent that it should be delivered to the prosecutor elsewhere; and that if the letter had never been delivered, the defendant's offence would have been the same. (*k*)

It may be observed, before this subject is concluded, that sending a challenge is an offence for which the Court of Queen's Bench will grant a criminal information: but in a case where it appeared, upon the affidavits, that the party applying for an information had himself given the first challenge, the Court refused to proceed against the other party by way of information; and left the prosecutor to his ordinary remedy by action or indictment. (*l*) A rule to show cause why such an information should not be granted has been made, upon producing *copies* only of the letters in which the challenge was contained, such copies being sufficiently verified. (*m*)

The punishment for this offence, as a misdemeanor, is discretionary, and must be guided by such circumstances of aggravation or mitigation as are to be found in each particular case. (*n*)

(*g*) King's case, 4 Inst. 181.

(*h*) R. v. Langley, 6 Mod. 125, S. C. 2 Lord Raym. 1081.

(*i*) The rule given in 3 Inst. 158, is—*Quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud.*

(*k*) R. v. Williams, 2 Campb. 506.

(*l*) R. v. Hankey, 1 Burr. 316, where it is said that the Court held that it might have been right to have granted *cross informations*, in case each party had applied for an information against the other.

(*m*) R. v. Chappel, 1 Burr. 402.

(*n*) R. v. Rice, 3 East, 584, in which case the defendant (though he had undergone some imprisonment, and though there were several circumstances tending materially to

mitigate his offence) was sentenced to pay a fine of £100, and to be imprisoned for one calendar month, and at the expiration of that time to give security to keep the peace for three years, himself in £1,000 and two sureties in £250 each, and to be further imprisoned till such fine was paid and such securities given. Hawkins, speaking of the pernicious consequence of duelling, says, 'upon which considerations persons convicted of barely sending a challenge have been adjudged to pay a fine of £100, and to be imprisoned for one month without bail, and also to make a public acknowledgment of their offence, and to be bound to their good behaviour.' 1 Hawk. P. C. c. 63, s. 21.

CHAPTER THE TWENTY-EIGHTH.

OF LIBEL AND INDICTABLE SLANDER.¹

SEC. I.

Definition.

It appears to be well settled that publications blaspheming God, or turning the doctrines of the Christian religion into contempt and ridicule, may be made the subject of indictment; and it is now fully established, though some doubt seems formerly to have been entertained upon the subject, that such immodest and immoral publications as tend to corrupt the mind, and to destroy the love of decency, morality, and good order, are also offences at common law. (a) It is also a misdemeanor wantonly to defame or indecorously to calumniate that economy, order, and constitution of things which make up the general system of the law and government of the country. (b) And it is especially criminal to degrade or calumniate the person and character of the sovereign, and the administration of his government by his officers and ministers of state, (c) or the administration of justice by his judges. (d) And the same policy which prohibits seditious comments on the King's conduct and government extends, on the same grounds, to similar reflections on the proceedings of the two Houses of Parliament. (e) Such publications also as tend to cause animosities between this country and any foreign state, by the personal abuse of the sovereign of such state, his ambassadors, or other public ministers, may be treated as libels. (f) With respect to libels upon individuals, they have been defined to be malicious defamations, expressed either in printing or writing, or by signs or pictures, tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and thereby exposing him to public hatred, contempt, and ridicule. (g)

(a) See the cases collected in 2 Starkie on Libel, 155.

(b) Holt on Libel, 82.

(c) R. v. Lambert and Perry, 2 Campb. 398.

(d) 2 Starkie on Libel, 194.

(e) 2 Starkie on Libel, 202.

(f) R. v. Peltier, Holt on Libel, 78. R. v. D'Eon, 1 Blac. R. 517.

(g) 1 Hawk. P. C. c. 73, ss. 1, 2, 3, 7; Bac. Abr. tit. *Libel*; R. v. Yates, 12 Cox, C. C. 233, and see as to libel by a picture, Du Bost v. Beresford, 2 Campb. 511. As to defaming one who is dead, see *post*. 629.

AMERICAN NOTE.

¹ See S. v. Cooper, 2 Denio, 293; C. v. Clapp, 4 Mass. 163; Sharp v. C., 2 Binn. 214; C. v. Kneeland, 20 Pick. 206; People

v. Crosswell, 3 Johns. Cas. 337; S. v. White, 7 Ired. N. C. 180; S. v. Lehre, 2 Brev. 446.

Upon some of these subjects a publication by slander, or words spoken only, though not properly a libel, (*h*) may be the subject of criminal proceeding, as will be shown in the course of the chapter.

A libel may be as well by descriptions and circumlocutions as in express terms, therefore scandal conveyed by way of allegory or irony amounts to a libel. As where a writing, in a taunting manner, reckoning up several acts of public charity done by a person, said, '*You will not play the Jew, nor the hypocrite,*' and then proceeded, in a strain of ridicule, to insinuate that what the person did was owing to his vainglory. Or where a publication, pretending to recommend to a person the characters of several great men for his imitation, instead of taking notice of what great men are generally esteemed famous for, selected such qualities as their enemies accuse them of not possessing (as by proposing such a one to be imitated for his courage who was known to be a great statesman, but no soldier; and another to be imitated for his learning who was known to be a great general, but no scholar); such a publication being as well understood to mean only to upbraid the parties with the want of these qualities as if it had done so directly and expressly. (*i*) And, upon the same ground, not only an allegory, but a publication in hieroglyphics, or a rebus or anagram, which are still more difficult to be understood, may be a libel. (*j*) So a libel may be by asking questions; for if a man insinuates a fact in asking a question, meaning thereby to assert it, it is the same thing as if he asserted it in terms. (*k*) Formerly it was the practice to say that words were to be taken in the more lenient sense; but that doctrine is now exploded; they are not to be taken in the more lenient or more severe sense, but in the sense which fairly belongs to them, and which they were intended to convey. (*l*)

Upon the same principles it has been resolved that a defamatory writing, expressing only one or two letters of a name, in such a manner that from what goes before, and follows after, it must needs be understood to signify a particular person, in the plain, obvious, and natural construction of the whole, and would be nonsense if strained to any other meaning, is as properly a libel as if it had expressed the whole name at large. (*m*)

(*h*) A libel is termed *Libellus famosus seu infamatoria scriptura*, and has been usually treated of as scandal, *written* or expressed by symbols. Lamb. Sax. Law, 64. Bract. lib. 3, c. 36. 3 Inst. 174. 5 Co. 125. 1 Lord Raym. 416. 2 Salk. 417, 418. Libel may be said to be a technical word, deriving its meaning rather from its use than its etymology. 'There is no other name but that of *libel* applicable to the offence of libelling; and we know the offence specifically by that name, as we know the offences of horse-stealing, forgery, &c., by the names which the law has annexed to them.' By Lord Camden in *R. v. Wilkes*, 2 Wils. 121.

(*i*) 1 Hawk. P. C. c. 73, s. 4. Bac. Abr. tit. *Libel* (A.) 3.

(*j*) Holt on Libel, 235, 236.

(*k*) Gathercole's case, 2 Lewin, 255, per Alderson, B.

(*l*) By Lord Ellenborough, C. J., in *R. v. Lambert and Perry*, 2 Campb. 403. And in a case of libel, *R. v. Watson and others*, 2 T. R. 206, Buller, J., said, 'Upon occasions of this sort I have never adopted any other rule than that which has been frequently repeated by Lord Mansfield to juries, desiring them to read the paper stated to be a libel as men of common understanding, and say whether in their minds it conveys the idea imputed.' See *Woolnoth v. Meadows*, 5 East, 463.

(*m*) 1 Hawk. P. C. c. 73, s. 5. Bac. Abr. tit. *Libel* (A.) 3, where it is said in the marginal note that if an application is made for an information in a case of this kind, some friend to the party complaining should, by affidavit, state the having read the libel, and understanding and believing it to mean the party. See *Du Bost v. Beresford*, 2 Campb. 512.

An indictment lies for general imputations on a body of men, though no individuals be pointed out,¹ because such writings have a tendency to inflame and disorder society, and are therefore within the cognizance of the law. (n) And scandal published of three or four persons is punishable on the complaint of one or more, or all of them. (o)

It appears to have been considered that the remedies by action and indictment for libels are co-extensive, and may be regarded as upon the same footing. (p)

Formerly, upon an indictment or criminal prosecution for a libel the party could not justify that its contents were true. But the 6 & 7 Vict. c. 96, permits a defendant to plead to any indictment or information for a defamatory libel that the libellous matters are true, provided it was for the public benefit that such matters should be published. (q) The ground of the former rule, which still exists where no such plea is pleaded, is, in the case of libels against religion, morality, or the constitution, the *public mischief*, which libels are calculated to create in alienating the minds of the people from religion and good morals, and rendering them hostile to the government and magistracy of the country; and, where particular individuals are attacked, in causing such irritation in their minds as may induce them to commit a breach of the public peace. A libel against an individual may consist in the exposure of some personal deformity, the actual existence of which would only show the greater malice in the defendant; and even if it contain charges of misconduct founded in fact, the publication will not be the less likely to produce a violation of the public tranquillity. It has been observed, that the greater appearance of truth there may be in any malicious invective, it is so much the more provoking; and that, in a settled state of government, the party grieved ought to complain, for every injury done to him, in the ordinary course of law, and not by any means to avenge himself by the odious proceeding of a libel. (r) See further as to this, *post*, p. 626.

A party will not be excused by showing that the libel with which he is charged was copied from some other work, even though he may

(n) *Holt on Libel*, 237. See *Le Fanu v. Malcomson*, 1 H. L. 637, *post*.

(o) *Id. ibid.* In *R. v. Benfield*, 2 Burr. 980, it was held that an information lay against two for singing a libellous song on A. and B., which first abused A. and then B. And it was said that if the defendants had sung separate stanzas, the one reflecting on A. and the other on B., the offence would still have been entire. See *R. v. Jenour*, 7 Mod. 400.

(p) *Starkie on Libel*, 150, 165, 550, 1st edit. *Holt on Libel*, 215, 216. *Bradley v. Methuen*, 2 Ford's MS. 78. This must be understood, however, of cases where the libel, from its nature and subject, inflicts a private injury, and not of those cases in which the public only can be said to be affected by the libel.

(q) See the Act, *post*, p. 647.

(r) 1 Hawk. P. C. c. 73, s. 6. *Bac. Abr. tit. Libel* (A.) 5. 4 *Blac. Com.* 150, 151. 2 *Starkie on Libel*, 251, *et seq.* *Holt on Libel*, 275, *et seq.* But whilst the truth was no justification in a criminal prosecution, yet in many instances it was considered as an extenuation of the offence; and the Court of King's Bench has laid down this general rule, that it will not grant an information for a libel unless the prosecutor who applies for it makes an affidavit asserting directly and pointedly that he is innocent of the charge imputed to him. This rule, however, may be dispensed with if the person libelled resides abroad, or if the imputations of the libel are general and indefinite, or if it is a charge against the prosecutor for language which he has held in Parliament. 4 *Blac. Com.* 151, note (6). *Dougl.* 271, 372. *R. v. Aunger*, 12 Cox, C. C. 407.

AMERICAN NOTE.

¹ The same has been held in America. See *Bishop ii. s. 934*; *S. v. Boogher*, 3 Mo.

Ap. 442; *Brennan v. Tracey*, 2 Mo. *Ap.* 540.

have stated it to be merely a copy, and disclosed the name of the original author at the time of its publication. (s)

A wife cannot take criminal proceedings against her husband for defamatory libel. (ss).

SEC. II.

Privileged Communications.

Petitions. — But there are some circumstances which will prevent a publication from being deemed libellous. A petition to the King to be relieved from doing what the King has directed the party to do, if *bonâ fide* and in respectful terms, is no libel, though it call in question the legality of the King's direction. James II. published a declaration of liberty of conscience and worship to all his subjects, dispensing with the oaths and tests prescribed by statutes 25 & 30 Car. II., and directed that it should be read two days in every church and chapel in the realm, and that the bishops should distribute it in their dioceses that it might be so read. The Archbishop of Canterbury and six bishops presented a petition to the King praying that he would not insist upon their distributing and reading it, principally because it was founded on such a dispensing power as had often been declared illegal in Parliament, and that they could not in prudence, honour, or conscience, so far make themselves parties to it as to distribute and publish it. This petition was treated as a libel: they were taken up and tried for it. The publication was proved; and Wright, C. J., and Allibone, J., thought it a libel: but Holloway and Powell, JJ., thought otherwise, there not being an ill intention of sedition in the bishops, and the object of their petition being to free themselves from blame in not complying with the King's command. The jury found them not guilty. (t)

It has been resolved that no false or scandalous matter contained in a petition to a committee of Parliament, or in articles of the peace exhibited to justices of peace, or in any other proceeding in a regular course of justice, will make the complaint amount to a libel; for it would be a great discouragement to suitors to subject them to public prosecution in respect of their applications to a court of justice. (u) Thus where the defendant, in a certain affidavit before the Court, had said that the plaintiff in a former affidavit against the defendant had sworn falsely, the Court held that this was not libellous; for in every dispute in a court of justice, where one by affidavit charges a thing

(s) *De Crespigny v. Wellesley*, 5 Bing. 392. 2 M. & P. 695. See *R. v. Sullivan*, 11 Cox, C. C. 44, (Irish); *R. v. Newman*, *post*; *M'Pherson v. Daniels*, 10 B. & C. 263; *Watkin v. Hall*, 37 L. J. Q. B. 125.

(ss) *R. v. Lord Mayor of London*, 16 Q. B. D. 772.

(t) *Case of the Seven Bishops*, 12 St. Tri. 183; and see *post*, as to communications made *bonâ fide*, and in the proper course of proceedings in courts of justice, &c.

(u) 1 Hawk. P. C. c. 73, s. 8. Bac. Abr. tit. *Libel* (A.) 4. And see the judgment of Holroyd, J., in *Hodgson v. Scarlett*, 1 B. & A. 232. It is holden by some that no want of jurisdiction in the court to which the complaint shall be exhibited will make it a libel; because the mistake of the court is not imputable to the party, but to his counsel; see 1 Hawk. P. C. c. 73, s. 8, 1 Starkie on Libel, 254, 2nd edit.

and the other denies it, the charges must be contradictory, and there must be affirmation of falsehood. (v) No presentment of a grand jury can be a libel, not only because persons who are supposed to be returned without their own seeking, and are sworn to act impartially, shall be presumed to have proper evidence for what they do, but also because it would be of the utmost ill consequence in any way to discourage them from making their inquiries with that freedom and readiness which the public good requires. (w) Where an action was brought against the president of a military court of inquiry for a libel contained in the minutes of such court, which had been delivered by the defendant to the commander-in-chief and deposited in his office, it was held that these minutes were a privileged communication, and properly rejected when tendered at the trial in proof of the alleged libel; and also that a copy of them had been properly rejected. (x) And where a court-martial, after stating in their sentence the acquittal of an officer against whom a charge had been preferred, subjoined thereto a declaration of their opinion, that the charge was malicious and groundless, and that the conduct of the prosecutor in falsely calumniating the accused was highly injurious to the service, it was held that the president of the court-martial was not liable to an action for a libel for having delivered such sentence and declaration to the judge-advocate; and Mansfield, C. J., in delivering his opinion, said: 'If it appear that the charges are absolutely without foundation, is the president of the court-martial to remain perfectly silent on the conduct of the prosecutor, or can it be any offence for him to state that the charge is groundless and malicious?' (y)

It having been reported that the plaintiff, an officer in the army, had made charges against his brother officers, the commander-in-chief directed that a court of inquiry should be assembled, who should inquire into the matter and report thereon to the commander-in-chief. A court was held, at which the defendant, an officer in the army, was required to attend as a witness. Being examined as a witness he gave *viva voce* evidence, and then handed in a paper containing in substance a repetition of his evidence, with some additions upon the subject, and this paper was received by the court. A report was made by the court to the commander-in-chief. The plaintiff applied for a court-martial upon the defendant for such his conduct towards the plaintiff. The application was not acceded to, and the plaintiff brought an action against the defendant, in respect of the written paper as a libel, and in respect of the *viva voce* evidence as slander. The judge at the trial ruled that the action would not lie if the verbal and written statements complained of were made by the defendant, being a military officer, in the course of a military inquiry in relation to the conduct of the plaintiff, he being also a military officer, and with reference to the subject of the inquiry, although the defendant had acted *malá fide*, and with actual malice, and without any reasonable and probable cause, and with

(v) *Astley v. Younge*, 2 Burr. 817. *Revis v. Smith*, 18 C. B. 126. *Henderson v. Broomhead*, 4 H. & N. 569, cases of malicious and false affidavits. See *Fitzjohn v. Mackinder*, 9 C. B. (N. S.) 505; *Doyle v. O'Doherty*, C. & M. 418.

(w) 1 Hawk. P. C. c. 73, s. 8. Bac. Abr. tit. *Libel* (A.).

(x) *Horne v. Lord F. C. Bentinck*, 4 Moore, 563.

(y) *Jekyll v. Sir John Moore*, 2 N. R. 341.

a knowledge that the statement made and handed in by him as aforesaid was false. A bill of exceptions having been tendered: Held, that this ruling as to the law was correct. Held, also, that the evidence of the defendant was but a parcel of the minutes of the proceedings of the Court, which, when reported and delivered to the commander-in-chief, was received and held by him on behalf of the sovereign, and as such was inadmissible in evidence. (z)

Proceedings in Parliament and courts of justice. — The members of the two houses of Parliament, by reason of their privilege, are not answerable at law for any personal reflections on individuals contained in speeches in their respective houses; for policy requires that those who are by the constitution appointed to provide for the safety and welfare of the public, should, in the execution of their high functions, be wholly uninfluenced by private considerations. (a)

Thus the actual proceedings in courts of justice and in Parliament are exempted from being deemed libellous; it becomes important to inquire in the next place how far the same privilege will be extended to communications of those proceedings to the public, made with impartiality and correctness.

In *Wason v. Walter*, 4 L. R. Q. B. 73, 38 L. J. Q. B. 34, Cockburn, C. J., in delivering the judgment of the Court said, that faithful and fair reports of the proceedings of courts of justice, though the character of individuals may incidentally suffer, are privileged, and that for the publication of such reports the publishers are neither criminally nor civilly responsible. (b) But a publication of the proceedings in a court of justice will not be protected unless it be a *true and honest* statement of those proceedings. (c) And it has been said that it must not be taken for granted that the publication of every matter which passes in a court of justice, however truly represented, is, under all circumstances and with whatever motive published, justifiable; and that such doctrine must be taken with grains of allowance. (d) And Lord Ellenborough, C. J., said, 'It often happens that circumstances necessary for the sake of public justice to be disclosed by a witness in a judicial inquiry are very distressing to the feelings of individuals on whom they reflect; and if such circumstances were afterwards wantonly published, I should hesitate to say that such unnecessary publication was not libellous merely because the matter had been given in evidence in a court of justice.' (e) In a subsequent case, not relating directly to this point, but to the publication of pro-

(z) *Dawkins v. Lord Rokeby*, 42 L. J. Q. B. 63, Ex. Ch. *et per Kelly*, C. B., no action lies against parties or witnesses for anything said or done, although falsely and maliciously, and without any reasonable or probable cause, in the ordinary course of any proceedings in a court of justice. Affirmed in *H. L.* 45, L. J. Q. B. 8.

(a) *Holt on Libel*, 190. 1 Starkie on Libel, 239. *R. v. Lord Abingdon*, 1 Esp. Rep. 226. By 4 Hen. 8, c. 3, members of Parliament are protected from all charges against them for anything said in either House; and this is further declared in the Bill of Rights, 1 Will. & M. st. 2, c. 2.

(b) See also *Curry v. Walter*, 1 Bos. &

Pull. 523. A defence that the matter complained of is so privileged, can be given in evidence under not guilty.

(c) *Waterfield v. The Bishop of Chester*, 2 Mod. 118. *R. v. Wright*, 8 T. Rep. 297, 298, per Lawrence, J. *Stiles v. Nokes*, 7 East, 493; *Wason v. Walter*, 38 L. J. Q. B. 34.

(d) By Lord Ellenborough, C. J., and Grose, J., in *Stiles v. Nokes*, 7 East, 503.

(e) *Ibid.* And see *R. v. Salisbury*, 1 Lord Raym. 341, that it is indictable to publish a scandalous petition to the House of Lords, or a scandalous affidavit made in a court of justice.

ceedings in Parliament, Bayley, J., said, 'It has been argued that the proceedings of courts of justice are open to publication. Against that, as an unqualified proposition, I enter my protest. Suppose an indictment for blasphemy, or a trial where indecent evidence was necessarily introduced; would every one be at liberty to poison the minds of the public, by circulating that which for the purposes of justice the Court is bound to hear? I should think not: and it is not true, therefore, that in all instances the proceedings of a court of justice may be published.' (f) This doctrine was recognised and acted upon in a later case. The defendant's husband had been convicted of publishing a blasphemous libel, after having in his defence at the trial used arguments and statements of a blasphemous and indecent description. His wife published the trial; and, upon showing cause against a rule for a criminal information, it was urged that she had a right to publish what actually took place in a court of justice; but the Court were clear she had not, if that statement contained anything seditious, blasphemous, or indecent: and the rule was made absolute. (g) And where it is allowable to publish what passes in a court of justice it is not essential that every word of the evidence, of the speeches, and of what was said by the judge, should be inserted; if the report is substantially a fair and correct report of what took place in a court of justice, it is privileged. (h) It may sometimes not be justifiable to publish everything a counsel says in the course of his speech, (i) but no action will lie against a barrister for words spoken by him in a cause, which are pertinent to the matter in issue. (j) And an attorney acting as an advocate has the same privilege. (k)

The party making the publication will not be justified, unless he confines himself to what actually passed in court. (l) Before the case of *Wason v. Walter* was decided, it was an established principle, upon which the privilege of publishing a report of *any* judicial proceedings was admitted to rest, that such report must be strictly confined to the actual proceedings in court, and must contain no defamatory observations or comments from any quarter whatever, in addition to what formed strictly and properly the legal proceedings. But perhaps it will now be considered that a fair comment upon any matter of public interest is privileged. (m)

Proceedings before magistrates, under the 11 & 12 Vict. c. 43, with respect to summary convictions and orders, in which, after both parties are heard, a final judgment is given, are strictly of a judicial nature, and the trial and the judgment may lawfully be made the subject of a printed report, if that report be impartial and correct; (n) and

(f) *R. v. Creevey*, 1 M. & S. 281.

(g) *R. v. Carlisle*, 3 B. & A. 167; *Steele v. Brannan*, 41 L. J. M. C. 85, where a report of proceedings in a court of justice was held not to be privileged, as the same was offensive to public decency.

(h) *Andrews v. Chapman*, 3 C. & K. 286, Lord Campbell, C. J. See *Smith v. Scott*, 2 C. & K. 580. *Hoare v. Silverlock*, 9 C. B. 20. See *Lewis v. Walter*, 4 B. & A. 645. As to publishing a judgment alone see *Macdougall v. Knight*, 17 Q. B. D. 636; 14 Ap. Cas. 194; 25 Q. B. D. 1.

(i) Per Bayley, J., *Flint v. Pike*, 4 B. & C. 473. 6 D. & R. 528. Per Holroyd, J., *ibid.* and per Tindal, C. J. *Roberts v. Brown*, 10 Bing. 519; *Saunders v. Mills*, 6 Bing. 213. S. C. 3 M. & P. 520; *R. v. Creevey*, 1 M. & Sel. 281.

(j) *Hodgson v. Scarlett*, 1 B. & Ald. 232.

(k) *Mackay v. Ford*, 5 H. & N. 792.

(l) *Delegal v. Highley*, 3 B. N. C. 950.

(m) *Delegal v. Highley*, 3 B. N. C. 950; *Lewis v. Clement*, 3 B. & A. 702.

(n) *Lewis v. Levy*, E. B. & E. 537.

the like privilege extends to the publication of proceedings taking place publicly before a magistrate on the preliminary investigation of a charge of an indictable offence, terminating in the discharge of the party charged, although there were several hearings, and separate publications as to each hearing; (o) and it has now been decided that the publication of such preliminary inquiries is lawful in all cases. (p) It was at one time said that such publications had a tendency to cause great mischief by perverting the public mind, and disturbing the course of justice. (q) And the Court of King's Bench has granted a criminal information for publishing in a newspaper a statement of the evidence given before a coroner's jury, accompanied with comments; although the statement was correct, and the party had no malicious motive in the publication. (r) But in *Wason v. Walter*, 38 L. J. Q. B. 34, Cockburn, C. J., whilst delivering the judgment of the Court, is reported to have said, 'Even in quite recent days, judges, in holding the publication of the proceedings of courts of justice lawful, have thought it necessary to distinguish what are called *ex parte* proceedings as a probable exception from the operation of the rule. Yet *ex parte* proceedings before magistrates, and even before this Court, as, for instance, applications for criminal informations, are published every day; but such a thing as an action or indictment, founded on a report of such an *ex parte* proceeding, is unheard of, and if any such action or indictment should be brought, it would probably be held that the true criterion of the privilege is not whether the report was, or was not, *ex parte*, but whether it was a fair and honest report of what had taken place, published simply with a view to the information of the public, and innocent of all intention to do injury to the reputation of the party affected.' And it has been more recently held that if the report of judicial proceedings is fair and impartial, the privilege is not taken away by the fact that the magistrate decided that he had no jurisdiction, or that the application was made *ex parte*. (s)

The examination of a prisoner in gaol by the registrar in bankruptcy, under the 101st section of the Bankruptcy Act, 1861, is a public judicial proceeding, and therefore a fair and correct report, without comment, of the examination is privileged, even though it may contain statements which injuriously affect the character of a third person. (t)

Proceedings at public meetings.—It was formerly held that a fair report in a newspaper of what takes place at a public meeting, if it contain matter defamatory of an individual, is not privileged, but by the Libel Act, 1888, (51 & 52 Vict. c. 64), s. 3, 'a fair and accurate report in any newspaper (u) of proceedings publicly heard before any

(o) Ibid.

(p) *Kimber v. Press Association*, 1893, 1 Q. B. 65.

(q) *R. v. Lee*, 5 Esp. 123. *R. v. Fisher*, 2 Campb. 563. *Duncan v. Thwaites*, 3 B. & C. 556. 5 D. & R. 447. *Delegal v. Highley*, 3 B. N. C. 950; but see the remarks in *Lewis v. Levy*, *supra*. The publication of a matter which was not brought before the magistrate in his judicial character, or in the regular discharge of his magisterial functions,

cannot be justified. *M'Gregor v. Thwaites* and another, 3 B. & C. 24; 4 D. & R. 695.

(r) *R. v. Fleet*, 1 Barn. & Ald. 379. See *East v. Chapman*, M. & M. 46. 2 C. & P. 570; *Charlton v. Watton*, 6 C. & P. 835; *R. v. Gray*, 10 Cox, C. C. 184.

(s) *Usill v. Hales*, 3 C. P. D. 319.

(t) *Ryalls v. Leader*, 35 L. J. Ex. 185; L. R. Ex. 296.

(u) 'The word "newspaper" shall mean any paper containing public news, intelli-

court exercising judicial authority shall, if published contemporaneously with such proceedings, be privileged, provided, that nothing in this section shall authorise the publication of any blasphemous or indecent matter.

By sec. 4. 'A fair and accurate report published in any newspaper of the proceedings of a public meeting, or (except where neither the public nor any newspaper reporter is admitted) of any meeting of a vestry, town council, school board, board of guardians, board or local authority formed or constituted under the provisions of any Act of Parliament, or of any committee appointed by any of the above-mentioned bodies, or of any meeting of any commissioners authorised to act by letters patent, Act of Parliament, warrant under the Royal Sign Manual, or other lawful warrant or authority, select committees of either House of Parliament, justices of the peace in quarter sessions assembled for administrative or deliberative purposes, and the publication at the request of any Government office or department, officer of State, commissioner of police or chief constable of any notice or report issued by them for the information of the public, shall be privileged, unless it shall be proved that such report or publication was published or made maliciously. Provided, that nothing in this section shall authorise the publication of any blasphemous or indecent matter. Provided also that the protection intended to be afforded by this section shall not be available as a defence in any proceeding if it shall be proved that the defendant has been requested to insert in the newspaper in which the report or other publication complained of appeared a reasonable letter or statement by way of contradiction or explanation of such report or other publication, and has refused or neglected to insert the same; Provided further, that nothing in this section contained shall be deemed or construed to limit or abridge any privilege now by law existing or to protect the publication of which is not for the public benefit.'

For the purposes of this section 'public meeting' shall mean any meeting *bonâ fide* and lawfully held for a lawful purpose and for the furtherance or discussion of any matter of public concern, whether the admission thereto be general or restricted.

By sec. 7. 'It shall not be necessary to set out in any indictment or other judicial proceeding instituted against the publisher of any obscene libel the obscene passages, but it shall be sufficient to deposit the book, newspaper, or other documents containing the alleged libel together with particulars showing precisely, by reference to pages, columns, and lines, in what part of the book, newspaper, or other document the alleged libel is to be found, and such particulars shall be deemed to form part of the record, and all proceedings may be taken thereon as though the passages complained of had been set out in the indictment or judicial proceedings.

By sec. 8 no criminal prosecution (v) shall be commenced against

gence, or occurrences, or any remarks or observations therein printed, for sale and published in England or Ireland periodically, or in parts or numbers, at intervals not exceeding twenty-six days between the publication of any two such papers, parts, or numbers. Also any paper printed in order

to be dispersed and made public weekly or oftener, or at intervals not exceeding twenty-six days, containing only or principally advertisements.' 44 & 45 Vict. c. 60, s. 1.

(v) This section seems not to apply to criminal informations for libel filed by the Court at the instance of private prosecutors.

any proprietor, (w) publisher, editor or any person responsible for the publication of a newspaper for any libel published therein without the order of a judge at Chambers being first had and obtained. Such application shall be made on notice to the person accused who shall have an opportunity of being heard against such application.

By sec. 9. 'Every person charged with the offence of libel before any court of criminal jurisdiction, and the husband or wife of the person so charged shall be competent, but not compellable witnesses on every hearing at every stage of such charge.'

If a report made by a medical officer of health to a vestry board, in pursuance of the Metropolitan Local Management Act (18 & 19 Vict. c. 120), contains libellous matter, a newspaper proprietor is not justified in publishing it. (y)

Reports of debates in Parliament.—The publication of a faithful report of a debate in either house of Parliament is privileged, so that the publisher is not responsible for defamatory statements made in the course of the debate so reported and published, and the publication of articles fairly commenting upon the debate so reported and published is equally privileged. (z) The printing and delivering a petition to members of a committee of the House of Commons, being according to the order of proceedings of Parliament and their committees, has been held to be justifiable. (a)

R. v. Yates, 11 Q. B. D. 750 ; 14 Q. B. D. 648. Such informations are, however, only granted at the suit of persons in some public office or position. The information would be refused to a foreigner, or to the representative of a deceased person. R. v. Labouchere, 12 Q. B. D. 320.

(w) By 44 & 45 Vict. c. 60, s. 1, 'The word "proprietor" shall mean and include as well the sole proprietor of any newspaper as also in the case of a divided proprietorship the persons who, as partners or otherwise, represent and are responsible for any share or interest in the newspaper as between themselves and the persons in like manner representing or responsible for the other shares or interests therein, and no other person.'

(y) Popham v. Pickburn, 7 H. & N. 891.

(z) Wason v. Walter, 38 L. J. Q. B. 34, *et per cur.*, "Our judgment will in no way interfere with the decisions that the publication of a single speech for the purpose or with the effect of injuring an individual will be unlawful, as was held in the cases of R. v. Lord Abingdon, 1 Esp. 225, and R. v. Creevey, 1 M. & S. 273. At the same time it may be as well to observe that we are disposed to agree with what was said in Davidson v. Duncan, 7 E. & B. 232, as to such a speech being privileged if *bonâ fide* published by a member for the information of his constituents. But whatever would deprive a report of the proceedings in a court of justice of immunity will equally apply to a report of proceedings in Parliament. We pass on to the second branch of this rule, which has reference to alleged misdirection in respect

of the second count of the declaration, which is founded on the article in the *Times*, commenting on the debate in the House of Lords; and the conduct of the plaintiff in preferring the petition which gave rise to it. We are of opinion that the direction given to the jury was perfectly correct. The publication of the debate having been justifiable, the jury were properly told that the subject was, for the reasons we have already adverted to, pre-eminently one of public interest, and therefore one on which public comment and observation might properly be made; and that consequently the occasion was privileged in the absence of malice. As to the latter, the jury were told that they must be satisfied that the article was an honest and fair comment on the facts; in other words, that, in the first place, they must be satisfied that the comments had been made with an honest belief in their justice; but that this was not enough, inasmuch as such belief might originate in the blindness of party zeal, or in personal or political aversion, that a person taking upon himself publicly to criticize and to condemn the conduct or motives of another must bring to the task not only an honest sense of justice, but also a reasonable degree of judgment and moderation, so that the result may be what a jury shall deem under the circumstances of the case a fair and legitimate criticism on the conduct and motives of the party who is the object of censure. See *Henwood v. Harrison*, 41 L. J. C. P. 206.

(a) *Lake v. King*, 1 Saund. 131. See the judgment of Lord Ellenborough, C. J., in R. v. Creevey, 1 M. & S. 278.

It was decided upon demurrer in a case, which underwent great consideration, that it is no defence in law to an action for publishing a libel, that the defamatory matter is part of a document which was, by order of the House of Commons, laid before the House, and thereupon became part of the proceedings of the House, and which was afterwards, by orders of the House, printed and published by the defendant; and that the House of Commons had theretofore resolved, 'that the power of publishing such of its reports, votes, and proceedings, as it shall deem necessary or conducive to the public interests, is an essential incident to the constitutional functions of Parliament, more especially to the Commons' House of Parliament, as the representative portion of it.' (b)

In consequence of this decision the 3 & 4 Vict. c. 9 was passed, which by Sec. 1, reciting, 'whereas it is essential to the due and effectual exercise and discharge of the functions and duties of Parliament, and to the promotion of wise legislation, that no obstructions or impediments should exist to the publication of such of the reports, papers, votes, or proceedings of either House of Parliament as such House of Parliament may deem fit or necessary to be published: And whereas obstructions or impediments to such publication have arisen, and hereafter may arise, by means of civil or criminal proceedings being taken against persons employed by or acting under the authority of the Houses of Parliament, or one of them, in the publication of such reports, papers, votes, or proceedings; by reason and for remedy whereof it is expedient that more speedy protection should be afforded to all persons acting under the authority aforesaid, and that all such civil or criminal proceedings should be summarily put an end to and determined in manner hereinafter mentioned:' enacts, 'that it shall and may be lawful for any person or persons who now is or are, or hereafter shall be, a defendant or defendants in any civil or criminal proceeding commenced or prosecuted in any manner soever, for or on account or in respect of the publication of any such report, paper, votes, or proceedings by such person or persons, or by his, her, or their servant or servants, by or under the authority of either House of Parliament, to bring before the Court in which such proceeding shall have been or shall be so commenced or prosecuted, or before any judge of the same (if one of the superior Courts of Westminster), first giving twenty-four hours' notice of his intention so to do to the prosecutor or plaintiff in such proceeding, a certificate under the hand of the Lord High Chancellor of Great Britain, or the Lord Keeper of the Great Seal, or of the Speaker of the House of Lords, for the time being, or of the Clerk of the Parliaments, or of the Speaker of the House of Commons, or of the Clerk of the same House, stating that the report, paper, votes, or proceedings, as the case may be, in respect whereof such civil or criminal proceeding shall have been commenced or prosecuted, was published by such person or persons,

(b) *Stockdale v. Hansard*, 9 A. & E. 1, 2 P. & D. 1. See *Wason v. Walter*, *supra*, per Cockburn, C. J.; *Henwood v. Harrison*, 41 L. J. C. P. 206, per Willes, J., 'By 39 Geo. 3, c. 79, (An Act for the more effectual suppression of societies established for seditious and treasonable purposes; and for

better preventing treasonable and seditious practices) s. 28, nothing in this Act contained shall extend or be construed to extend to any papers printed by the authority and for the use of either House of Parliament.' See 32 & 33 Vict. c. 24.

or by his, her, or their servant or servants, by order or under the authority of the House of Lords or of the House of Commons, as the case may be, together with an affidavit verifying such certificate; and such court or judge shall thereupon immediately stay such civil or criminal proceeding, and the same, and every writ or process issued therein, shall be and shall be deemed and taken to be finally put an end to, determined and superseded by virtue of this Act.' (c)

Sec. 2. 'In case of any civil or criminal proceeding hereafter to be commenced or prosecuted for or on account or in respect of the publication of any copy of such report, paper, votes, or proceedings, it shall be lawful for the defendant or defendants at any stage of the proceedings to lay before the court or judge such report, paper, votes, or proceedings, and such copy, with an affidavit verifying such report, paper, votes, or proceedings, and the correctness of such copy, and the court or judge shall immediately stay such civil or criminal proceeding, and the same, and every writ or process issued therein, shall be and shall be deemed and taken to be finally put an end to, determined, and superseded by virtue of this Act.'

Sec. 3. 'It shall be lawful in any civil or criminal proceeding to be commenced or prosecuted for printing any extract from or an abstract of such report, paper, votes, or proceedings, to give in evidence under the general issue such report, paper, votes, or proceedings, and to show that such extract or abstract was published *bonâ fide* and without malice; and if such shall be the opinion of the jury a verdict of not guilty shall be entered for the defendant or defendants.'

Sec. 4. 'Nothing herein contained shall be deemed or taken, or held or construed, directly or indirectly, by implication or otherwise, to affect the privileges of Parliament in any manner whatsoever.'

Fair Criticism. — A publication commenting upon a literary work, exposing its follies and errors, and holding up the author to ridicule, will not be deemed a libel, provided such comment does not exceed the limits of fair and candid criticism, by attacking the character of the writer, unconnected with his publication. (d) But if a person under the pretence of criticising a literary work, defames the private character of the author, and, instead of writing in the spirit and for the purpose of fair and candid discussion, travels into collateral matter, and introduces facts not stated in the work, accompanied with injurious comments upon them, such person is a libeller. (e) So if a reviewer imputes base, sordid, dishonest, and wicked motives, it is no answer that the reviewer published only what he believed was correct and true. (f) A fair and candid comment on a place of public enter-

(c) The Act is imperative upon the Court to stay proceedings. *Stockdale v. Hansard*, 11 A. & E. 297. 3 P. & D. 346.

(d) *Carr v. Hood*, 1 Campb. 355. And in an action for a libel upon the plaintiff in his business of a bookseller, accusing him of being in the habit of publishing immoral and foolish books, the defendant, under the plea of not guilty, may adduce evidence to show that the supposed libel is a fair stricture upon the general run of the plaintiff's publications. *Tabart v. Tipper*, 1 Campb. 350; *Strauss v. Francis*, 4 F. & F. 1107. If the plaintiff contends that the

alleged libel exceeds the limits of fair criticism, he should, unless the contrary appears on the face thereof, put in his work as part of his case (S. C. and see 4 F. & F. 939).

(e) *Nightingale v. Stockdale*, 49 Geo. 3, cor. *Ellenborough*, C. J. Selw. N. P. 1044. It is lawful to animadvert upon the conduct of a bookseller in publishing books of an improper tendency. *Tabart v. Tipper*, 1 Campb. 354. And see *Herriott v. Stuart*, 1 Esp. 437, and *Stuart v. Lovell*, 2 Stark. R. 93.

(f) *Campbell v. Spottiswoode*, 31 L. J. Q. B. 185. 3 B. & S. 769.

tainment, in a newspaper, is not a libel. (*g*) And there is no distinction between a handbill, circular, or advertisement of a tradesman and a book; both are literary productions, and are addressed to the public, and both are subject to such comments as do not exceed the bounds of fair and reasonable criticism. (*h*)

It has been doubted whether the preaching a sermon, in the ordinary mode of a clergyman's duty, makes it public property, so as to allow observations upon it in the same way that a publication of a literary work does. (*i*)

A fair comment in a newspaper upon the conduct of a person attending a meeting,¹ held for the purpose of hearing a candidate at a parliamentary election, was held to be privileged. (*j*)

Confidential communications. — Confidential communications are in some cases privileged: as where it was holden that a letter written confidentially to persons who employed A. as their solicitor, conveying charges injurious to his professional character in the management of certain concerns which they had entrusted to him, and in which B., the writer of the letter, was likewise interested, was not a libel. (*k*) And if a person, in a private letter to the party, should expostulate with him about some vices, of which he apprehends him to be guilty, and desire him to refrain from them; or if a person should send such a letter to a father, in relation to some faults of his children; these, it seems, would not be considered as libellous, but as acts of friendship, not designed for defamation but reformation. (*l*) But this doctrine must be applied with some caution; since the sending an abusive letter filled with provoking language to another, is an offence of a public nature, and punishable as such, inasmuch as it tends to create ill blood, and cause a disturbance of the public peace; (*m*) and the reason assigned by Lord Bacon, why such private letter should be punishable, seems to be a very sufficient one, namely, that it enforces the party to whom the letter is directed to publish it to his friends, and thus induces a compulsory publication. (*n*) And though a letter written by a master, in giving a character of a servant, will not be libellous, unless its contents be not only false but malicious; (*o*) yet

(*g*) *Dibden v. Swan*, 1 Esp. N. P. C. 28; and see also *Ashley v. Harrison*, 1 Esp. N. P. C. 48. *Peake*, N. P. C. 194.

(*h*) *Paris v. Levy*, 9 C. B. (N. S.) 342.

(*i*) *Gathercole v. Miall*, 15 M. & W. 319. See *Kelly v. Tinling*, 35 L. J. Q. B. 231, noticed *post*.

(*j*) *Davies v. Duncan*, 43 L. J. C. P. 185.

(*k*) *M'Dougall v. Claridge*, 1 Campb. 267. *Wright v. Woodate*, 1 T. & G. 12.

(*l*) *Peacock v. Sir George Reynell*, 2 Brownl. 151, 152. *Bac. Abr. tit. Libel (A.)* 2, in the notes.

(*m*) *Bac. Abr. tit. Libel (B.)* 2. *R. v.*

Cator, 2 East, R. 361. *Thorley v. Lord Kerry*, 4 Taunt. 355. In the last case the letter was unsealed, and opened and read by the bearer.

(*n*) *Poph.* 189, cited in *Holt on Libel*, 222.

(*o*) *Weatherstone v. Hawkins*, 1 T. R. 110. *Edmondson v. Stephenson*, Bull. N. P. 8. *Child v. Affleck*, 9 B. & C. 403. 4 M. & R. 338. *Manby v. Witt*, 18 C. B. 544. *Taylor v. Hawkins*, 16 Q. B. 303. *Somerville v. Hawkins*, 10 C. B. 533. *Gardener v. Slade*, 13 Q. B. 796. *Croft v. Stevens*, 6 H. & N. 570.

AMERICAN NOTE.

¹ It would seem that in America "it is the duty of all good citizens to communicate to the voters" (at an election) "information

concerning his" (the candidate's) "fitness, and the newspaper is the proper channel." *Bishop ii. s. 937 (5).*

in such a case malice may be inferred from the circumstances. (*p*) But where a tradesman's wife being informed that one of the female assistants was dishonest wrote her a letter accusing her of theft and reproaching her, Huddleston, B., held the occasion privileged, and said that if the prisoner honestly believed what she wrote, the manner in which she expressed herself ought not to be too nicely criticised. (*pp*)

Where a writer is acting on any duty, legal or moral, towards the person to whom he writes, or where he has by his situation to protect the interests of another, that which he writes under such circumstances is a privileged communication, if he writes it *bonâ fide*. If, therefore, a tenant be desired by his landlord to make communications to him in respect of any neglect of duty in his gamekeepers, any communication made by him in respect of any such neglect of duty is privileged, if written *bonâ fide*, and on the supposition that he was doing his duty to his landlord. (*q*) The plaintiff was the agent of the defendants, a trading company, and it was part of his duty to furnish them with an account of his transactions, to enable them to prepare the balance-sheet for the inspection of the shareholders. This balance-sheet was prepared and duly referred to the auditors, who reported that there was a deficiency, for which the plaintiff was responsible, and that his accounts had been badly kept. There was evidence that an explanation had been offered to the auditors, which they had disregarded, but no evidence that the directors had any knowledge of this explanation. The directors, after laying the accounts before a general meeting of the shareholders, caused a letter containing the part of the report which affected the character of the plaintiff to be printed and forwarded to the absent shareholders: Held, first, that this letter was published on a privileged occasion, as it was the duty of the defendants to communicate to all the shareholders any part of the report of the auditors which materially affected the accounts of the company; secondly, that there was no intrinsic or extrinsic evidence of malice to be left to the jury, as the report of the auditors was published without comment, and the explanations offered to the auditors did not come before the defendants; and that causing the letter to be printed was a reasonable and necessary mode of publishing it to the absent shareholders. (*r*)

If a man *bonâ fide* writes a letter in his own defence, and for the defence of his rights and interests, and is not actuated by any malice, that letter is privileged, although it may impute dishonesty to another. (*s*)

A letter published by an attorney honestly in vindication of the character of a client against charges published and circulated against the client by the prosecutor, is privileged. (*t*)

Sending defamatory matter by a post-office telegram is an unauthorized publication which prevents a communication from being privileged

(*p*) *Rogers v. Sir G. Clifton*, 3 Bos. & Pul. 587. *Patteson v. Jones*, 8 B. & C. 578. 3 M. & R. 101. *Kelly v. Partington*, 4 B. & Ad. 700. 2 Nev. & M. 460.

(*pp*) *R. v. Perry*, 15 Cox, C. C. 169.

(*q*) *Cockayne v. Hodgkinson*, 5 C. & P. 543, Parke, B.

(*r*) *Lawless v. The Anglo-Egyptian Cotton and Oil Company*, 38 L. J. Q. B. 129.

(*s*) *Coward v. Wellington*, 7 C. & P. 531. *Littledale, J.*, see *Whiteley v. Adams*, *infra*.

(*t*) *R. v. Velej*, 4 F. & F. 1117.

though made *bonâ fide*, and under circumstances which otherwise would have made it privileged. (*u*)

Any one, in the transaction of business with another, has a right to use language *bonâ fide*, which is relevant to that business, and which a due regard to his own interest makes necessary, even if it should directly or by its consequences be injurious or painful to another; and this is the principle upon which privileged communication rests; but defamatory comments on the motives or conduct of the party with whom he is dealing do not fall within that rule. (*v*) But the privilege, which protects a communication, must result from a right to discuss the particular matter in respect of which the alleged libel is published; nothing else can be privileged. Where, therefore, remarks were made reflecting on a Roman Catholic priest at a public meeting called for the purpose of petitioning Parliament against the grant to the Roman Catholic College at Maynooth, it was held that the speaker was not justified by the circumstance that the libel was published in the course of a *bonâ fide* discussion respecting the propriety of supporting that college. (*w*)

Communications in discharge of a duty.—Although that which is written may be injurious to the character of another, yet if done *bonâ fide*, or with a view of investigating a fact in which the party making it is interested, it is not libellous. Thus where an advertisement was published by the defendant at the instigation of A., the plaintiff's wife, for the purpose of ascertaining whether the plaintiff had another wife living when he married A., it was holden that although the advertisement might impute bigamy to the plaintiff, yet having been published under such authority, and with such a view, it was not libellous. (*x*)

A communication fairly made by a person in the discharge of some public (*y*) or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned, is a privileged communication. (*z*) And if the communication be made in the regular and proper course of a proceeding, it will not be libellous. As where a writing, containing the defendant's case, and stating that some money, due to him from the government for furnishing the guard at Whitehall with fire and candle, had been improperly obtained by a Captain C., was directed to a general officer and the four principal officers of the Guards, to be presented to his Majesty for redress, an information was refused, on the ground that the writing was no libel, but a representation of an injury drawn up in a proper way for redress, without any intention to asperse the prosecutor; and that

(*u*) *Williamson v. Frere*, 43 L. J. C. P. 161.

(*v*) *Per curiam*, *Tuson v. Evans*, 12 A. & E. 733. See *Whiteley v. Adams*, 33 L. J. C. P. 89; 15 C. B. N. S. 392.

(*w*) *Hearne v. Stowell*, 12 A. & E. 719.

(*x*) *Delany v. Jones*, 4 Esp. 191. *Lay v. Lawson*, 4 A. & E. 795.

(*y*) *Henwood v. Harrison*, 41 L. J. M. C. 206.

(*z*) *Toogood v. Spyring*, 4 Tyrw. 582. 1 C. M. & R. 181. See *Spencer v. Amerton*, 1 M. & Rob. 470. *Warren v. Warren*, 4 Tyrw.

850. 1 C. M. & R. 150. *Wright v. Woodgate*, 2 C. M. & R. 573. 1 T. & G. 12. *Coxhead v. Richards*, 2 C. B. 569. When the occasion is privileged the burden of proof is on the plaintiff to show that the defendant did not honestly believe his statements to be true. If he did honestly believe them to be true the defendant can claim privilege although he had no reasonable grounds for such belief. *Clark v. Molyneux*, 8 Q. B. D. 237; 47 L. J. Q. B. 230. But see 6 & 7 Vict. c. 96, s. 6; *post*, p. 648.

though there was a suggestion of fraud, yet that is no more than is contained in every bill in Chancery, which is never held libellous if relative to the subject-matter. (a) So a petition addressed by a creditor of an officer in the army to the Secretary-at-War, *bonâ fide*, and with the view of obtaining, through his interference, the payment of a debt due, and containing a statement of facts which, though derogatory to the officer's character, the creditor believed to be true, is not a malicious libel for which an action is maintainable. (b) A letter written to the Postmaster-General, or to the Secretary to the General Post-Office, complaining of misconduct in a postmaster, or guard of a mail, is not a libel, if it was written as a *bonâ fide* complaint to obtain redress for a grievance that the party really believed he had suffered. (c) And where the defendant being deputy-governor of Greenwich Hospital, wrote a large volume, containing an account of the abuses of the hospital, and treating the characters of many of the officers of the hospital (who were *public* officers), and Lord Sandwich in particular, who was First Lord of the Admiralty, with much asperity, and printed several copies of it, which he distributed to the governors of the hospital only, and not to any other person, the rule for an information was discharged. Lord Mansfield said, that this distribution of the copies to the persons only who were from their situations called on to redress these grievances, and had, from their situations, competent power to do it, was not a publication sufficient to make the writing a libel. (d) Where, however, the defendant wrote a letter to the Secretary of State, imputing to the town clerk and clerk to the justices of a borough, corruption in the latter office, it was held that this was not privileged, because the Secretary of State had no direct authority in respect of the matter complained of, and was not a competent tribunal to receive the application. (e) But a memorial presented to the Secretary of State for the Home Department by the elector of a borough complaining of the conduct of a justice of the peace during a recent election of a Member of Parliament for the borough, and imputing that he had made speeches inciting to a breach of the peace, and praying that the secretary would cause an inquiry to be made into the conduct of the plaintiff, and that, on the allegations being substantiated, the secretary would recommend to the Queen that the justice should be removed from the commission of the peace, is a privileged communication; for though the Lord Chancellor generally is consulted as to the removal of justices of the peace, the memorial might be considered as addressed to the Queen, through the secretary, who might have caused the inquiry to be made, have communicated with the Lord Chancellor, and have,

(a) *R. v. Bayley*, Andr. 229, Bac. Abr. tit. *Libel* (A.) 2. As to the privilege of proceedings in courts of justice, see *ante*, p. 600.

(b) *Fairman v. Ives*, 5 B. & A. 642. See per Maule, J., in *Wenman v. Ash*, 13 C. B. 836.

(c) *Woodward v. Lander*, 6 C. & P. 548. Alderson, B. *Blake v. Pilford*, 1 M. & Rob. 198, Taunton, J.

(d) *R. v. Baillie*, 30 Geo. 3. Holt on Libel, 173. 1 Ridgway's Collection of Erskine's Speeches, p. 1. Lord Mansfield

seemed to think that whether the paper were in manuscript or printed, under these circumstances, made no difference.

(e) *Blagg v. Sturt*, 10 Q. B. 899. This case was much considered in *Harrison v. Bush*, *infra*, and may, perhaps, be shaken by it. The cases, however, are distinguishable, as the clerk to justices of the peace is appointed by them, and a Secretary of State has no authority as to him, either directly or indirectly.

in effect, recommended the removal of the justice. (*f*) And where the publication is an admonition, or in the course of the discipline of a religious sect, as the sentence of expulsion from a society of Quakers, it is not libellous. (*g*) So a letter written by a son-in-law to his mother-in-law, containing imputations on the character of a person whom she was about to marry, and desiring a diligent and attentive inquiry into his character, if written *bonâ fide*, is a privileged communication. (*h*) And it has been decided, that an action will not lie for words innocently read as a story out of a book, however false and defamatory they may be. Thus, where a clergyman in a sermon recited a story out of *Fox's Martyrology*, that one G., being a perjured person, and a great persecutor, had great plagues inflicted upon him, and was killed by the hand of God; whereas in truth he never was so plagued, and was himself actually present at the discourse, the words being delivered only as matter of history, and not with any intention to slander, it was adjudged for the defendant. (*i*)

To a declaration in an action for libel, setting out letters written of and concerning the plaintiff, the defendant pleaded, in substance, that when he wrote the letters he was the superior military officer of the plaintiff, and that it was his duty, as such superior officer, to forward to the Adjutant-General letters written by the officers under his command, and sent to him in relation to their military conduct, &c., and to make reports in writing to the Adjutant-General upon such letters for the information of the Commander-in-Chief; that he (defendant) had received such letters from the plaintiff, and had forwarded them in the ordinary course of his military duty as such superior military officer to the Adjutant-General as an act of military duty and not otherwise, and had made certain reports in writing, &c., which letters and reports were the libels complained of. To this plea the plaintiff replied that 'the said words in the declaration mentioned were written and published by the defendant of actual malice on his [the defendant's] part, and without reasonable, probable, or justifiable cause, and not *bonâ fide* or in the *bonâ fide* discharge of the defendant's duty as such superior officer, as in the said second plea alleged:'. Held, by Mellor and Lush, JJ., that even though the words complained of were published of actual malice, and without any reasonable, probable, or justifiable cause, as alleged in the replication, yet that, inasmuch as the question raised was one purely of military cognizance, the plaintiff and the defendant being officers in the army, and both bound by the Articles of War, the plaintiff had no remedy at law: Held, by Cockburn, C. J., that the plaintiff was entitled to judgment. (*j*)

The Board of Admiralty having ordered the defendant, the Queen's printer, to print a board minute relating to their proceedings in naval ship-building, which contained a letter of the Comptroller of the Navy in reference to plans of the plaintiff submitted to the board, the de-

(*f*) *Harrison v. Bush*, 5 E. & B. 344; *Dickeson v. Hilliard*, 43 L. J. Ex. 37.

(*g*) *R. v. Hart*, 2 Burn's Ecc. L. 779. The charge of a bishop to his clergy in convocation is a privileged communication. *Laughton v. The Bishop of Sodor and Man*, 42 L. J. P. C. 11.

(*h*) *Todd v. Hawkins*, 8 C. & P. 88, Alderson, B.

(*i*) Bac. Ab. *Libel* (A.) 2.

(*j*) *Dawkins v. Paulet*, 32 L. J. Q. B. 53. See *Dawkins v. Lord Rokeby*, 42 L. J. Q. B. 63.

fendant sold copies to the public; the plaintiff brought his action of libel against the defendant, averring that a statement in such letter that the plans derived no weight from his antecedents, meant that his plans were worthless, and were calculated to injure him in his profession; no actual malice was imputed: Held, by the majority (Willes, Byles, and Brett, JJ.) of the Court (*dissentiente*, Grove, J.), that the plaintiff was rightly non-suited on the ground that every man has a right to discuss freely, if honestly and without malice, any subject in which the public are generally interested, and that what the defendant had done merely amounted to this. (*k*)

Comments by a churchwarden upon the conduct of the clergymen, in taking meals in the vestry, and in causing books to be sold in the church during service, are matters of public interest, and may lawfully be published if they do not exceed the boundaries of fair criticism. (*l*)

The proper meaning of a privileged communication is this: that the occasion on which the communication was made rebuts the inference, *prima facie*, arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact; that the defendant was actuated by motives of personal spite or ill will, independent of the occasion on which the communication was made. This may be made out either from the language of the letter itself, or by extrinsic evidence, or by proof of the conduct or expressions of the defendant, showing that he was actuated by a motive of personal ill will. (*m*) But where the publication is *prima facie* privileged, juries ought not to look too strictly at the particular expressions used, but ought clearly to see that the letter was written with a malicious intent before they find it to be a libel. (*n*)

It is matter of law for the judge to determine whether the occasion of writing or speaking criminary language repels the inference of malice, constituting what is called a privileged communication; and if at the close of the case for the prosecution there is no intrinsic or extrinsic evidence of malice, it is the duty of the judge to direct a verdict for the defendant; but wherever there is evidence of malice, either intrinsic or extrinsic, it is the duty of the judge to leave the question of express malice to the jury. (*o*) But where a communication is *prima facie* privileged, in order to leave the question of malice to the jury, it is not enough that the facts proved are consistent with the presence of malice as well as with its absence; for actual malice must be proved, and therefore its absence must be presumed until such proof is given. (*p*) Where a letter containing defamatory words is written upon a privileged occasion, surrounding circumstances are to be considered by the judge at the trial in determining whether the

(*k*) *Henwood v. Harrison*, 41 L. J. C. P. 206.

(*l*) *Kelly v. Tinling*, 35 L. J. Q. B. 231.

(*m*) *Wright v. Woodgate*, 2 C. M. & R. 573. 1 T. & Gr. 12. See *Blake v. Pilfold*, 1 M. & Rob. 198, Taunton, J. *Blagg v. Sturt*, 10 Q. B. 899.

(*n*) *Woodward v. Lander*, 6 C. & P. 548, Alderson, B. *Todd v. Hawkins*, 8 C. & P. 88.

(*o*) *Cooke v. Wildes*, 5 E. & B. 328. *Gilpin v. Fowler*, 9 Exc. R. 615.

(*p*) *Somerville v. Hawkins*, 10 C. B. 588. *Taylor v. Hawkins*, 16 Q. B. 308. *Harris v. Thompson*, 13 C. B. 333. *Wenman v. Ash*, 13 C. B. 836; *Wason v. Walter*, 38 L. J. Q. B. 41, per Cockburn, C. J.; *Hart v. Von Gumpack*, 43 L. J. P. C. 25.

words used are so much too violent for the occasion as to rebut the presumption of the absence of malice arising from the privilege of the occasion; and if from surrounding circumstances it appears that the words are capable of two constructions, one of which is compatible with the absence of malice, then the presumption of the absence of malice which existed in the first instance from the privilege of the occasion should be allowed to prevail throughout. (*q*)

SEC. III.

*Publications against the Christian Religion.*¹

Of publications against the Christian religion.—1. It has been before observed, (*r*) that blaspheming God, or turning the doctrines of the Christian religion into contempt and ridicule, is an indictable offence. At common law, all blasphemies against God, as denying His being or providence; and all contumelious reproaches of Jesus Christ; all profane scoffing at the Holy Scripture, or exposing any part thereof to contempt or ridicule; and also seditious words in derogation of the established religion,—are considered as offences tending to subvert all religion and morality, and punishable by the temporal courts with fine and imprisonment, and also infamous corporal punishment in the discretion of the Court. (*s*)

Some provisions have also been made upon this subject by statutes. The 1 Edw. 6, c. 1, (*t*) enacts, that persons reviling the Sacrament of the Lord's Supper by contemptuous words or otherwise, shall suffer imprisonment. The 1 Eliz. c. 2, (*u*) enacts, that if any *minister* shall speak anything in derogation of the Book of Common Prayer, he shall, if not beneficed, be imprisoned one year for the first offence, and for life for the second; and if he be beneficed, shall for the first offence be imprisoned six months and forfeit a year's value of his benefice; for the second, shall be deprived and suffer one year's imprisonment; and for the third, shall in like manner be deprived and suffer imprisonment for life. And that if any person whatsoever shall in plays, songs, or other open words, speak anything in derogation, depraving, or despising of the said book, or shall forcibly prevent the reading of it, or cause any other service to be read in its stead, he shall forfeit for the first offence 100 marks; for the second, 400; and for the third, shall forfeit all his goods and chattels, and suffer imprisonment for life. The 1 Will. 3, c. 18, s. 17, enacted, that whosoever should deny in his preaching or writing the doctrine of the Blessed Trinity, should

(*q*) *Spill v. Maule*, 38 L. J. Ex. 188.

(*r*) *Ante*, p. 595.

(*s*) See *ante*, p. 595, and the cases collected in 1 Hawk. P. C. c. 5. *Gathercole's case*, 2 Lewin, 287.

(*t*) Repealed by 1 Mary c. 2, and revived by 1 Eliz. c. 1.

(*u*) Partly repealed by the 7 & 8 Vict. c. 102, and 9 & 10 Vict. c. 59, but not so as to affect the provisions here mentioned.

AMERICAN NOTE.

¹ See Bishop ii. s. 74. Various statutes have been passed in many States of America declaratory of the law, see s. 80, and pro-

fane swearing to such an extent as to become a public nuisance is also indictable in America.

lose all benefit of the Act for granting toleration. This section is now repealed by 53 Geo. 3, c. 160: but while it was in existence it was considered as operating to deprive the offender of the benefit therein mentioned, leaving the punishment of the offence as for a misdemeanor at common law. (*v*) The 9 & 10 Will. 3, c. 32, enacted, that, if any person, educated in or having made profession of the Christian religion, should, by writing, printing, teaching, or advised speaking, deny any one of the Persons in the Holy Trinity to be God, (*w*) or should assert or maintain there are more gods than one, or should deny the Christian religion to be true, or the Holy Scriptures to be of divine authority, he should upon the first offence be rendered incapable to hold any office or place of trust; and for the second be rendered incapable of bringing any action, being guardian, executor, legatee, or purchaser of lands, and should suffer three years' imprisonment without bail. (*x*) A person offending under this statute was held to be also indictable at common law. (*y*) And where a motion was made in arrest of judgment on an information for a blasphemous libel, on the ground that this statute had put an end to the common law offence: the Court were clear that it had not, considering that the provisions of the statute were cumulative. (*z*)

Upon the trial of an information against the defendant for uttering expressions grossly blasphemous, Hale, C. J., observed, that such kind of wicked blasphemous words were not only an offence to God and religion, but a crime against the laws, state, and government, and therefore punishable in the Court of King's Bench. That to say religion is a cheat is to dissolve all those obligations whereby civil society is preserved; that Christianity is part of the laws of England, and therefore to reproach the Christian religion is to speak in subversion of the law. (*a*) In a case where a libel stated that Jesus Christ was an impostor, a murderer in principle, and a fanatic, a jurymen asked whether a work denying the divinity of our Saviour was a libel; and Abbott, C. J., answered that a work speaking of Jesus Christ in the language here used was a libel; and on a motion for a new trial, on the ground that this was a wrong answer, the Court without difficulty held that the answer was right. (*b*)

Where the defendant had been convicted for publishing several blasphemous libels, in which the miracles of our Saviour were turned into ridicule and contempt, and His life and conversation calumniated, it was moved in arrest of judgment that this was not an offence within the cognizance of the temporal courts at common law; but the Court would not suffer the point to be argued, saying that the Christian religion, as established in this kingdom, is part of the law; and, therefore that whatever derided Christianity derided the law, and consequently must be an offence against the law. (*c*) It was also moved in

(*v*) By Lord Kenyon in *R. v. Williams*, 1797. *6 Holt on Libel*, 66.

(*w*) Repealed by the 53 Geo. 3, c. 160, s. 2, 'so far as the same relates to persons denying as therein mentioned respecting the Holy Trinity.'

(*x*) But the delinquent publicly renouncing his error in open court, within four months after the first conviction, is to be

discharged for that once from all disabilities.

(*y*) *Barnard*, 162. 2 Str. 834. *Fitzgib.* 64. *R. v. Williams*, 1797. *R. v. Caton*, 1812.

(*z*) *R. v. Carlisle*, 3 B. & A. 161.

(*a*) *R. v. Taylor*, Vent. 293. 3 Keb. 607.

(*b*) *R. v. Waddington*, 1 B. & C. 26.

(*c*) *R. v. Woolston*, *Barnard*, 162. 2 Str. 834. *Fitzgib.* 64.

arrest of judgment, that as the intent of the book was only to show that the miracles of Jesus Christ were not to be taken in their literal sense, it could not be considered as attacking Christianity in general, but only as striking against one received proof of His being the Messiah; to which the Court said, that the attacking Christianity in the way in which it was attacked in this publication was destroying the very foundation of it; and that, though there were professions in the book that its design was to establish Christianity upon a true bottom by considering these narrations in Scripture as emblematical and prophetic, yet that such professions were not to be credited, and that the rule is *allegatio contra factum non est admittenda*. But the Court also said, that though to write against Christianity in general is clearly an offence at common law, they laid stress upon the word *general*, and did not intend to include disputes between learned men upon particular controverted points; and, in delivering the judgment of the Court, Raymond, C. J., said, 'I would have it taken notice of that we do not meddle with any differences of opinion, and that we interpose only where the very root of Christianity itself is struck at.' (d)

The doctrine of the Christian religion constituting part of the law of the land was recognized in a later case, where the judgment of the Court of King's Bench was pronounced upon a person convicted of having published a blasphemous libel, called *Paine's Age of Reason*. (e) Ashhurst, J., said, that, although the Almighty did not require the aid of human tribunals to vindicate His precepts, it was, nevertheless, fit to show our abhorrence of such wicked doctrines as were not only an offence against God, but against all law and government, from their direct tendency to dissolve all the bonds and obligations of civil society; and that it was upon this ground that the Christian religion constituted part of the law of the land. That if the name of our Redeemer was suffered to be traduced, and His holy religion treated with contempt, the solemnity of an oath, on which the due administration of justice depended, would be destroyed, and the law be stripped of one of its principal sanctions, the dread of future punishments. (f)

Contumely and contempt are what no establishment can tolerate: but, on the other hand, it would not be proper to lay any restraint upon rational and dispassionate discussions of the rectitude and propriety of the established mode of worship. (g) A sensible writer upon the subject of libel says, as to this point — 'that it may not be going too far to infer, from the principles and decisions, that no author or preacher who fairly and conscientiously promulgates the opinions with whose truth he is impressed, for the benefit of others, is, for so doing, amenable as a criminal; but a malicious and mischievous intention is in such case the broad boundary between right and wrong; and that if it can be collected, from the offensive levity with which so serious a subject is treated, or from other circumstances, that the act of the party was malicious, then, since the law has no means of distinguish-

(d) *R. v. Woolston*, Fitzgib. 66.

(e) This libel was of the worst kind, attacking the truth of the Old and New Testaments; arguing that there was no genuine revelation of the will of God existing in the world; and that reason was the only true faith which laid any obligations on the

conduct of mankind. In other respects also it ridiculed and vilified the prophets, our Saviour, His disciples, and the Sacred Scriptures.

(f) *R. v. Williams*, 1797. *Holt on Libel*, 69, note (e). 2 *Starkie on Libel*, 141.

(g) 4 *Blac. Com.* 51.

ing between different degrees of evil tendency, if the matter published contain any such tendency, the publisher becomes amenable to justice.' (*h*) It is a question for the jury whether or not the words amount to a blasphemous libel. The wilful intention to insult and mislead others by means of licentious and contumelious abuse offered to sacred subjects or by wilful misrepresentations or wilful sophistry calculated to mislead the ignorant and unwary, is the criterion and test of guilt. A malicious and mischievous intention, or what is equivalent to such an intention in law as well as morals — a state of apathy and indifference to the interests of society — is the broad boundary between right and wrong. (*i*) 'To asperse the truth of Christianity cannot *per se* be sufficient to sustain a criminal prosecution for blasphemy. To maintain that merely because the truth of Christianity is denied without more, therefore the person denying it may be indicted for blasphemous libel is, I venture to think, absolutely untrue. It is a view of the law which cannot be historically justified. Parliament, the supreme authority as to old law, has passed Acts which render the *dicta* of the judges in former times no longer applicable. And it is no disparagement to their authority to say that observations which were made under one state of the law are no longer applicable under a different state of things. As I observed before, I put it as a *reductio ad absurdum* that if it was enough to say that "Christianity was part of the law of the land," then there could be no discussion on any part of the law of the land, and it would be impossible, for example, to discuss in a grave argumentative way the question of a monarchical form of government, as Harrington discussed it in his "Oceana," without being liable to be indicted for a seditious libel. I was not aware that what I then put as a *reductio ad absurdum* had been judicially held, and that a man had actually been convicted of a seditious libel (*R. v. Sedford*, Gilbert's Rep. 297) for discussing such a question, his work containing, as the report states, no reflection upon the existing government. No judge or jury in our day would convict a man of seditious libel in such a case, — it would be regarded as monstrous. I have no doubt therefore that the mere denial of the truth of Christianity is not enough to constitute the offence of blasphemy. . . . Whatever the older cases may have been, the fact remains that Parliament has altered the law as to religion. It is no longer the law that none but believers in Christianity can hold office in the State. The state of things is no longer the same as when the older judgments were pronounced, — judgments, however, which have been strained, I think, beyond what they will justly warrant. . . . The defendants have admitted that these publications were intended to be attacks on Christianity and on the Hebrew Scriptures, and have cited a number of passages from approved writers which they say are to the same effect. That may be so . . . and I lay it down as law that if the decencies of controversy are observed, even the fundamentals of religion may be attacked without the writer being guilty of blasphemy. But no one can fail to see the difference between the works of the writers who have been quoted and the language used in the publications now before us, and I am obliged to say that it is different not only in degree but in kind and nature. There

(*h*) Starkie on Libel, 1st edit. 496, 497.
See 2nd edit., vol. 2, 146-7.

(*i*) Per Lord Coleridge, C. J., *R. v. Bradlaugh*, 15 Cox, C. C. 217.

is a grave and earnest tone, a reverent, perhaps I might even say a religious, spirit about the very attacks on Christianity itself which we find in the authors referred to which shows that what they aimed at was not insult to the opinions of the majority of mankind nor to Christianity itself, but real, quiet, earnest pursuit of truth. And if the truth at which they have arrived is not that which you and I have been taught and at which perhaps we might now arrive, it is not because their conclusions differ from ours that they are to be deemed fit subjects for criminal prosecution.' (j)

Where a defendant was charged with publishing a libel upon a religious order, consisting of females, professing the Roman Catholic faith, called the Scorton Nunnery, Alderson, B., observed, a person may, without being liable to prosecution for it, attack Judaism or Mahomedanism, or even any sect of the Christian religion, save the established religion of the country; and the only reason why the latter is in a different situation from the other is, because it is the form established by law, and is therefore a part of the constitution of the country. For the same reason any general attack on Christianity is the subject of a criminal prosecution, because Christianity is the established religion of the country. Any person has a right to entertain his opinions, to express them, to discuss the subject of the Roman Catholic religion, and its institutions; but he has no right in so doing to attack the characters of individuals. (k)

As to the extent of this offence and the nature and certainty of the words, it appears to be immaterial whether the publication is oral or written; though the committing mischievous matter to print or writing, and thereby affording it a wider circulation, would undoubtedly be considered as an aggravation, and affect the measure of punishment. (l)

SEC. IV.

Publications against Morality.

When the Star Chamber had been abolished, it appears that the Court of King's Bench came to be considered as the *custos morum*, having cognizance of all offences against the public morals; (m) under which head may be comprehended representations whether by writing, picture, sign, or substitute, tending to vitiate and corrupt the minds and morals of the people. (n) Formerly, indeed, it appears to have been holden that publications of this kind were not punishable in the temporal Courts; (o) but a different doctrine has since been established. (p) And in late times indictments for obscene writings and prints have frequently been preferred, without any objection having been made to the jurisdiction of the temporal Courts.

(j) Per Lord Coleridge, C. J., in charging the jury, *R. v. Ramsay*, 15 Cox, C. C. 231.

(k) *Gathercole's case*, 2 Lewin, 237.

(l) 2 Starkie on Libel, 144, 2nd edit.

(m) *Sir Ch. Sedley's case*, 1663. Keb. 720. 2 Str. 790. Sid. 168.

(n) Holt on Libel, 73.

(o) *R. v. Read*, 11 Mod. 142. 1 Hawk. P. C. c. 73, s. 9.

(p) *R. v. Curl*, 2 Str. 788. *R. v. Wilks*, 4 Burr. 2527.

The principle of the cases upon this subject seems to comprehend oral communications, when made before a large assembly, and when there is a clear *tendency* to produce immorality, as in the case of the performance of an obscene play. (*q*)

SEC. V.

Libels against the Constitution.

Libels against the constitution, abstracted from all personal allusions, do not appear, either in ancient or modern times, to have been often made the subject of legal inquiry. In general, publications upon the constitution, avoiding all discussions of personal rights and privileges, are speculative in their nature, and not calculated to generate popular heat. But if they should be of a different description, tending to degrade and vilify the constitution, to promote insurrection, and circulate discontent through its members, they would, without doubt, be considered as seditious and criminal. (*r*) An intention to excite ill will between different classes of her Majesty's subjects may be a seditious intention under all the circumstances of the case which are for the jury. Sedition embraces everything whether by word, deed, or writing which is calculated to disturb the tranquillity of the state and lead ignorant persons to endeavour to subvert its laws. (*s*)

Thus it appears to have been adjudged, that though no indictment lay for saying that the laws of the realm were not the laws of God, because true it is that they are not the laws of God; yet that it would be otherwise to say that the laws of the realm are contrary to the laws of God. (*t*) And a defendant was convicted on an information charging him with having published, concerning the government of England and the traitors who adjudged King Charles the First to death, that the government of the kingdom consists of three estates, and that if a rebellion should happen in the kingdom, unless that rebellion was against the three estates, it was no rebellion. (*u*) In another case a person was convicted for publishing a libel, in which it was suggested that the revolution was an unjust and unconstitutional proceeding, and the limitation established by the Act of Settlement was represented as illegal, and that the revolution and settlement of the crown as by law established had been attended with fatal and pernicious consequences to the subjects of the kingdom. (*v*)

(*q*) 2 Starkie on Libel, 159. In *R. v. Curl*, 2 Str. 790, it was stated that there had been many prosecutions against the players for obscene plays, but that they had interest enough to get the proceedings stayed before judgment.

(*r*) Holt on Libel, 86.

(*s*) Per Cave J., *R. v. Burns*, 16 Cox, C. C. 355.

(*t*) 2 Roll. Abr. 78.

(*u*) *R. v. Harrison*, 1677. 3 Keb. 841. Vent. 324. And a treatise upon hereditary right was holden to be a libel, though it contained no reflection upon any part of the then government, *R. v. Bedford*, 1711. 2 Str. 789. Gilb. 297.

(*v*) *R. v. Nutt*, 1754. Dig. L. L. 126, and see Dr. Shebbeare's case, and *R. v. Paine*, Holt on Libel, 88, 89, and 2 Starkie on Libel, 164.

SEC. VI.

Libels against the King.

Though a different construction may have prevailed in more arbitrary times, it is now settled that bare words, not relative to any act or design, however wicked, indecent, or reprehensible they may be, are not in themselves overt acts of high treason; but only a misprision, punishable at common law by a fine and imprisonment, nor other corporal punishment; (*w*) though words may expound an overt act, and show with what intent it was done. (*x*) And, generally speaking, any words, acts, or writing tending to vilify or disgrace the King, or to lessen him in the esteem of his subjects, or any denial of his right to the crown, even in common and unadvised discourse, amount at common law to a misprision punishable by fine and imprisonment. (*y*)

There are also some legislative provisions upon this subject. The 3 Edw. 1, c. 34, enacts, that none be so hardy to tell or publish any false news or tales, whereby discord or occasion of discord or slander may grow between the King and his people, and the great men of the realm. (*z*)¹ And with a view to the security of the succession of the House of Hanover, according to the Act of Settlement, a law was passed declaring it to be treason to write or print against it. (*a*)

The nature of the offence of libel against the monarch personally has been ably explained and illustrated, according to the more mild and liberal doctrines of the present time, in the following case:—

The defendant was charged with having published a libel to the following effect: ‘What a crowd of blessings rush upon one’s mind, that might be bestowed upon the country in the event of a total change of system! Of all monarchs, indeed, since the Revolution, the successor of George the Third will have the finest opportunity of becoming nobly popular.’ Lord Ellenborough, C. J., in addressing the jury, stated, that the first sentence of this passage would easily admit of an innocent interpretation; that the fair meaning of the expression ‘change of system’ was a change of political system, — not a change in the frame of the established government, but in the measures of policy which had been for some time pursued; and that by total change of system was certainly not meant *subversion* or *demolition*, the descent of the crown to the successor of his Majesty being mentioned immediately after. His Lordship then proceeded: ‘If a person who admits the wisdom and virtues of his Majesty, laments that in the exercise

(*w*) 1 East, P. C. c. 2, s. 55, p. 117.

(*z*) Crohagan’s case, Cro. Car. 332.

(*y*) 4 Blac. Com. 123.

(*z*) It is said to have been resolved by all the judges that all writers of false news are indictable and punishable (4 Read. St. L. Dig. L. L. 23); and probably at this day

the fabrication of news likely to produce any public detriment would be considered as criminal. Starkie on Libel, 546, 1st edit.

(*a*) 6 Anne, c. 7; and see other statutes which were passed for the purpose of guarding the King’s character and title, cited in 2 Starkie on Libel, 171, 2nd edit.

AMERICAN NOTE.

¹ It seems doubtful whether this would be held to be an offence in America. Bishop i. s. 477.

of these he has taken an unfortunate and erroneous view of the interests of his dominions, I am not prepared to say that this tends to degrade his Majesty, or to alienate the affections of his subjects. I am not prepared to say that this is libellous. But it must be with perfect decency and respect, and without any imputation of bad motives. Go one step further, and say or insinuate that his Majesty acts from any partial or corrupt view or with an intention to favour or oppress any individual or class of men, and it would become most libellous.' Upon the second sentence, after stating that it was more equivocal, and telling the jury that they must determine what was the fair import of the words employed, not in the more lenient or severe sense, but in the sense fairly belonging to them, and which they were intended to convey, Lord Ellenborough proceeded: 'Now do these words mean, that his Majesty is actuated by improper motives, or that his successor may render himself nobly popular by taking a more lively interest in the welfare of his subjects? Such sentiments, as it would be most mischievous, so it would be most criminal to propagate. But if the passage only means that his Majesty, during his reign, or any length of time, may have taken an imperfect view of the interests of the country, either respecting our foreign relations, or the system of our internal policy; if it imputes nothing but honest error, without moral blame, I am not prepared to say that it is a libel.' And again, towards the conclusion of his address, his Lordship said: 'The question of intention is for your consideration. You will not distort the words, but give them their application and meaning as they impress your minds. What appears to me most material is the substantive paragraph itself; (b) and if you consider it as meant to represent that the reign of his Majesty is the only thing interposed between the subjects of this country and the possession of great blessings which are likely to be enjoyed in the reign of his successor, and thus to render his Majesty's administration of his government odious, it is a calumnious paragraph, and to be dealt with as a libel. If on the contrary you do not see that it means distinctly, according to your reasoning, to impute any purposed maladministration to his Majesty, or those acting under him, but may be fairly construed as an expression of regret that an erroneous view has been taken of public affairs, I am not prepared to say that it is a libel. There have been errors in the administration of the most enlightened men.' (c)

Falsely publishing that the King is labouring under mental derangement is a libel: it tends to unsettle and agitate the public mind, and to lower the respect due to the King. (d)

(b) The libel was published in a newspaper; and it had been allowed to the defendant to have read in evidence an extract from the same paper connected with the subject of the passage charged as libellous, although disjoined from it by extraneous

matter, and printed in a different character.

(c) *R. v. Lambert*, 2 Campb. 398.

(d) *R. v. Harvey*, 2 B. & C. 257, and malice will be implied from such wilful defaming without excuse. See the case, *post*, p. 643.

SEC. VII.

Libels against Houses of Parliament.

The two Houses of Parliament are an essential part of the constitution, and entitled to reverence and respect, on account of the important public duties which they have to discharge. But as they have the power of treating libels against them as breaches of their privileges, and vindicating them in the nature of contempts, more cases of such libels are to be met with in their journals than in the proceedings of the courts of law. The common law, however, is fully capable of taking cognizance of any publications reflecting in a libellous manner upon the members or proceedings of the Houses of Parliament; (e) and it seems rather to have been the inclination of Parliament in modern times to direct prosecutions for such offences in the courts of common law, and to waive the exercise of their own extensive privileges. In the case of *R. v. Stockdale*, (f) the attorney-general in his speech to the jury, after stating the address of the House of Commons to the King, praying that his Majesty would direct the information to be filed, proceeded thus: 'I state it as a measure which they have taken, thinking it in their wisdom, as every one must think it, to be the fittest to bring before a jury of their country an offender against themselves, avoiding thereby, what sometimes indeed is unavoidable, but which they wish to avoid whenever it can be done with propriety, the acting both as judges and accusers, which they must necessarily have done, had they resorted to their own powers, which are great and extensive, for the purposes of vindicating themselves against insult and contempt, but which in the present instance they have wisely forborne to exercise, thinking it better to leave the offender to be dealt with by a fair and impartial jury.' (g)

SEC. VIII.

*Libels upon the Government.*¹

Of publications against the government. — The extent to which the measures of the King, or the proceedings of his government, may be

(e) As in *R. v. Rayner*, 2 Barnard, 293, where the defendant was convicted of printing a scandalous libel on the Lords and Commons; and in *R. v. Owen*, 25 Geo. 2. MS. Dig. L. L. 67. In *R. v. Stockdale*, 28 Geo. 3, an information was filed by the attorney-general for a libel upon the House of Commons. A prosecution was also instituted in *R. v. Reeves*, 36 Geo. 3, in consequence of a resolution of the House of Commons, declaring a pamphlet, published by the defendant, to be a libel. In the

pamphlet, which was called 'Thoughts on the English Government,' there was this passage amongst others which the House deemed libellous — 'That the King's government might go on if the Lords and Commons were lopped off.' The jury considered the expressions as merely metaphorical, and acquitted the defendant.

(f) *Ante*, note (e).

(g) See 2 Ridgway's speeches of the Hon. T. Erskine, p. 208.

AMERICAN NOTE.

¹ It is stated that the prosecution of libels on government are nearly or quite unknown in America. Bishop ii. s. 942 (2). The

United States Courts have no common law jurisdiction as to these libels.

fairly and legally canvassed, has been the subject of much discussion, as it is undoubtedly one of the first importance: but it is not within the scope and design of this Treatise to enter further upon the question, than by stating a few of the established principles and decided cases.

It may be observed, that the liberty of discussion, which in many instances has been admitted on the part of the officers of the crown, would seem to be sufficient to answer all the purposes of the honest patriot; the man who would condemn only with a view to genuine and constitutional reformation. Upon a prosecution for a libel, the Attorney-General in his opening to the jury thus expressed himself: 'The right of every man to represent what he may conceive to be an abuse or grievance in the government of the country, if his intention in so doing be honest, and the statement made upon fair and open grounds, can never for a moment be questioned. I shall never think it my duty to prosecute any person for writing, printing, and publishing, fair and candid opinions on the system of the government and constitution of this country, nor for pointing out what he may honestly conceive to be grievances, nor for proposing legal means of redress.' (h) Every man has a right to give every public matter a candid, full, and free discussion; but although the people have a right to discuss any grievances they have to complain of, they must not do it in a way to excite tumult; and if a party publish a paper on any such matter, and it contain no more than a calm and quiet discussion, allowing something for a little feeling in men's minds, that will be no libel; but if the paper go beyond that limit, and be calculated to excite tumult, it is a libel. (i)

In many cases which may occur, the due exercise of this liberty and right of discussion will involve considerations of much difficulty, and require great nicety of discrimination; as it may become necessary to ascertain the particular points at which the bounds of rational discussion have been exceeded. The answer to the following question has, however, been proposed as a test, by which the intrinsic illegality of such publications may be decided: (j) 'Has the communication a plain tendency to produce public mischief by perverting the mind of the subject, and creating a general dissatisfaction towards government?'

However innocent and allowable it may be to canvass political measures within these limits, it is quite clear that their discussion must not be made a cloak for an attack upon private character. Libels on persons employed in a public capacity receive an aggravation as they tend to scandalize the government by reflecting on those who are entrusted with the administration of public affairs; for they not only endanger the public peace, as all other libels do, by stirring up the parties immediately concerned to acts of revenge, but also have a direct tendency to breed in the people a dislike of their governors, and incline them to faction and sedition. (k) If a paper has a direct tendency to cause unlawful meetings and disturbances, and to lead to a violation of the laws, it is a seditious libel. (l)

(h) *R. v. Perry*, 1793. See 2 Ridgway's speeches, 371.

(i) *R. v. Collins*, 9 C. & P. 456. Little-dale, J.

(j) Starkie on Libel, 525, 1st edit.

(k) 1 Hawk. P. C. c. 73, s. 7. Bac. Abr. tit. *Libel* (A.) 2. *R. v. Franklin*, 9 St. Tri. 255.

(l) *R. v. Lovett*, 9 C. & P. 462. Little-dale, J.

A person delivered a ticket up to the minister after sermon, wherein he desired him to take notice that offences passed now without control from the civil magistrate, and to quicken the civil magistrate to do his duty, &c.; and this was held to be a libel, though no magistrate in particular was mentioned, and though it was not averred that the magistrates suffered those vices knowingly. (m)

In a case where the defendant was prosecuted upon an information for a libel upon the government, his counsel contended that the publication was innocent, and could not be considered as libellous, because it did not reflect upon particular persons. But Holt, C. J., said: 'They say nothing is a libel but what reflects on some particular person. But this is a very strange doctrine to say that it is not a libel reflecting on the government, endeavouring to possess the people that the government is maladministered by corrupt persons that are employed in such stations, either in the navy or army. To say that corrupt officers are appointed to administer affairs is certainly a reflection on the government. If men should not be called to account for possessing the people with an ill opinion of the government, no government can subsist; nothing can be worse to any government than to endeavour to procure animosities as to the management of it; this has always been looked upon as a crime, and no government can be safe unless it be punished.' (n)

This doctrine was recognized in a case, where the defendant was charged with publishing a libel upon the administration of the Irish government, and upon the public conduct and character of the Lord Lieutenant and Lord Chancellor of Ireland. Lord Ellenborough, C. J., in his address to the jury, observed, 'It is no new doctrine that if a publication be calculated to alienate the affections of the people, by bringing the government into disesteem, whether the expedient be by ridicule or obloquy, the person so conducting himself is exposed to the inflictions of the law. It is a crime; it has ever been considered as a crime, whether wrapt in one form or another. The case of *R. v. Tuchin*, decided in the time of Lord Chief Justice Holt, has removed all ambiguity from this question; and, although at the period when that case was decided great political contentions existed, the matter was not again brought before the judges of the Court by any application for a new trial.' And afterwards his lordship said: 'It has been observed, that it is the right of the British subject to exhibit the folly or imbecility of the members of the government. But, gentlemen, we must confine ourselves within limits. If in so doing individual feelings are violated, there the line of interdiction begins, and the offence becomes the subject of penal visitation.' (o) Notwithstanding any statute rule or provision to the contrary, a person convicted of a seditious libel is to be treated as a first-class misdemeanant. (p)

(m) Bac. Abr. tit. *Libel* (A.) 2.

(n) *R. v. Tuchin*, 1704. Holt's R. 424.

5 St. Tri. 532.

(o) *R. v. Cobbett*, 1804. Holt on Libel,

114, 115. 2 Starkie on Libel, 193, where see in the note other cases referred to.

(p) 40 & 41 Vict. c. 21, s. 40.

SEC. IX.

Libels on Magistrates and Administration of Justice.

As nothing tends more to the disturbance of the public weal than aspersions upon the administration of justice, contempts against the King's judges, and scandalous reflections upon their proceedings, have always been considered as highly criminal offences; and one of the earliest cases of libel appears to have been an indictment for an offence of this kind. (g)

Generally, any contemptuous or contumacious words spoken to the judges of any courts in the execution of their offices are indictable; and when reflecting words are spoken of the judges of the superior courts at Westminster, the speaker is indictable both at common law and under the statutes of *scandalum magnatum*, whether the words relate to their office or not. (r)

Any publications reflecting upon and calumniating the administration of justice are of a libellous nature (s). So an order made by a corporation, and entered in their books, stating that A. (against whom a jury had found a verdict with large damages in an action for a malicious prosecution, and which verdict had been confirmed in the Court of Common Pleas), was actuated by motives of public justice in preferring the indictment, was held to be a libel reflecting on the administration of justice, for which an information should be granted against the members who had made the order. Ashhurst, J., said, that the assertion that A. was actuated by motives of public justice carried with it an imputation on the public justice of the country; for if those were his only motives, then the verdict must be wrong. Buller, J., said: 'Nothing can be of greater importance to the welfare of the public than to put a stop to the animadversions and censures which are so frequently made on courts of justice in this country. They can be of no service, and may be attended with the most mischievous consequences. Cases may happen in which the judge and jury may be mistaken: when they are, the law has afforded a remedy; and the party injured is entitled to pursue every method which the law allows to correct the mistake. But when a person has recourse either by a writing like the present, by publications in print, or by any other means, to calumniate the proceedings of a court of justice, the obvious tendency of it is to weaken the administration of justice, and in consequence to sap the very foundation of the constitution itself.' (t)

In another case the same doctrine was acted upon: but it was at the same time clearly admitted that it would be lawful to discuss the

(g) Holt on Libel, 153.

(r) 2 Starkie on Libel, 195, where see the cases collected. And see 1 Hawk. P. C. c. 7, *et seq.* The proceeding by writ of *scandalum magnatum* upon the statutes 3 Edw. 1, c. 34. 2 R. 2, st. 1, c. 5. 12 R. 2, c. 11, is of a civil, as well as of a criminal nature; and was formerly had recourse to in case of defamation of any of the great officers and

nobles. But the civil proceeding is now almost obsolete, the nobility preferring to waive their privileges in any action of slander, and to stand upon the same footing, with respect to civil remedies, as their fellow subjects.

(s) Vin. Abr. tit. *Contempt* (A.) 44. Pool v. Sacheverel, 1720.

(t) R. v. Watson, 2 T. R. 199.

merits of the verdict of a jury, or the decisions of a judge, provided it be done with candour and decency. An information was filed against the proprietors and printers of a Sunday newspaper for a libel upon Le Blanc, J., and a jury, by whom a prisoner had been tried for murder and acquitted; and it was contended on the part of the defendants that they had only made a fair use of their right to canvass the proceedings of a court of justice. Grose, J., said that 'it certainly was lawful, with decency and candour, to discuss the propriety of the verdict of a jury, or the decisions of a judge; and if the defendants should be thought to have done no more in this instance, they would be entitled to an acquittal: but, on the contrary, they had transgressed the law, and ought to be convicted, if the extracts from the newspaper, set out in the information, contained no reasoning or discussion, but only declamation and invective, and were written not with a view to elucidate the truth, but to injure the characters of individuals, and to bring into hatred and contempt the administration of justice in the country.' (u)

It seems that no indictment will lie for contemptuous words spoken either of or to inferior magistrates,¹ unless they are at the time in the actual execution of their duty, or at least unless the words affect them directly in their office though it may be good cause for binding the offender to his good behaviour. (v) This doctrine was recognized in a case, where the defendant was indicted for saying of a justice of the peace for the county of Middlesex, in his absence, that he was *a scoundrel and a liar*. (w) Lord Ellenborough, C. J., said: 'The words not being spoken to the justice, I think they are not indictable. This doctrine is laid down by Lord Holt in a case in *Salkeld*; (x) and in *R. v. Pocock* (y) the Court of Queen's Bench refused to grant an information for saying of a justice, in his absence, that he was a *forsworn rogue*. However, I will not direct an acquittal upon this point, as it is upon the record, and may be taken advantage of in arrest of judgment. It will be for the jury now to say whether these words were spoken of the prosecutor as a justice of the peace, and with intent to defame him in that capacity; for if they were not, this indictment is not supported; and it could not by possibility be a misdemeanor to utter them, although the prosecutor's name may be in the commission of the peace for the county of Middlesex.' (z) But it has been holden to be an indictable offence to say of a justice of the peace, when *in the execution of his office*, 'you are a rogue and a liar.' (a) The Court will not, however, grant an information for calling a magistrate a liar, accusing him of misconduct in having absented himself from an election of clerk to the magistrates, and threatening a repetition of the same language whenever such magistrate came into the town, unless they tend to a breach of the peace. (b)

(u) *R. v. White*, 1 Campb. 359. And see a note of another proceeding by information against the same defendants for a libel on Lord Ellenborough, C. J. Holt on Libel, 170, 171.

(v) 2 Starkie on Libel, 195. 1 Hawk. P. C. c. 21, s. 13.

(w) *R. v. Weltje*, 2 Campb. 142.

(x) *R. v. Wrightson*, 2 Salk. 698.

(y) 2 Str. 1157. And see *R. v. Penny*, 1 Lord Raym. 153.

(z) *R. v. Weltje*, 2 Campb. 142.

(a) *R. v. Revel*, 1 Str. 420.

(b) *Ex parte Chapman*, 4 A. & E. 773.

AMERICAN NOTE.

¹ In America it is held that words spoken of official persons may be indictable slanders which would not be so if spoken of a private

person. See Bishop i. s. 470. But see *S. v. Wakefield*, 8 Mo. Ap. 11.

SEC. X.

Libels on Private Individuals.

A general definition of a libel on an individual has already been given, *ante*, p. 596.

As every person desires to appear agreeable in life, and must be highly provoked by such ridiculous representations of him as tend to lessen him in the esteem of the world, and take away his reputation, which to some men is more dear than life itself; it has been held that not only charges of a flagrant nature, and which reflect a moral (*c*) turpitude on the party, are libellous, but also such as set him in a scurrilous, ignominious, or ludicrous (*d*) light, whether expressed in printing or writing, or by signs or pictures; for these equally create ill blood, and provoke the parties to acts of revenge and breaches of the peace. (*e*) The sending to a young woman of a letter of such a defamatory character that it tended reasonably to provoke a breach of the peace was held to be indictable as a libel. (*f*)

But it should be observed, that there is an important distinction under this head between words *spoken* only, and words published by writing or printing. Words spoken, however scurrilous, even though spoken personally to an individual, are not the subject of indictment, unless they directly tend to a breach of the peace, as if they convey a challenge to fight. (*g*) But words, though not scandalous in themselves, if published in writing, and tending in any degree to the discredit of a man, have been held to be libellous. (*h*)

Upon these principles it has been held to be libellous to write of a man that he had the itch, and stunk of brimstone. (*i*) And an information was granted against the mayor of a town for sending to a nobleman a licence to keep a public house. (*j*) An information was also granted for a publication reflecting upon a person who had been unsuccessful in a lawsuit; (*k*) and against the printer of a newspaper for publishing a ludicrous paragraph, giving an account of the marriage of a nobleman with an actress, and of his appearing with her in the boxes with jewels, &c. (*l*) A defendant was convicted for publishing

(*c*) A charge of ingratitude is actionable as libel, *Cox v. Lee*, 38 L. J. Ex. 219.

(*d*) *Cooke v. Ward*, 6 Bing. 409. 4 M. & P. 99.

(*e*) *Ante*, p. 596. Bac. Abr. tit. *Libel* (A.) 2. So in the case of *Thorley v. Lord Kerry*, 4 Taunt. 364, Mansfield, C. J., delivering the opinion of the Court, said: 'There is no doubt that this is a libel for which the plaintiff in error might have been indicted and punished, because, though the words impute no punishable crimes, they contain that sort of imputation which is calculated to vilify a man, and bring him, as the books say, into hatred, contempt, and ridicule; for all words of that description an indictment lies.' And in *R. v. Cobbett*, Holt on Libel, 114, 115, Lord Ellenborough, C. J., said: 'No man has a right to render the person or abilities of another ridiculous,

not only in publications, but if the peace and welfare of individuals, or of society, be interrupted, or even exposed by types and figures, the act, by the law of England, is a libel.'

(*f*) *R. v. Adams*, 22 Q. B. D. 66. See also per Lush, J., *R. v. Holbrook*, 4 Q. B. D. p. 46.

(*g*) *R. v. Langley*, 6 Mod. 125. *R. v. Bear*, 2 Salk. 417. By Holt, C. J., *Villars v. Monsley*, 2 Wils. 403, and see 2 Starkie on Libel, 208. *Thorley v. Lord Kerry*, 4 Taunt. 355.

(*h*) Bac. Abr. tit. *Libel* (A.) 2. *Fray v. Fray*, 34 L. J. C. P. 45.

(*i*) *Villars v. Monsley*, 2 Wils. 403.

(*j*) The Mayor of Northampton's case, 1 Str. 422.

(*k*) 2 Barnard, 84.

(*l*) *R. v. Kinnarsley*, 1 Blac. R. 294. It was sworn that the nobleman was a married

a libel in a review, tending to traduce, vilify, and ridicule an officer of high rank in the navy; and to insinuate that he wanted courage and veracity; and to cause it to be believed that he was of a conceited, obstinate, and incendiary disposition. (*m*) And an information was granted against a printer of a newspaper, for publishing a paragraph containing a libel on the Bishop of Derry, by representing him as a bankrupt. (*n*) But in an action for publishing a libel by posting it on a paper in the Casino-room at Southwold, containing these words, 'The Rev. John Robinson and Mr. James Robinson, inhabitants of this town, not being persons that the proprietors and annual subscribers think it proper to associate with, are excluded this room,' the Court of Exchequer held, that the publication was not a libel, as it did not affect the moral character of the plaintiffs, nor state that they were not proper persons for general society; that the paper might import no more than that the plaintiff was not a social and agreeable character in the intercourse of common life. (*o*) But where a count alleged that the defendant published of the Duke of Brunswick the following libel: 'Why should Theophilus be surprised at anything Mrs. W. does? If she chooses to entertain the Duke of Brunswick, she does what very few will do; and she is of course at liberty to follow the bent of her own inclining, by inviting all the *expatriated* foreigners who crowd our streets to her table, if she thinks fit;' the Court of Exchequer Chamber held that the matter stated was libellous, as it might be understood in such a sense as to be injurious to the prosecutor's character. (*p*)

A publication reflecting upon a man in respect of his trade may also be libellous; as where A., a gunsmith, published in an advertisement that he had invented a short kind of gun, that shot as far as others of a longer size, and that he was gunsmith to the Prince of Wales; and B., another gunsmith, counter-advertised, 'That whereas, &c., [reciting the former advertisement], he desired all gentlemen to be cautious, for that the said A. durst not engage with any artist in town, nor ever did make such an experiment, except out of a leather gun, as any gentleman might be satisfied at the Cross Guns in Long Acre, the said B.'s house.' The Court held, that though B., or any other of the trade, might counter-advertise what was published by A., yet it should have been done without any general reflections on him in the way of his business: that the advice to 'all gentlemen to be cautious,' was a reflection upon his honesty; and the allegation that he would not engage with an artist was setting him below the rest of his trade, and calling him a bungler in general terms; and that the expression 'except out of a leather gun' was charging him with a lie, the word *gun* being vulgarly used for a *lie*, and *gunner* for a *liar*, and that therefore these words were libellous. (*q*)

Declaration, 'that the plaintiffs carried on the business of manufac-

man; and the Court said, that under such circumstances the publication would have been a high offence even against a commoner, and that it was high time to stop such intermeddling in private families.

(*m*) *R. v. Dr. Smollet*, 1759. Holt on Libel, 224.

(*n*) *Anonymous*, Hill, T. 1812.

(*o*) *Robinson v. Jermyn*, 1 Price, R. 11.

(*p*) *Gregory v. R.*, 15 Q. B. 957.

(*q*) *Harman v. Delany*, Barnard, K. B. 289. Fitzgib. 121. 2 Str. 898, S. C. See *The Western Counties Manure Company v. Lawes Chemical Manure Company*, 43 L. J. Ex. 171.

turers of bags, and in such business invented, manufactured, and sold great numbers of a bag called "The Bag of Bags," and the defendant maliciously printed and published of and concerning the plaintiffs in their business in a periodical called the "Tomahawk," the words following:—"Novelty and enough. Let us [meaning the defendant] premise our remarks that they are not a planned advertisement, and then let us declare that Messrs. J. & K. [meaning the plaintiffs] have introduced and largely advertised an article of their manufacture as the Bag of Bags. As we have not seen the Bag of Bags, we cannot say that it is useful or that it is portable or that it is elegant. All this it may be, but the only point we can deal with is the title, which we think very silly, very slangy, and very vulgar, and which has been forced upon the notice of the public *ad nauseam*." Held, on demurrer, by the majority of the Court (Mellor, J., and Hannen, J.), that the declaration was good, on the ground that it was a question for the jury whether the article did not exceed the limits of fair criticism, and tend to disparage the plaintiffs to the public in respect to their mode of carrying on their business; but by Lush, J., that the declaration was bad, and that there was no evidence of a libel for the jury, as there was nothing in the article which conveyed an imputation on the character of the plaintiffs, or on the manner in which they conducted their business. (r)

General imputations upon a body of men are indictable, though no individuals may be pointed out. (s) An information was prayed against the defendant for publishing a paper containing an account of a murder committed upon a Jewish woman and her child, by certain *Jews* lately arrived from Portugal, and living near Broad Street, because the child was begotten by a Christian. (t) It was objected that no information should be granted in this case, because it did not appear who in particular the persons reflected on were. (u) But the Court said, that admitting that an information for a libel might be improper, yet the publication of this paper was deservedly punishable in an information for a misdemeanor, and that of the highest kind; such sort of advertisements necessarily tending to raise tumults and disorders amongst the people, and inflame them with an universal spirit of barbarity against a whole body of men, as if guilty of crimes scarcely practicable, and wholly incredible. (v) And if some of the individuals affected by the libel are specified, it will be sufficient; as where it was objected that the names of certain trustees, who were part of the body prosecuting, were not mentioned, Lord Hardwicke observed, that though there were authorities where, in cases of libel upon persons in their private capacities, it had been holden necessary that some particular person should be named, this was never carried so far as to make it necessary that every person injured by such libel should be specified. (w)

(r) *Jenner and another v. A'Beckett*, 41 L. J. Q. B. 14.

(s) *Ante*, p. 597.

(t) The affidavit set forth that several persons therein mentioned, who were recently arrived from Portugal, and lived in Broad Street, were attacked by multitudes in several parts of the city, barbarously treated,

and threatened with death, in case they were found abroad any more.

(u) *R. v. Orme*, 3 Salk. 224. 1 Lord Raym. 486, was cited.

(v) *R. v. Osborne*, Sess. Cas. 260. 2 Barnard, 138, 166. Kel. 230, pl. 183.

(w) *R. v. Griffin and others*, Holt on Libel, 239.

Where a publication stated that, upon the death of her late Majesty, none of the bells of the several churches of Durham were tolled; and ascribed this omission to the clergy, and then proceeded to make some very severe observations on that body, a criminal information was granted. (x)

A malicious defamation of one who is dead, if published with a malevolent purpose, to vilify the memory of the deceased, and with a view to injure his posterity, will be libellous; but it has been holden that an indictment for a libel, reflecting on the memory of a deceased person, cannot be supported, unless it state that it was done with a design to bring contempt on his family, or to stir up the hatred of the King's subjects against his relations, and to induce them to break the peace in vindicating the honour of the family. (y)

SEC. XI.

Libels on Foreigners of Distinction. (z)

Upon the ground that malicious and scurrilous reflections upon those who are possessed of rank and influence in foreign states may tend to involve this country in disputes and warfare, it has been held that publications tending to degrade and defame persons in considerable situations of power and dignity in foreign countries may be treated as libels.¹ Thus an information was filed, by the command of the Crown, for a libel on a French ambassador, then residing at the British court, consisting principally of some angry reflections on his public conduct, and charging him with ignorance in his official capacity, and with having used stratagem to supplant and depreciate the defendant at the court of Versailles. (a) And Lord George Gordon was found guilty upon an information for having published some severe reflections upon the Queen of France, in which she was represented as the leader of a faction: upon which occasion Ashhurst, J., observed, in passing sentence, that the object of the publication being to rekindle animosities between England and France by the personal abuse of the sovereign of one of them, it was highly necessary to repress an offence of so dangerous a nature: and that such libels might be supposed to have been made with the connivance of the state where they were published, unless the authors were subjected to punishment. (b) So a defendant was found guilty upon an information charging him with having published the following libel: 'The Empe-

(x) R. v. Williams, 5 B. & A. 597.

(y) R. v. Topham, 4 T. R. 126.

(z) An information for libel on deceased foreign nobleman will be refused because an information will not be granted at the suit

of private persons. R. v. Labouchere, 12 Q. B. D. 320.

(a) R. v. D'Eon, 1 Black. Rep. 510. The defendant was convicted.

(b) R. v. Lord George Gordon, 1787.

AMERICAN NOTE.

¹ It seems that in America this particular class of libel is without remedy, for it is doubtful whether the State Courts can take cognizance of such a libel, and the United

States Courts have no common law jurisdiction. See Bishop l. ss. 177, 178, 190-203, and II. s. 938.

ror of Russia is rendering himself obnoxious to his subjects by various acts of tyranny, and ridiculous in the eyes of Europe by his inconsistency. He has lately passed an edict to prohibit the exportation of deals and other naval stores. In consequence of this ill-judged law, a hundred sail of vessels are likely to return to this country without freight.' (c)

And in a case where the defendant was charged by an information with a libel upon Napoleon Buonaparte, Lord Ellenborough, C. J., in his address to the jury, said: 'I lay it down as law, that any publication which tends to degrade, revile, and defame persons in considerable situations of power and dignity in foreign countries, may be taken to be and treated as a libel; and particularly when it has a tendency to interrupt the pacific relations between the two countries.' (d)

SEC. XII.

Indictment for Libel.

Having stated the different sorts of publications for which a party may be found guilty of libel, we may mention some of the points relating to the indictment on a prosecution for this offence.

An indictment for a libel must import to whom the libellous matter referred; and stating that the libel was published to defame and vilify J. S., and to bring him into disgrace, and concluding that it was to the great scandal and disgrace of J. S., is not sufficient to show that the libellous matter referred to J. S. An indictment stated that the defendant intended to vilify W. S., Mayor of Colchester, and a justice; and in order to cause it to be believed that W. S., as such mayor, had been guilty of great abuse in granting an ale-licence to J. L., and in order to bring him into great disgrace, published a certain scandalous libel, in which said libel was contained, &c., and the libel stated a speech supposed to have been made before the borough magistrates by a fictitious character, called Excise, who was supposed to lay before them a case of gross corruption, sanctioned by the mayor (*innuendo* the said W. S.), to the great scandal, injury, and disgrace of the said W. S. The usual allegation, that the libellous matter was of and concerning W. S., was omitted; and, on account of this omission, the judgment was arrested. (e) Where a count alleged that the defendant published of and concerning the Duke of Brunswick the following libel: 'The evidence to facts in relation to the particular subject alluded to is procuring; and we have no doubt sufficient information will be obtained for a strong case to lay before the Home Secretary, to enable that functionary to cause it to be intimated to the suspected party [meaning the said duke] that his presence here can be dispensed with,

(c) *R. v. Vent*, 1801.

(d) *R. v. Peltier*. *Holt on Libel*, 78. 2 *Starkie on Libel*, 218. The defendant was convicted, but never was called upon to receive the judgment of the Court. Shortly after the trial, war broke out between Great Britain and France.

(e) *R. v. Marsden*, 4 M. & S. 164. Lord Ellenborough said, that if by inevitable construction no other person could have been intended but W. S., he should have been inclined to support the indictment; but that did not appear. *Clement v. Fisher*, 7 B. & C. 459; 1 M. & R. 281, S. P.

as it may be attended with danger to himself,' thereby meaning and intending to have it believed that the said duke was suspected of having committed and had committed some crime which would bring his life into danger from the laws of England; the count was held bad on error, because it did not show in what manner the life of the duke would be endangered. (*f*) But where a count alleged that the defendant, intending to defame the Duke of Brunswick, published a libel containing divers false and malicious matters and things of and concerning the said duke, that is to say: We should think that no lady would admit to her society such a crack-brained scamp as the Duke of Brunswick (meaning the said Duke), the Court of Exchequer Chamber held that these averments showed sufficiently without more formal introduction, that the libel was of and concerning the duke. (*g*)

An information stated, that defendant, intending to excite hatred against the government of the realm, and to cause it to be believed that divers subjects had been inhumanly killed by certain troops of the King, published a libel of and concerning the government of this realm, and of and concerning the said troops, which libel stated, that the defendant saw with abhorrence, in the newspapers, the accounts of a transaction at Manchester, and alleged that unarmed and unresisting men had been inhumanly cut down by the dragoons (meaning the said troops), and then commented strongly upon this being the use of a standing army, and called upon the people to demand justice, &c.; but it did not, in terms, say, that the dragoons acted under the authority or orders of the government. After conviction, a motion was made in arrest of judgment, on the ground that it did not sufficiently appear that the libel was written of and concerning the government, nor of or concerning what troops it was written: but the Court held, that it was obvious, from its whole tenor and import, that it meant to cast imputations upon the government; that it was a libel to impute crime to any of the King's troops, though it did not define what troops in particular were referred to; and that the innuendo of 'the said troops' meant the undefined part of those troops. (*h*) It is the duty of a judge to say whether a publication is *capable* of the meaning ascribed to it by an innuendo; but when the judge is satisfied of that, it must be left to the jury to say whether the publication has the meaning so ascribed to it. (*i*)

Where written or printed matter in itself imports a libel on a person, no statement of extrinsic circumstances, by way of inducement, is necessary. It is no objection, therefore, in arrest of judgment that words are not explained by an innuendo where they are commonly enough understood in a libellous sense to warrant a jury in so applying them; (*j*) and if, in such a case, there be innuendos improperly enlarging the sense, they may be rejected as surplusage after ver-

(*f*) *Gregory v. R.*, 15 Q. B. 974.

(*g*) *Gregory v. R.*, 15 Q. B. 957.

(*h*) *R. v. Burdett*, 4 B. & A. 314.

(*i*) *Blagg v. Sturt*, 10 Q. B. 899; *Hunt v. Goodlake*, 43 L. J. C. P. 54; *Mulligan v. Cole*, 44 L. J. Q. B. 153.

(*j*) *Hoare v. Silverlock*, 12 Q. B. 624.

See *Homer v. Taunton*, 5 H. & N. 661, where there was no innuendo to explain 'truck-master,' and it was held that it was properly left to the jury to say whether it was used in a defamatory sense, though no evidence was given to explain its meaning.

dict; (*k*) for on motion in arrest of judgment, or on error, an innuendo which is not warranted by the words themselves, or properly connected with them by prefatory matter, may be rejected. (*l*) But the case would be different if the words were capable of two senses, and the innuendo ascribed one meaning to them, and was good on the face of it. (*m*) If there be contained in the alleged libel matter which is capable of receiving the interpretation put upon it by an innuendo, there is no fault in the count for not having explanatory averments to fix and point the libel. But generally if the words written or spoken cannot apply to the individual, no previous averments or subsequent innuendos can help to give the words an application which they have not. 'Suppose the words to be, "a murder was committed in A.'s house last night," no introduction can warrant the innuendo "meaning that B. committed the said murder," nor would it be helped by the finding of the jury for the plaintiff. For the Court must see that the words do not and cannot mean it, and would arrest the judgment accordingly.' (*n*) But if an innuendo ascribes to certain words a particular meaning which cannot be supported in evidence, the innuendo, if well pleaded in form, cannot be repudiated on the trial, so as to let in proof that the words have another meaning. (*o*) If words be laid to be uttered with intent to convey a particular meaning to persons present, it must be proved that the party uttering them had that meaning, and that they were so understood by the hearers. (*p*) In an indictment for publishing an obscene book, it is not sufficient to describe the book by its title only, but the words alleged to be obscene must be set out. The defect will not be cured by a verdict of guilty, and the indictment will be bad either upon arrest of judgment or upon error; for although an inaccurate averment may be cured by verdict, an averment which is totally absent cannot be supplied. (*q*)

SEC. XIII.

Evidence — Plea — Trial, &c. — Lord Campbell's Act.

It may be laid down generally that all who are concerned in composing, writing, and publishing a libel, are guilty of the misdemeanor, unless the part they had in the transaction was a lawful or an innocent act. (*r*) Thus upon an information against the defendant, for printing and publishing a libel, the evidence was, that he acted as servant to the printer, and clapped down the press; and few or no circumstances were offered of his knowing the import of the paper, or being conscious that he was doing anything illegal; and Raymond, C. J.,

(*k*) *Harvey v. French*, 2 Tyrw. 585, 1 C. & M. 11.

(*l*) *Williams v. Stott*, 3 Tyrw. 688; 1 C. & M. 675. Per Bayley, B.

(*m*) *Barrett v. Long*, 3 H. L. C. 395.

(*n*) *Solomon v. Lawson*, 3 Q. B. 823, per *curiam*.

(*o*) *Williams v. Stott*, *supra*.

(*p*) Per Bayley, B., *ibid.*, citing Woolnoth

v. Meadows, 5 East, 470. See as to the office and nature of an innuendo, 1 Stark. on Libel, 418, *et seq.* *Clegg v. Laffer*, 10 Bing. 250, 3 M. & S. 727. *Day v. Robinson*, 1 Ad. & E. 554, 4 N. & M. 884. *West v. Smith*, 1 T. & G. 825. *Kelly v. Partington*, 5 B. & Ad. 645.

(*q*) *Bradlaugh v. R.*, 3 Q. B. D. 607.

(*r*) Bac. Abr. tit. *Libel* (B.) 1.

held that this made the defendant guilty, and so the jury found him. (*s*) But there must be a publication; and the mere writing or composing a defamatory paper by any one, which is confined to his closet, and neither circulated nor read to others, will not render him responsible; nor will he be held to have published the paper, if he deliver it, by mistake, out of his study. (*t*) But this position admits of great doubt, and two very great judges seem to have been of opinion, that one who composes or writes a libel with intent to defame another, is guilty of a misdemeanor, although the libel be not published. (*u*) A count charging a defendant with having an obscene libel in his possession, with intent to publish it, seems to be bad. (*v*) And it will not be a publication of a libel if a party takes a copy of it, provided he never publishes it; (*w*) but a person who appears once to have written a libel, which is afterwards published, will be considered as the maker of it, unless he rebut the presumption of law by showing another to be the author, or prove the act to be innocent in himself. (*x*) For by Holt, C. J., if a libel appears under a man's handwriting, and no other author is known, he is taken in the mainour, (*y*) and it turns the proof upon him; and if he cannot produce the composer, it is hard to find that he is not the very man. (*z*) Where the manuscript of a libel was in the handwriting of the defendant, and a printer had printed five hundred copies from it, three hundred of which had been posted about Birmingham, but there was no evidence to connect the defendant with the printing or the posting, except the handwriting, it was held, that there was evidence to go to the jury that it was published by the

(*s*) *R. v. Clerk*, 1 Barnard, 304. *See qu.*, and *vide Day v. Bream*, *post*.

(*t*) *R. v. Paine*, 5 Mod. 165, 167.

(*u*) Lord Tenterden, C. J., and Holroyd, J., in *R. v. Burdett*, 4 B. & A. 95. Lord Tenterden said: 'The composition of a treasonable paper intended for publication, has, on more than one occasion, been held an overt act of high treason, although the actual publication had been intercepted or prevented, and I have heard nothing on the present occasion to convince my mind that one who composes or writes a libel with intent to defame, may not, under any circumstances, be punished, if the libel be not published.' Holroyd, J., said: 'Where a misdemeanor has been committed by writing and publishing a libel, the writing of such a libel so published is in my opinion criminal, and liable to be punished by the law of England as a misdemeanor, as well as the publishing of it.' And again, 'The composing and writing, with intent and for the purpose above stated, of a libel proved to have been published by the defendant, is in my opinion of itself a misdemeanor, in whatever county the publishing of it took place.' Upon the principle that an act done, and a criminal intention joined to that act, are sufficient to constitute a crime it should seem that writing a libel with intent to defame is a crime. C. S. G.

(*v*) *R. v. Rosenstein*, 2 C. & P. 414, J. A. Park, J. This count seems clearly bad, on

the ground that no act was charged; it is precisely similar to *R. v. Stewart*, R. & R. 238. C. S. G.

(*w*) Com. Dig. tit. *Libel* (B.) 2. Lamb's case, 9 Co. 596. But see *R. v. Beare*, 2 Salk. 417. 1 Lord Raym. 414.

(*x*) Bac. Abr. tit. *Libel* (B.) 1. Lamb's case, 9 Co. 59. The writing a libel may be an innocent act in the clerk who draws the indictment, or in the student who takes notes of it. But in *Maloney v. Bartley*, 3 Campb. 210, Wood, B., held, on the trial of an action for a libel, in the shape of an *extra-judicial* affidavit sworn before a magistrate, that a person who acted as the magistrate's clerk was not bound to answer whether by the defendant's orders he wrote the affidavit, and delivered it to the magistrate, as he might thereby criminate himself.

(*y*) A man was taken with the mainour, mainouvre, when he was taken with the thing stolen in his possession, or, as it was termed in the ancient indictments, *captus cum manu opere*, and when so taken he might be brought into Court, arraigned, and tried without a grand jury. 2 Hale, 148. And some lords of manors had jurisdiction to try such cases; for I have the record of such an indictment for horse stealing, tried in the Court of Leek, Staffordshire, in the 35 Edw. 1. C. S. G.

(*z*) *R. v. Beare*, 1 Lord Raym. 417. 2 Salk. 417.

defendant. (a) So the sale of an obscene print to a person in a private room, he having requested that such print should be shown to him, his object being to prosecute the seller, is a sufficient publication. (b) Where, in an action for libel contained in a pamphlet, a witness proved that the defendant gave her a pamphlet, and that she read parts of it, and that she had lent it to several persons, and it was returned to her, but she could not swear the copy produced was the same pamphlet the defendant gave her, but it was an exact copy, if it was not the same, and she believed it to be the same, it was held that this was sufficient evidence to be left to the jury. (c)

The reading of a libel in the presence of another, without previous knowledge of its being a libel, or the laughing at a libel read by another, or the saying that such a libel is made by J. S., whether spoken with or without malice, does not amount to a publication. And it has also been held, that he who repeats part of a libel in merriment, without any malice or purpose of defamation, is not punishable. (d) In an action for a libel contained in a caricature print, where the witness stated, that having heard that the defendant had a copy of this print, he went to his house and requested liberty to see it, and that the defendant thereupon produced it, and pointed out the figure of the plaintiff and the other persons it ridiculed, Lord Ellenborough, C. J., ruled that this was not sufficient evidence of publication to support the action. (e)

Proof that the libel was contained in a letter directed to the party, and delivered into the party's hands, is sufficient proof of a publication upon an indictment or information. (f) Addressing a letter to a wife, containing matter reflecting on her husband, is a sufficient publication to support an action. (g) And delivering a libel sealed, in order that it may be opened and published by a third person in a distant county, is a publication. (h) The production of a letter containing a libel with the seal broken, and the postmark on it, is *prima facie* evidence of publication. (i)

In an information for a libel against the doctrine of the Trinity,

(a) R. v. Lovett, 9 C. & P. 462, Little-dale, J.

(b) R. v. Carlisle, 1 Cox, C. C. 229.

(c) Fryer v. Gathercole, 4 Ex. R. 262.

(d) Bac. Abr. tit. *Libel* (B.) 2. This is doubted in 1 Hawkins, P. C. c. 73, s. 14, on the ground that jests of such a kind are not to be endured, and that the injury to the reputation of the party grieved is no way lessened by the merriment of him who makes so light of it. As to reading a libel in the hearing of others, knowing it to be such, being a publication of it, see Bac. Abr. *Libel* (B.) 2.

(e) Smith v. Wood, 3 Campb. 323. And see R. v. Paine, 5 Mod. 165, where a *qu.* is made in the margin, whether a person who has a libellous writing in his possession, and reads it to a private friend in his own house, is thereby guilty of *publishing* it.

(f) 1 Hawk. P. C. c. 73, s. 11. Bac. Abr. tit. *Libel* (B.) 2, n. (a), Selw. N. P. 1050, n. (9). R. v. Brooke, 7 Cox, C. C. 251. A further publication is necessary to support

an action. Thus it has been held that where the action was brought for a libel contained in a letter transmitted by the defendant to the plaintiff, by means of a third person, it is a question for the jury whether there has been any publication except to the plaintiff himself, and that if there has not, the defendant is entitled to their verdict. Clutterbuck v. Chaffers, 1 Stark. R. 471. But in an action for a libel contained in a letter written by the defendant to the plaintiff, it was holden that proof that the defendant knew that the letters sent to the plaintiff were usually opened by his clerk, was evidence to go to the jury of the defendant's intention that the letter should be read by a third person. Delacroix v. Thevenot, 2 Stark. R. 63.

(g) Wenman v. Ash, 13 C. B. 836.

(h) R. v. Burdett, 4 B. & A. 95.

(i) Warren v. Warren, 4 Tyrw. 850. 1 C. M. & R. 360. Shipley v. Todhunter, 7 C. & P. 680.

the witness for the Crown, who produced the libel, swore that it was shown to the defendant, who owned himself the author of that book, *errors of the press and some small variations excepted*. The counsel for the defendant objected that this evidence would not entitle the Attorney-General to read the book, because the confession was not absolute, and therefore amounted to a denial that he was the author of that identical book. But Pratt, C. J., allowed it to be read, saying he would put it upon the defendant to show that there were material variances. (*j*)

It seems to be agreed, that not only he who publishes a libel himself, but also he who procures another to do it, is guilty of the publication; and it is held not to be material whether he who disperses a libel knew anything of the contents or effects of it or not, for that nothing would be more easy than to publish the most virulent papers with the greatest security, if the concealing the purport of them from an illiterate publisher would make him safe in dispersing them. (*k*) Where a reporter to a newspaper proved that he had given a written statement to the editor of the paper, the contents of which had been communicated to him by the defendant for the purpose of such publication, and that the newspaper then produced was exactly the same, with the exception of some slight alterations, not affecting the sense; it was held, that what the reporter published, in consequence of what passed with the defendant, might be considered as published by the defendant; but that the newspaper could not be read without producing the written account delivered by the reporter to the editor. (*l*)

The defendant was indicted for causing to be published in a newspaper a libel which told a story of the prosecutor, and added comments on the story, giving it a ludicrous character. The editor of the newspaper stated that the defendant had expressed a wish to him that he would 'show up' the prosecutor, and had told him the story. The witness communicated it to a reporter for the paper, and the libel was substantially what was so communicated. Before the publication the defendant remarked to the witness that the article had not yet appeared. After it had appeared, the defendant told the witness that he had seen it, and that he liked it very much. The witness had heard the story before the defendant told it him. The Court of Queen's Bench held, that on this evidence the jury might find that the defendant authorised the publication of this particular libel, notwithstanding the comments added, as there were both a general authority to publish, and an approval of the particular publication. (*m*)

In an action for libel the plaintiff complained of the publication in certain newspapers of reports of the proceedings of a board of guardians, containing defamatory statements concerning himself. At the meeting at which the proceedings in question took place, reporters

(*j*) *R. v. Hall*, 1 Str. 416.

(*k*) Bac. Abr. tit. *Libel* (B.) 2. 1 Hawk. P. C. c. 73, s. 10.

(*l*) *Adams v. Kelly*, R. & M. N. P. C. 157; *Parkes v. Prescott*, 38 L. J. Ex. 105.

(*m*) *R. v. Cooper*, 8 Q. B. 533. Lord Denman, C. J., said: 'If a man request another generally to write a libel, he must

be answerable for any libel written in pursuance of his request: he contributes to a misdemeanor, and is therefore responsible as a principal.' 'I have no doubt that a man who employs another generally to write a libel must take his chance of what appears, though something may be added which he did not state.'

were present in the discharge of their duty as representatives of newspapers. One of the defendants was chairman of the meeting, and the other was present and took part in the proceedings. The latter said that he hoped the local press would take notice of 'this scandalous case,' and requested the chairman to give an account of it. This he accordingly did, and in the course of his statement said, 'I am glad gentlemen of the press are in the room, and I hope they will take notice of it.' The other defendant thereupon said, 'And so do I.' The reports complained of were afterwards inserted in the newspapers, being somewhat condensed, but substantially correct, accounts of what had been said at the meeting. These reports were set out in the declaration, and constituted the libels complained of. The judge at the trial directed a verdict for the defendants, on the ground that there was no evidence of a publication by the defendants of these libels, to which direction the plaintiff excepted. Held (per Keating, Montague Smith, and Hannen, JJ., *dissentientibus* Byles and Mellor, JJ.), that the direction was wrong, and that there was evidence for the jury. Per Byles, J., 'There is a distinction between the authority which will make a man liable criminally, and that which will make him liable civilly for the acts of another.' (n)

It was for a long time held, that the buying of a book or paper containing libellous matter, in a bookseller's shop, was sufficient evidence to charge the master with the publication, although it did not appear that he knew of any such book being there, or what the contents thereof were, and though he was not upon the premises, and had been kept away for a long time by illness; and it would not be presumed that it was bought and sold there by a stranger; but the master must, if he suggested anything of this kind in his excuse, prove it. (o) So the proprietor of a newspaper was answerable criminally as well as civilly for the acts of his servants in the publication of a libel, although it could be shown that such publication was without the privity of the proprietor; (p) for a person who derives profit from, and who furnishes means for, carrying on the concern, and entrusts the conduct of the publication to one whom he selects, and in whom he confides, may be said to cause to be published what actually appears, and ought to be answerable, although it cannot be shown that he was individually

(n) *Parkes v. Prescott and Ellis*, 38 L. J. Ex. 105, *et per* Montague Smith, J., whilst delivering the judgment of the majority of the Court: 'In the result, I come to the conclusion that, on principle it is correct to hold that, where a man makes a request to another to publish defamatory matter, of which, for the purpose, he gives him a statement, whether in full or in outline, and the agent publishes that matter, adhering to the sense and substance of it, although the language be to some extent his own, the man making the request is liable to an action as the publisher. If the law were otherwise, it would, in many cases, throw a shield over those who are the real authors of libels, and who seek to defame others under what would then be the safe shelter of intermediate agents. I make this observation only with reference to the general consequences which

would result from the arguments relied on to sustain the defendant's contention.

(o) *Bac. Abr. tit. Libel (B.) 2. R. v. Nutt, Fitzgib. 47. 1 Barnard. K. B. 306. 2 Sess. Cas. 33, pl. 38. And see also R. v. Almon, 5 Burr. 2686. And by Lord Hardwicke, in 2 Atk. 472. 'Though printing papers and pamphlets is a trade by which persons get their livelihood, yet they must take care to use it with prudence and caution; for if they print anything that is libellous, it is no excuse to say that the printer had no knowledge of the contents, and was entirely ignorant of its being libellous.'*

(p) *R. v. Walter*, 3 Esp. N. P. C. 21; *R. v. Dod*, 2 Sess. Cas. 33, pl. 38. In 1 Hawk. P. C. c. 73, s. 10 (7th edit.). *Woodfall's case, Essay on Libels*, p. 18. *Salmon's case*, B. R. Hil. 1777, and *R. v. Almon*, 5 Burr. 2687.

concerned in the particular publication ; (*q*) and these are acts done in the course of the trade or business carried on by the master. But there were cases in which the presumption arising from the proprietorship of a paper might be rebutted. (*r*)¹ See when this presumption can now be rebutted, 6 & 7 Vict. c. 96, s. 7, noticed *post*, p. 647.

In an action for a libel, where it appeared upon the evidence that the defendant, a tradesman, was accustomed to employ his daughter to write his bills and letters ; that a customer, to whom a bill written by the daughter had been sent by the daughter, sent it back on the ground of the charge being too high, and that the bill was afterwards returned to the customer, inclosed in a letter also written by the defendant's daughter, and being a libel upon the plaintiff, who had inspected and reduced the bill for the customer ; it was holden that this was not sufficient evidence to go to a jury, either of command, authority, adoption, or recognition by the defendant. (*s*)

The proceedings against the printers, publishers, and proprietors of newspapers for any libel contained in such papers were much facilitated by the 38 Geo. 3, c. 78, which was repealed by the 6 & 7 Will. 4, c. 76. This statute also contained enactments facilitating such proceedings. But these enactments, except sec. 19, are repealed by 32 & 33 Vict. c. 24. Sec. 19 enacts that, 'If any person shall file any bill in any court for the discovery of the name of any person concerned as printer, publisher, or proprietor of any newspaper, or of any matters relative to the printing or publishing of any newspaper, in order the more effectually to bring or carry on any suit or action for damages alleged to have been sustained by reason of any slanderous or libellous matter contained in any such newspaper respecting such person, it shall not be lawful for the defendant to plead or demur to such bill, but such defendant shall be compellable to make the discovery required ; provided always that such discovery shall not be made use of as evidence or otherwise in any proceeding against the defendant, save only in that proceeding for which the discovery is made.' (*t*)

By 39 Geo. 3, c. 79 (an Act for the more effectual suppression of societies established for seditious and treasonable purposes, and for better preventing treasonable and seditious practices), s. 29, 'Every person who shall print any paper for hire, reward, gain, or profit shall carefully preserve and keep one copy (at least) of every paper so printed by him or her, on which he or she shall write, or cause to be written or printed, in fair and legible characters, the name and place of abode of the person or persons by whom he or she shall be employed to print the same ; and every person printing any paper for

(*q*) *R. v. Gutch*, Moo. & M. 433, Lord Tenterden, C. J.

(*r*) *R. v. Gutch*, Moo. & M. 433, Lord Tenterden, C. J., and see *R. v. Almon*, 5 Burr. 2686.

(*s*) *Harding v. Greening*, 8 Taunt. 42. And it was also held in this case that the

daughter could not be compelled to prove by whose direction the letter was written. The answer would tend to fix herself with the crime of writing it.

(*t*) Proceedings against proprietors of newspapers are now governed by the provisions of 51 & 52 Vict. c. 64. See *ante*.

hire, reward, gain, or profit, who shall omit or neglect to write, or cause to be written or printed as aforesaid, the name and place of his or her employer on one of such printed papers, or to keep or preserve the same for the space of six calendar months next after the printing thereof, or to produce and show the same to any justice of the peace who within the said space of six calendar months shall require to see the same, shall for every such omission, neglect, or refusal, forfeit and lose the sum of twenty pounds.'

By sec. 31, 'nothing herein contained shall extend to the impression of any engraving, or to the printing by letterpress of the name, or the name and address, or business or profession, of any person, and the articles in which he deals, or to any papers for the sale of estates or goods by auction or otherwise.'

Secs. 34, 35 & 36 relate to the recovery of the penalties. This Act, by 51 Geo. 3, c. 65, does not require the name and residence of printers to be put to bank notes, bills, &c., or to any paper printed by authority of any public board or public office. See 32 & 33 Vict. c. 24.

By 2 & 3 Vict. c. 12, s. 2, 'Every person who after the passing of this Act shall print any paper or book whatsoever which shall be meant to be published or dispersed, and who shall not print upon the front of every such paper, if the same shall be printed on one side only, or upon the first or last leaf of every paper or book which shall consist of more than one leaf, in legible characters, his or her name and usual place of abode or business; and every person who shall publish or disperse, or assist in publishing or dispersing, any printed paper or book on which the name and place of abode of the person printing the same shall not be printed as aforesaid, shall for every copy of such paper so printed by him or her forfeit a sum not more than five pounds. Provided always, that nothing herein contained shall be construed to impose any penalty upon any person for printing any paper excepted out of the operation of the said Act of the 39 Geo. 3, c. 79, either in the said Act or by any Act made for the amendment thereof.'

By sec. 3, in the case of books or papers printed at the University Press of Oxford, or the Pitt Press of Cambridge, the printer, instead of printing his name thereon, shall print the following words: 'Printed at the University Press, Oxford,' or 'The Pitt Press, Cambridge,' as the case may be.

By sec. 4, no actions, &c. for penalties are to be commenced except in the name of the Attorney or Solicitor-General in England or the Queen's Advocate in Scotland. See 32 & 33 Vict. c. 24.

Before the 38 Geo. 3, c. 78, it was holden, upon an indictment for a libel in a newspaper, that evidence that the paper had been sold at the office of the defendant, that the defendant, as proprietor of the paper, had given a bond to the stamp office pursuant to the 29 Geo. 3, c. 50, s. 10, for securing the duties on the advertisements, and that he had from time to time applied to the stamp office respecting the duties on the paper, was evidence to be left to the jury, to show that the defendant was the publisher. (u) And since the statute it has been

(u) *R. v. Topham*, 4 T. R. 126.

held to be sufficient evidence of a publication at common law to put in the original affidavit of the proprietor stating where the paper was to be published, and to prove that a paper with a corresponding title, containing the libel, was purchased there. (*v*) This was held in a case where it had been previously ruled that in order to render the certified copy of the affidavit made by the proprietor of a newspaper evidence under the 38 Geo. 3, c. 78, it must either appear upon the *jurat* that the person before whom it was made had authority to take it, or this fact must appear *aliunde*. (*w*) So the delivery of a newspaper to the officer at the stamp office is a sufficient publication to sustain an indictment for a libel in the paper. (*x*) So proof that the defendant, as proprietor of the newspaper in which a libel is contained, accounted with the distributor of stamps for the duty on advertisements in the paper, is sufficient evidence of a publication by the defendant. (*y*) An affidavit according to the repealed statute 38 Geo. 3, c. 78, together with the production of a newspaper, corresponding in every respect with the description of it in the affidavit, was not only evidence of the publication of such paper by the parties named, but was also evidence of its publication in the county where the printing of it was described to be. (*z*) Where in an action for libel in a newspaper a certified copy of the stamp office declaration was put in, which stated the title of the paper to be 'The Leicester Herald and Midland Counties Advertiser,' and the intended place of publication to be 'No. 23, Charles Street, in the parish of St. Margaret, in the borough of Leicester,' and the paper containing the libel had the same title, but the place of publication was 'at the corner of Charles Street and Hadfield Street, in the parish of St. Margaret, in the borough of Leicester;' Lord Denman, C. J., held that the evidence of identity was sufficient (*a*) to enable the plaintiff to put the newspaper in evidence under the 8th section of 6 & 7 Will. 4, c. 76 (now repealed). But if the affidavit from the stamp office and the paper varied in the place where the paper was stated to be printed, as where the affidavit stated it to be 'in Union Street, Castle Street,' and the paper 'in Union Buildings, John Street,' the production of the affidavit and paper was not sufficient. (*b*) So where the affidavit described the proprietor's residence to be in 'Red Lion Street, St. Ann's Square,' and on the paper it was described as in 'St. Ann's Square;' Lord Tenterden held that as the party was not excluded from other proof of publication, if he relied on the statutory proof he must bring himself within the statute, and that the discrepancy was fatal. (*c*) In moving for a criminal information a prosecutor was not bound to adopt the statutory proof, but if he adopted any other, the publication must have been shown by some direct proof. (*d*)

(*v*) *R. v. White*, 3 Campb. 100.

(*w*) *R. v. White*, 3 Campb. 99.

(*x*) *R. v. Amphlit*, 4 B. & C. 35.

(*y*) *Cook v. Ward*, 6 Bing. 409, 4 M. & P. 99.

(*z*) *R. v. Hart*, 10 East, 94. *Mayne v. Fletcher*, 9 B. & C. 382, 4 M. & R. 311; *R. v. O'Connell*, 1 Cox, C. C. 405; *R. v. Donnison*, 4 B. & Ad. 698. Per Littledale, J., *R. v. Woolmer*, 12 A. & E. 422.

(*a*) *Baker v. Wilkinson*, C. & M. 399.

(*b*) *R. v. Franceys*, 2 Ad. & E. 49.

(*c*) *Murray v. Souter*, cited 6 Bing. 414, in *Cook v. Ward*.

(*d*) *R. v. Baldwin*, 8 A. & E. 168, and see *Watts v. Fraser*, 7 A. & E. 223; *R. v. Stanger*, 40 L. J. Q. B. 96; *R. v. Pearce*, Peake's N. P. C. 75.

Where in an action for libel to prove that the defendant, Harmer, was the proprietor of the 'Sun' newspaper, a certified copy of the declaration made at the stamp office under the repealed enactment 6 & 7 Will. 4, c. 76, s. 6, was put in, and it was a joint declaration, and stated that, 'We are the sole proprietors; that is to say, the said James Harmer, as legal owner as mortgagee, and Murdo Young, as owner of the equity of redemption,' it was objected that this declaration showed that the defendant was a mortgagee only, and not a proprietor against whom an action for libel could be maintained; but Lord Campbell, C. J., held that the defendant was liable. (*e*)

Upon the trial the libel must in general be produced on the part of the prosecution, and after sufficient proof of a publication by the defendant, may be read; and if the libel has merely been exhibited by the defendant, and he refuses on the trial to produce it, after notice for that purpose, parol evidence may be given of its contents. (*f*) The libellous matter must be set out in the indictment; (*g*) and the libel proved must appear to correspond with the statement of it in the indictment, and any variation in the sense between the matter charged and that proved will be fatal. (*h*) But the mere alteration of a single letter, so long as it does not change one word into another, will not vitiate; though the smallest variance, if it renders the meaning different, will be fatal. (*i*) As to amendments of variances at the trial, see *ante*, p. 53.

The libel must also be proved to have been published, by the party accused, in the county laid in the indictment. (*j*) But if a man write a libel in one county and consent to its publication in another, the consent is sufficient to charge him in the latter county. (*k*) So if a man write a libel in London, and send it by post addressed to a person in Exeter, he is guilty of a publication in Exeter. (*l*) And where the defendant wrote a libel in Leicestershire, with intent to publish it in Middlesex, and published it in Middlesex accordingly, and the information against him was in Leicestershire, three of the judges held the information right: but Bailey, J., doubted. (*m*) From the same case it appears to have been considered that delivering a libel sealed, in order that it may be opened and published by a third person in a distant county, is a publication in the county in which it is so delivered: and further, that if delivering it open were essential, proof that the defendant wrote it in county A., and that C. delivered it unsealed to D. in county B., would be *prima facie* evidence that the defendant delivered it open to C., in the county A., though there be no evidence of C.'s having been in county A. about the time; or that application had been made to D. to know of whom he received it. The informa-

(*e*) Duke of Brunswick v. Harmer, 3 C. & K. 10.

(*f*) By Buller, J., in R. v. Watson and others, 2 T. R. 201.

(*g*) R. v. Sacheverell, 15 Sta. Tri. 466.

(*h*) Tabart v. Tipper, 1 Campb. 352. And if it appears upon the proof that parts of the libel which are separated by intervening matter are set forth as if they were continuous, it will be bad, if the sense is altered by the passage omitted. *Id. ibid.* It is settled that the whole libel need not be set forth in

the indictment; but if any part qualifies the rest, it may be given in evidence, 2 Salk. 417. See the 9 Geo. 4, c. 15, and 14 & 15 Vict. c. 100, s. 1.

(*i*) R. v. Beech, 1 Leach, 133; R. v. Hart, 1 Leach, 145.

(*j*) Case of the Seven Bishops, 12 St. Tri. 354.

(*k*) 12 St. Tr. 331.

(*l*) *Id. ibid.* 332.

(*m*) R. v. Burdett, 4 B. & A. 95.

tion was in the county of Leicester, for writing and publishing a libel: and it was proved by the date of the letter that the defendant wrote it in that county, and that Bickersteth delivered it to Brooks for publication in the county of Middlesex, it being then unsealed. Bickersteth was not called as a witness; and there was no evidence of his having been in the county of Leicester, or how the libel came to him. The jury were told that as Bickersteth had it open, they might presume that he received it open; and that, as the defendant wrote it in the county of Leicester, it might be presumed that Bickersteth received it in that county; and three judges held against the opinion of Bayley, J., that this direction was proper; and they also held that if the delivering open could not be presumed, a delivery sealed with a view to and for the purpose of publication was a publication; and they thought there was sufficient ground for presuming some delivery, either open or sealed, in the county of Leicester. (*n*) It appears from this case that the dating a libel at a particular place is evidence of its having been written at that place. (*o*) The postmark upon a letter has been considered as no evidence for the purpose of proving that the letter was put into the post-office at the place mentioned by such postmark. (*p*) But it appears to be the better opinion that such postmarks, whether in town or country, proved to be such, are evidence that the letters on which they exist were in the offices to which the postmarks belong at the dates thereby specified. (*q*) But a mark of double postage having been paid on such letter is not of itself sufficient evidence that the letter contained an enclosure. (*r*) If a libellous letter is sent by the post, addressed to a party at a place out of the county in which the venue is laid in an indictment for the libel, yet, if it were first received by him within that county, it is a sufficient publication to support the indictment. (*s*) Owning the signature to a libel is no evidence in what county it was signed. This was held in the celebrated case of the Seven Bishops; but additional evidence being afterwards given that the bishops applied to the Lord President of the Council about delivering a petition to the King, and that they were admitted to the King for that purpose in Middlesex, the case was left to the jury. (*t*) It has been held to be sufficient to prove a defendant to have *published* a libel without proving him to

(*n*) *Ibid.*, and *MS. Bayley, J.*

(*o*) *R. v. Burdett*, 4 B. & A. 95.

(*p*) *R. v. Watson*, 1 Campb. 215. Lord Ellenborough, C. J., said the postmark might have been forged.

(*q*) *R. v. Plumer*, Hil. T. 1814. *MS. Bayley, J.*, and *R. & R.* 264. *R. v. Johnson*, 7 East, 65. 2 Stark. Evid. 456, and Fletcher v. Braddyll, note (*g*), *ibid.*

(*r*) *R. v. Plumer*, *supra*, note (*q*). Some person who paid or received the postage might be called.

(*s*) *R. v. Watson*, 1 Campb. 215; and see *R. v. Middleton*, 1 Str. 77. In the case of *R. v. Johnson*, 7 East. 65, the publisher of a public register received an anonymous letter, tendering certain political information on Irish affairs, and requiring to know to whom letters should be directed, to which an

answer was returned in the register, after which he received two letters in the same handwriting directed as mentioned, and having the Irish postmark on the envelopes, which two letters were proved to be in the handwriting of the defendant, the previous letter having been destroyed, it was held that this was a sufficient ground for the Court to have the letters read; and the letters themselves containing expressions of the writer, indicative of his having sent them to the publisher of the register in Middlesex for the purpose of publication, the whole was evidence sufficient for the jury to find a publication by the procurement of the defendant in Middlesex.

(*t*) Case of the Seven Bishops, 12 St. Tri. 183.

have *composed* it, upon a count in an information charging him with having 'composed, printed, and published' it. (*u*) So if the defendant is charged by a count in an indictment with having 'composed, *printed*, and published' a libel, if the evidence be that he only composed and published it, he may be found guilty of the composing and publishing, and acquitted of the printing. (*v*)

If the libel be in a *foreign language*, as it is necessary that it should be set forth in the indictment in the original language, and also in an English translation, it will be necessary to prove the translation to be correct. (*w*)

Where an information for libel stated that the prosecutor had received certain anonymous letters, and that the defendant published a libellous placard of and concerning those letters, and the placard asked, 'Were you not warned that your character was at stake?' and the prosecutor stated that he should not have understood the meaning of the placard if he had not also seen the letters, and that he understood the passage in the placard to allude to the letters, it was held that the letters were admissible without proving who wrote or sent them, as the placard referred to them, and would not be intelligible without them, and that a defendant, who refers to other papers in his publication, must submit to have them read as explanatory of such publication. (*x*)

Depositions taken before a magistrate were not evidence upon a trial for a libel, under the 1 & 2 Ph. & M. c. 13, and 2 & 3 Ph. & M. c. 10, (*y*) which extended only to cases of felony. (*z*) But as the 11 & 12 Vict. c. 42, extends to misdemeanors, it should seem that such depositions would now be evidence. (*a*) A Gazette is evidence to prove an averment in an information for a libel, 'that divers addresses, &c., had been presented to his Majesty by divers of his loving subjects.' (*b*) The King's proclamation, reciting that it had been represented that certain outrages had been committed in different parts of certain counties, and offering a reward for the discovery and apprehension of offenders, had been held admissible evidence to prove an introductory averment, in an information for a libel, that divers acts of outrage had been committed in those parts. (*c*) And a *preamble* to an Act of Parliament, reciting the existence of such outrages, and making provision against them, was also held to be admissible for the same purpose. (*d*)

The criminal intention of the defendant will be matter of inference from the nature of the publication. Where a libellous publication appears, unexplained by any evidence, the jury should judge from the overt act; and, where the publication contains a charge slanderous in its nature, should from thence infer that the intention was malicious. (*e*) It is a general rule that an act unlawful in itself, and injurious to another, is considered both in law and reason to be done *malo*

(*u*) R. v. Hunt, 2 Campb. 583.

(*v*) R. v. Williams, 2 Campb. 646, Lawrence, J., R. v. Knell, 1 Barnard, 305.

(*w*) R. v. Peltier, Selw. N. P. 1048.

(*x*) R. v. Slaney, 5 C. & P. 213, Lord Tenterden, C. J.

(*y*) Repealed by 7 Geo. 4, c. 64, s. 33.

(*z*) R. v. Paine, 5 Mod. 163.

(*a*) See Vol. III., *Evidence*.

(*b*) R. v. Holt, 5 T. R. 436.

(*c*) R. v. Sutton, 4 M. & S. 532.

(*d*) Id. *ibid*.

(*e*) By Lord Kenyon, C. J., in R. v. Lord Abingdon, 1 Esp. 228. And see R. v. Topham, 4 T. R. 127, and R. v. Woodfall, 5 Burr. 2667. Stuart v. Lovel, 2 Stark. R. 93.

animo towards the person injured; and this is all that is meant by a charge of malice in a declaration for libel, which is introduced rather to exclude the supposition that the publication may have been made on some innocent occasion than for any other purpose. (f) The intention may be collected from the libel, unless the mode of publication, or other circumstances, explain it; and the publisher must be presumed to intend what the publication is likely to produce; so that if it is likely to excite sedition, he must be presumed to have intended that it should have that effect. (g) Publishing what is a libel without excuse is indictable, though the publisher be free from what in common parlance is called malice; for defaming wilfully without excuse is in law malicious. And even if it could be an excuse, that the publisher held what he published to be true, it is not so if he professes to publish it from authority. A newspaper contained this paragraph: 'the malady under which his Majesty labours is of an alarming nature [meaning insanity]; it is from authority we speak.' At the trial of the indictment for this publication, the jury asked if a malicious intention were necessary to constitute a libel; to which Abbott, C. J., answered, that a man must have intended to do what his act was calculated to effect; and the jury found the defendant guilty. Upon a motion for a new trial it was admitted that the paragraph was libellous, but it was urged that malice was essential to make the defendant criminal; that he believed the King to have been so afflicted, and that the answer to the question by the jury was incorrect. But the Court thought otherwise, as the defendant must know if he spoke from authority, and could have proved it; and if malice were a question of fact, a man must be presumed to have intended to produce the effect which his act will naturally produce; and libelling without excuse is legal malice. (h) A person who publishes matter injurious to the character of another must be considered, in point of law, to have intended the consequences resulting from that act, (i) from that act, for every man must be presumed to intend the natural and ordinary consequences of his own act. (j) The judge, therefore, ought not to leave it as a question to the jury, whether the defendant intended to injure the person libelled, but whether the tendency of the publication was injurious to such person. (k) In some cases, however, the paper or other matter may be libellous only with reference to circumstances which should be laid before the jury by evidence.

In order to show the existence of actual malice in the mind of the writer of a libel, other libels by him, whether written previously or subsequently, are admissible in evidence. (l) Where the House of Lords asked the judges 'in an action for libel, when the plea of the general issue is pleaded, and also a plea under the 6 & 7 Vict. c. 96, s. 1, denying actual malice, and stating the publication of an apology set forth in the plea, is it admissible upon a trial for the plaintiff to give evidence of other publications by the defendant (some of them more

(f) Per Lord Tenterden, C. J., *Duncan v. Thwaites*, 3 B. & C. 584, 585.

(g) *R. v. Burdett*, 4 B. & A. 95. *R. v. Lovett*, 9 C. & P. 462, *Littledale, J.*

(h) *R. v. Harvey*, 2 B. & C. 257.

(i) Per Lord Tenterden, C. J. *Fisher v. Clement*, 10 B. & C. 472.

(j) Per Lord Tenterden, C. J. *Haire v. Wilson*, 9 B. & C. 643, 4 M. & R. 605.

(k) *Haire v. Wilson, supra.*

(l) *Pearson v. Lemaitre*, 5 M. & G. 700.

Darby v. Ouseley, 1 H. & N. 1; *Stuart v.*

Lovel, 2 Stark. Rep. 93.

than six years before the publication complained of) of and concerning the plaintiff, in order to prove malice against the defendant?' the judges answered, 'We are all of opinion that, under such a plea, the publication of the previous libels on the plaintiff by the defendant is admissible evidence to show that the defendant wrote the libel in question with actual malice against the plaintiff. A long practice of libelling the plaintiff may show in the most satisfactory manner that the defendant was actuated by malice in the particular publication, and that it did not take place through carelessness or inadvertence; and the more the evidence approaches to the proof of a systematic practice, the more convincing it is. The circumstance that the other libels are more or less frequent, or more or less remote from the time of the publication of that in question, merely affects the weight, not the admissibility of the evidence.' And the House of Lords held accordingly. (*m*)

Where an information for libel alleged that a person unknown murdered E. Grimwood, and that one Hubbard had been arrested on the charge of committing the murder and discharged, and the libel set out spoke of 'the acquittal of Hubbard for the murder of E. Grimwood'; it was held that the inducement was proved by evidence that a person had been murdered, and that Hubbard had been charged with the murder and afterwards discharged, and that at the inquest held on the body witnesses called the deceased by the name of E. Grimwood, and that this last fact might be proved by the coroner, and that he might for this purpose use an inquisition drawn up on paper. (*n*)

Where a declaration for libel set out the following passage: 'We would suggest to the ex-Duke of Brunswick the propriety of withdrawing into his own *natural* and sinister obscurity' (meaning thereby to insinuate that the plaintiff was guilty of unnatural practices), Lord Campbell, C. J., refused to permit a witness to be asked if he had read the libel, and what he understood by the word '*natural*' printed in italics, as it was for the jury to form their own opinion as to what was meant by the word so printed. (*o*)

In an action for libel it appeared that the plaintiff, an attorney, was employed by one Nash to bring an action against an executor; and that the defendant, who was employed to adjust the executor's accounts, finding that an action was about to be commenced against the executor, wrote a letter to Nash blaming him for allowing the plaintiff to sue, and containing this passage, 'If you will be misled by an attorney, who only considers his own interest, you will have to repent it; you may think when you have once ordered your attorney to write to Mr. G., he would not do any more without your further orders; but if you once set him about it, he will go any length without further orders.' And it was held that the question whether this letter applied to the plaintiff individually, or to the profession at large, was properly left to the jury. (*p*)

The evidence for the defence will now depend upon the defendant's pleas; if he plead that the libellous matter is true, and that it was

(*m*) *Barrett v. Long*, 3 H. L. C. 395. See *Hemmings v. Gasson*, E. B. & E. 346.

(*n*) *R. v. Gregory*, 8 Q. B. 508.

(*o*) *Duke of Brunswick v. Harmer*, 3 C. & K. 10.

(*p*) *Godson v. Home*, 3 Moore, 323.

published for the public benefit, it will lie upon him to prove these facts; but if he plead not guilty only, then the evidence which can be adduced on his behalf at the trial will in general be confined to a very narrow compass. There may, however, be cases of a publication in point of law, where no criminal intention can be imputed to the party; as where a person delivers a letter without knowing its contents, or delivers one paper instead of another; (*q*) and evidence to such effect may be produced. Where, therefore, an action was brought against the porter of a coach for a libel contained in a hand-bill, which he had delivered tied up in a paper parcel, evidence was admitted that he delivered the parcel in the course of his business without any knowledge of its contents. (*r*) But it is not competent to the defendant to prove that a paper similar to that, for the publication of which he is prosecuted, was published on a former occasion by other persons, who have never been prosecuted for it. (*s*) It was held in a case where the supposed libel was contained in a newspaper, that the defendant had a right to have read in evidence any extract from the same paper, connected with the subject of the passage charged as libellous, although disjointed from it by extraneous matter, and printed in a different character. (*t*) Though the defendant cannot have the assistance of counsel to examine the witnesses, and reserve to himself the right of addressing the jury, yet if he conducts his defence himself, and any point of law arises which he professes himself unable to argue, the Court will hear this argued by his counsel. (*u*)

If a libel imputes to a man a triable offence, proof of the truth of such imputation is inadmissible under a plea of not guilty. Where a libel imputed murder to certain soldiers, evidence was offered of the truth of such imputation, and rejected: and the Court of King's Bench were unanimous that such evidence was rightly rejected. (*v*)

Where an information for a libel states that certain transactions took place, and that the libel was published of and concerning them, and then sets out the libel as referring to them, and general evidence is given in proof of such transactions on the part of the prosecution, the defendant cannot, therefore, give evidence of the particular nature of those transactions so as to bring into issue the truth or falsehood of the libel. But if such evidence were adduced, *bona fide*, to show that the transactions referred to in the alleged libel are not the same with those which the information supposes it to have had in view, it is admissible. (*w*)

(*q*) By Lord Kenyon, C. J., in *R. v. Topham*, 4 T. R. 127, 128. *R. v. Nutt*, Fitz. 47.

(*r*) *Day v. Brean*, 2 M. & Rob. 54. Paterson, J., who said '*prima facie* he was answerable, he had in fact delivered and put into publication the libel complained of, and was therefore called upon to show his ignorance of the contents.'

(*s*) *R. v. Holt*, 5 T. R. 436.

(*t*) *R. v. Lambert*, 2 Campb. 398.

(*u*) *R. v. White*, 3 Campb. 98.

(*v*) *R. v. Burdett*, 4 B. & A. 95. 'In some cases, indeed, it is possible that the falsehood may be of the very essence of the

libel. As for instance, suppose a paper were to state that A. was on a given day tried at a given place, and convicted of perjury; if that be true it may be no libel, but if false, it is from beginning to end calumnious, and may no doubt be the subject of a criminal prosecution. Possibly, therefore, in such a case, evidence of the truth of such a statement by the production of the record, might afford an answer to a prosecution for libel.' *Ibid.* per Bayley, J., p. 147. *R. v. Brigstock*, 6 C. & P. 184. See *post*, where the defendant may plead that the libellous matters are true.

(*w*) *R. v. Grant*, 5 B. & Ad. 1081.

It had been held in many cases, that, on trials for libels, the facts of writing, printing, or publishing, and the truth of the innuendos inserted in the proceedings, were the only matters to be submitted to the consideration of the jury: but the justice of such doctrine being questioned and ably arraigned, (x) the 32 Geo. 3, c. 60 (Fox's Act), was passed, sec. 1 of which enacts 'that on every such trial, the jury sworn to try the issue may give a general verdict of guilty or not guilty, upon the whole matter put in issue upon such indictment or information; and shall not be required or directed, by the Court or judge before whom such indictment or information shall be tried, to find the defendants or defendant guilty, merely on the proof of the publication by such defendant or defendants of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information.' By sec. 2, 'the Court, or judge before whom such indictment or information shall be tried, shall, according to their or his discretion, give their or his opinion and directions to the jury, on the matter in issue between the King and the defendant or defendants, in like manner as in other criminal cases.' (y)

In criminal cases the judge is to define the crime, and the jury are to find whether the party has committed that offence; this Act made it the same in cases of libel, the practice having been otherwise before. (z) It has been the course for a long time for a judge in cases of libel, as in other cases of a criminal nature, first to give a legal definition of the offence, and then to leave it to the jury to say, whether the facts necessary to constitute that offence are proved to their satisfaction; and that, whether the libel is the subject of a criminal prosecution or civil action. Whether the particular publication, the subject of inquiry, is calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule, is a question upon which a jury is to exercise their judgment, and pronounce their opinion as a question of fact. The judge, as a matter of advice to them in deciding that question, may give his own opinion as to the nature of the publication, but is not bound to do so. (a)

The Court will not sanction applications for a criminal information for libel if they are only for the purpose of extorting an apology, nor will it sanction a compromise of a prosecution when once before the Court, as the object of a criminal information is the repression of libels and not the mere vindication of the character of the person who has been libelled. (b)

The judgment in cases of libel at common law is in the discretion of the Court, as in most other cases of misdemeanors; and usually consists of fine, imprisonment, and the finding sureties to keep the peace. (c) Judgment was given on each of four counts of an in-

(x) See the celebrated speeches of Mr. Erskine, in the case of the Dean of St. Asaph, *Ridgway's Col.* pp. 234, 264, vol. 1.

(y) Sec. 3 provides that the jury may find a special verdict, in their discretion, as in other criminal cases. And sec. 4, that defendants may move in arrest of judgment as before the passing of the Act.

(z) Per Parke, B. *Parmiter v. Coupland*, 6 M. & W. 105; *Jenner v. A'Beckett*, 41 L. J. Q. B. 14.

(a) *Parmiter v. Coupland*, *supra*, Baylis v. Lawrence, 11 A. & E. 920. *Paris v. Levy*, 9 C. B. (N. S.) 342; *R. v. Burdett*, 4 B. & A. 95; *Fray v. Fray*, 34 L. J. C. P. 45.

(b) *R. v. 'The World'*, 13 Cox, C. C. 305.

(c) 1 Hawk. P. C. c. 73, s. 21. Bac. Abr. tit. *Libel* (C.) *R. v. Middleton*, Fort. 201. *R. v. Dunn*, 12 Q. B. 1026.

formation that the defendant be imprisoned on the first count 'for the space of two months now next ensuing;' on the second count, 'for the further space of two months, to be computed from and after the end and expiration of his imprisonment' for the offence mentioned in the first count; on the third count, for the further space of two months, to be computed in like manner from the end of the imprisonment on the second count; and on the fourth count, for the further space of two months, to be computed in like manner from the end of the imprisonment on the third count. The third count was adjudged on error to be insufficient: but it was held, that the sentence on the fourth count was not thereby invalidated, and that the imprisonment on it was to be computed from the end of the imprisonment on the second count. (*d*)

In the case of a blasphemous or seditious libel, the 60 Geo. 3, & 1 Geo. 4, c. 8, s. 4, made a second offence punishable by banishment from the King's dominions, or such punishment as might be inflicted in cases of high misdemeanor; but the 11 Geo. 4 & 1 Will. 4, c. 73, s. 1, repealed 'so much and such parts of that Act as relate to the sentence of banishment for the second offence;' consequently the common law punishment alone remains. (*e*)

Most important alterations were made in the law of libel by Lord Campbell's Act.¹ By that Act, (*f*) 6 & 7 Vict. c. 96, s. 3, 'If any per-

(*d*) Gregory v. R., 15 Q. B. 974.

(*e*) A certificate of every indictment and conviction of any offender convicted of having composed, &c., any blasphemous or seditious libel, is, by sec. 2 of the former Act, to be given by the officer having the custody of the records, upon the request of the prosecutor on his Majesty's behalf, to the justices of assize, &c., where such offender shall be indicted for any second offence, and is to be sufficient proof of the conviction of such offender. And in all cases in which any verdict or judgment by default shall be had against any person for publishing any blasphemous or seditious libel, the judge or court may make an order for the seizure and carrying away and detaining all copies of the libel in the possession of the party, or of any other person named in the order for his use. See secs. 1, 2. Secs. 8 and 9 provide for the limitation of actions brought for anything done in the execution of the Act.

(*f*) Sec. 1, 'for the better protection of private character, and for more effectually securing the liberty of the press, and for better preventing abuses in exercising the said liberty,' enacts, 'that in any action for defamation it shall be lawful for the defendant (after notice in writing of his intention so to do, duly given to the plaintiff at the

time of filing or delivering the plea in such action), to give in evidence, in mitigation of damages, that he made or offered an apology to the plaintiff for such defamation before the commencement of the action, or as soon afterwards as he had an opportunity of doing so, in case the action shall have been commenced before there was an opportunity of making or offering such apology.'

Sec. 2. 'In an action for a libel contained in any public newspaper or other periodical publication it shall be competent to the defendant to plead that such libel was inserted in such newspaper or other periodical publication without actual malice, and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, he inserted in such newspaper or other periodical publication a full apology for the said libel, or, if the newspaper or periodical publication in which the said libel appeared should be ordinarily published at intervals exceeding one week, had offered to publish the said apology in any newspaper or periodical publication to be selected by the plaintiff in such action; and that every such defendant shall upon filing such plea be at liberty to pay into court a sum of money by way of amends for the injury sustained by the publication of such

AMERICAN NOTE.

¹ In America, as in England under Lord Campbell's Act, the truth of the libel may be given in evidence where the publication was made with good motives and for good ends, and in some cases this provision is to be

found in the constitution of some of the States. See *Barthelemy v. P.*, 2 Hill, N. Y. 248; *C. v. Bonner*, 9 Met. 410; *C. v. Snelling*, 15 Pick. 337; *S. v. White*, 7 Ire. 180; *Bishop i. s.* 319, ii. s. 920.

son shall publish or threaten to publish any libel upon any other person, or shall directly, or indirectly threaten to print or publish, or shall directly or indirectly propose to abstain from printing or publishing, or shall directly or indirectly offer to prevent the printing or publishing, of any matter (*g*) or thing touching any other person, with intent to extort any money or security for money, or any valuable thing from such or any other person, or with intent to induce any person to confer or procure for any person any appointment or office of profit or trust, every such offender, on being convicted thereof, shall be liable to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding three years: provided always, that nothing herein contained shall in any manner alter or affect any law now in force in respect of the sending or delivery of threatening letters or writings.'

Sec. 4. 'If any person shall maliciously publish any defamatory libel knowing the same to be false, (*h*) every such person, being convicted thereof, shall be liable to be imprisoned in the common gaol or house of correction for any term not exceeding two years, and to pay such fine as the Court shall award.'

Sec. 5. 'If any person shall maliciously publish any defamatory libel, every such person, being convicted thereof, shall be liable to fine or imprisonment or both, as the Court may award, such imprisonment not to exceed the term of one year.'

Sec. 6. 'On the trial (*i*) of any indictment or information for a defamatory libel, the defendant having pleaded such plea as herein-after mentioned, the truth of the matters charged may be inquired into, but shall not amount to a defence, unless it was for the public benefit that the said matters charged should be published; and that to entitle the defendant to give evidence of the truth of such matters charged as a defence to such indictment or information it shall be necessary for the defendant, in pleading to the said indictment or information, to allege the truth of the said matters charged in the manner now required in pleading a justification to an action for defamation, and further to allege that it was for the public benefit that the said matters charged should be published, and the particular fact or facts by reason whereof it was for the public benefit that the said matters charged should be published; to which plea the prosecutor shall be at liberty to reply generally, denying the whole thereof; and that if after such plea the defendant shall be convicted on such indictment or information it shall be com-

libel, and such payment into court shall be of the same effect and be available in the same manner and to the same extent, and be subject to the same rules and regulations as to payment of costs and the form of pleading, except so far as regards the pleading of the additional facts hereinbefore required to be pleaded by such defendant, as if actions for libel had not been excepted from the personal actions in which it is lawful to pay money into court under an Act passed in the session of Parliament held in the fourth year of his late Majesty, intituled "An Act for the further Amendment of the Law and the better

Advancement of Justice;" and that to such plea to such action it shall be competent to the plaintiff to reply generally, denying the whole of such plea.' By the 8 & 9 Vict. c. 75, s. 2, the defendant is to pay money into court when the plea is filed; and see 15 & 16 Vict. c. 76, s. 70.

(*g*) See *R. v. Coghlan*, 4 F. & F. 316.

(*h*) Upon an indictment for publishing a defamatory libel, 'knowing the same to be false,' the defendant may be convicted of merely publishing a defamatory libel. *Boaler v. The Queen*, 21 Q. B. D. 284.

(*i*) See *R. v. Townsend*, 4 F. & F. 1089.

petent to the Court, in pronouncing sentence, to consider whether the guilt of the defendant is aggravated or mitigated by the said plea, and by the evidence given to prove or to disprove the same: provided always, that the truth of the matters charged in the alleged libel complained of by such indictment or information shall in no case be inquired into without such plea of justification: provided also that, in addition to such plea, it shall be competent to the defendant to plead a plea of not guilty: provided also, that nothing in this Act contained shall take away or prejudice any defence under the plea of not guilty which it is now competent to the defendant to make under such plea to any action or indictment or information for defamatory words or libel.'

Sec. 7. 'Whosoever, upon the trial of any indictment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent, or knowledge, and that the said publication did not arise from want of due care or caution on his part.' (*j*)

Sec. 8. 'In the case of any indictment or information by a private prosecutor for the publication of any defamatory libel, if judgment shall be given for the defendant, he shall be entitled to recover from the prosecutor the costs sustained by the said defendant by reason of such indictment or information; (*k*) and that upon a special plea of justification to such indictment or information, if the issue be found for the prosecutor, he shall be entitled to recover from the defendant the costs sustained by the prosecutor by reason of such plea, such costs so to be recovered by the defendant or prosecutor respectively to be taxed by the proper officer of the Court before which the said indictment or information is tried.' (*l*)

Sec. 9. 'Wherever throughout this Act, in describing the plaintiff or the defendant, or the party affected or intended to be affected by the offence, words are used importing the singular number or the masculine gender only, yet they shall be understood to include several persons as well as one person, and females as well as males, unless when the nature of the provision or the context of the Act shall exclude such construction.'

Where one count charged the defendants with offering to prevent the publishing, and another with threatening to publish certain matters of the prosecutor with intent to extort money, and the defendants appeared to have attempted to obtain money from the prosecutor by leading him to believe that an information for an offence relating to the post-horse duties would be laid against him, and that they would prevent it if he paid them a sum of money, it was held that the evidence did not support the counts. (*m*)

It has been held in Ireland that to an indictment for publishing in a newspaper 'a certain false, defamatory, malicious, and seditious

(*j*) See *R. v. Holbrook*, 3 Q. B. D. 60; 4 Q. B. D. 42; *R. v. Bradlaugh*, 15 Cox, C. 217; *R. v. Ramsay*, 15 Cox, C. C. 231.

(*k*) See *post*, p. 651.

(*l*) Such costs may be recovered by action, *Richardson v. Willis*, 8 L. R. Ex. 69; 42 L. J. Ex. 68.

(*m*) *R. v. Yates*, 6 Cox, C. C. 441.

libel' concerning her Majesty's Government and the Parliament of the United Kingdom, with intent to create disaffection and hatred to her Majesty's Government and the Parliament, a special plea of justification cannot be pleaded under the 6 & 7 Vict. c. 96, s. 6. (*n*)

Where to a criminal information for a libel the defendant pleaded a justification, alleging that the imputations contained in the libel were true, it was held that it was not competent to the defendant to prove that imputations identical with those in the libel had been previously published in a book. (*o*)

Where a justification is pleaded under the 6 & 7 Vict. c. 96, s. 6, to an information for a defamatory libel, and the libel contains several distinct imputations, and the plea alleges the truth of all, and is traversed generally, if the evidence fail as to any one of them, the verdict will be entered generally against the defendant. Where, therefore, upon the trial of such an issue upon such a plea, evidence was offered in support of some only of the imputations, and the jury found that only one of the imputations upon which evidence was offered was proved, the verdict was entered for the Crown generally; as there can be no partial finding for a defendant on the ground that a justification is partially established. (*p*) But where the libel was general, to the effect that the prosecutor was one of a gang of cardsharps, and the plea of justification alleged specific instances of cardsharpping, and also that the prosecutor confederated with others for the purpose of cheating, and did so cheat, at various places, it was held that it was sufficient to prove the plea in substance, and that it was so proved by the jury finding that in two instances the prosecutor did cheat at cards, and that he did confederate with other persons for that purpose. (*q*)

By the express enactment that, wherever there is a conviction after such a plea of justification 'the Court, in pronouncing sentence,' shall 'consider whether the guilt of the defendant is aggravated or mitigated by the said plea, and by the evidence given to prove and disprove the same,' the Court is to consider the evidence on the one side and the other, and to form their own conclusion whether it aggravates or mitigates the guilt of the defendant, and they are to apportion the punishment accordingly. The evidence, as it appears on the notes of the judge who presided at the trial, comes in place of affidavits in aggravation and mitigation of punishment when sentence is to be pronounced, and by that the sentence is to be regulated, and not by any declaration of the jury as to the credit which they think ought to be given to the witnesses. (*r*)

In such a case the defendant may, in mitigation of punishment, show by affidavit that after the publication, but before pleading, information was given to him which, if true, would have supported an allegation in the plea, evidence having been given at the trial to account for the non-production of proof, but no evidence in support of the allegation itself. (*s*)

A libel imported to be founded on certain newspaper reports, and upon the foundation of those reports charged certain troops with acts of murder: after conviction the defendant offered affidavits that the

(*n*) *R. v. Duffy*, 2 Cox, C. C. 45.

(*o*) *R. v. Newman*, 1 E. & B. 268.

(*p*) *R. v. Newman*, 1 E. & B. 558.

(*q*) *R. v. Labouchere*, 14 Cox, C. C. 419.

(*r*) *R. v. Newman*, 1 E. & B. 558.

(*s*) *Ibid.*

newspapers did contain those reports, and also other affidavits that the facts were true. The former affidavits were received, because they explained the situation in which the defendant stood at the time he wrote the libel, and showed the impression under which he wrote; but the latter were rejected, because the receiving them might deprive of a fair trial persons who might afterwards be tried for the murders; and if murders were committed, the proper course was to prosecute and bring to a fair trial, not to libel and create an unfair prejudice. (*t*)

Where an indictment for a libel on the governor of a parish work-house was preferred by the direction and carried on at the expense of the select vestry of the parish, and the defendant having removed it into the King's Bench by certiorari was convicted, it was held that the party libelled was not the 'party grieved' within the 5 & 6 Will. & M. c. 11, s. 3, and, therefore, was not entitled to costs. (*u*)

Costs. — When a prosecutor or defendant is entitled to costs under 6 & 7 Vict. c. 96, s. 8, see *ante*, p. 649. On a criminal information for libel the defendant, if he obtain a verdict, is entitled to costs under the 6 & 7 Vict. c. 96, s. 8, though he has not pleaded a special plea under section 6; and the judge cannot deprive him of costs by a certificate, the provision in the 4 & 5 Will. & M. c. 18, s. 2, on this head being superseded by the later Act. (*v*) Upon the trial of a criminal information for a defamatory libel the defendant obtained a verdict, whereupon the Master on taxation allowed him the costs which he had incurred in showing cause unsuccessfully against the rule nisi for filing the information under the above section 8: held by Mellor, J., and Lush, J. (Blackburn, J., *dub.*), that the allowance was properly made. (*w*) The Court of Queen's Bench has no jurisdiction to direct the clerk of assize to review his taxation of costs (under the 6 & 7 Vict. c. 96, s. 8) of an indictment for libel tried on the Crown side under a commission of oyer and terminer. But, perhaps, one of the commissioners under that commission might do so, before that commission was superseded. (*x*)

The offence of libel is not triable at Quarter Session (5 & 6 Vict. c. 38, s. 1).

(*t*) *R. v. Burdett*, 4 B. & A. 314.

(*u*) *R. v. Dewhurst*, 5 B. & Ad. 405. See *R. v. Hawdon*, 3 P. & D. 44.

(*v*) *R. v. Latimer*, 15 Q. B. 1077; 20 L. J. Q. B. 129.

(*w*) *R. v. Steel*, 1 Q. B. D. 402; 45 L. J.

M. C. 391. It was held on appeal that the Court of Appeal had no jurisdiction, as this was a criminal case, 2 Q. B. D. 37.

(*x*) *R. v. Newhouse*, 1 Bail. C. R. 129; 22 L. J. Q. B. 127.

CHAPTER THE TWENTY-NINTH.

OF DISTURBANCES IN PLACES OF PUBLIC WORSHIP. (a)

It has been already stated that affrays in a church or churchyard have always been esteemed very heinous offences, as being very great indignities to the Divine Majesty, to whose worship and service such places are immediately dedicated; (b) and upon this consideration all irreverent behaviour in these places has been esteemed criminal by the makers of our laws. So that many disturbances occurring in these places are visited with punishment which, if they happened elsewhere, would not be punishable at all; as bare quarrelsome words: and some acts are criminal which would be commendable if done in another place; as arrests by virtue of legal process. (c)

Several statutes have been passed for the purpose of preventing disturbances in places of worship belonging to the established church, and also in those belonging to congregations of Protestant Dissenters and Roman Catholics.

By the 5 & 6 Edw. 6, c. 4, 'if any person whatsoever shall, by words only, quarrel, chide, or brawl, in any church or churchyard, that then it shall be lawful unto the ordinary of the place where the offence shall be done, and proved by two lawful witnesses, to suspend every person so offending; that is to say, if he be a layman, *ab ingressu ecclesiæ*, and if he be a clerk, from the ministration of his office, for so long time as the said ordinary shall by his discretion think meet and convenient, according to the fault.' (d)

By sec. 2, 'if any person or persons shall smite or lay violent hands upon any other, either in any church or churchyard, then *ipso facto* every person so offending shall be deemed excommunicate, and be excluded from the fellowship and company of Christ's congregation.' (e)

In the construction of this statute it has been held that the Ecclesiastical Court may proceed upon the two first sections, and is not to be prohibited; for though the offence mentioned in the second section of smiting in the church or churchyard is still an offence at

(a) The statute 5 & 6 Edw. c. 1, s. 2, imposed a general duty on people to go to church, and conferred a general right correlatively to go to church, and these are still binding on members of the Church of England. *Taylor v. Timson*, 20 Q. B. D. 671.

(b) *Ante*, p. 588.

(c) 1 Hawk. P. C. c. 63, s. 23.

(d) By the 23 & 24 Vict. c. 32, s. 1, 'it shall not be lawful for any ecclesiastical court in England or Ireland to entertain or adjudicate upon any suit or cause of brawling

commenced after July 3, 1860, against any person *not* being in holy orders; 'and by sec. 4, the 5 & 6 Edw. 6, c. 4, is repealed 'so far as relates to persons *not* in holy orders.'

(e) The 9 Geo. 4, c. 31, repeals this Act as far 'as relates to the punishment of persons convicted of striking with any weapon, or drawing any weapon with intent to strike as therein mentioned.' The statute has three degrees of offences, per Lord Mansfield, C. J., 1 Burr. 242, and only the last, *i. e.*, sec. 3, seems to be repealed. C. S. G.

common law, and the offender may be indicted for it, yet, besides this, he may, by the act, be *ipso facto* excommunicated. (*f*) No previous conviction is necessary in this case; though, if there be one, the ordinary may use it as proof of the fact. But if the Ecclesiastical Court proceeds for damages on either clause, the Court of King's Bench will prohibit them; for the proceedings of the Ecclesiastical Court are *pro salute animæ*. (*g*)

Cathedral churches, and the churchyards which belong to them, are within the statute. (*h*) And it will be no excuse for a person who strikes another in a church, &c., to show that the other assaulted him. (*i*) But churchwardens, or perhaps private persons, who whip boys for playing in the church, or pull off the hats of those who obstinately refuse to take them off themselves, or gently lay their hands on those who disturb the performance of any part of divine service, and turn them out of the church, were never within the meaning of the statute. (*j*)

By the 1 Mary, sess. 2, c. 3, s. 2, 'if any person or persons, of their own power and authority, do and shall willingly and of purpose, by open and overt word, fact, act, or deed, maliciously or contemptuously molest, let, disturb, vex, or trouble, or by any other unlawful ways or means disquiet or misuse, any preacher or preachers, licensed, allowed, or authorized to preach by the Queen's Highness, or by any archbishop or bishop of this realm, or by any other lawful ordinary, or by any of the universities of Oxford and Cambridge, or otherwise lawfully authorized or charged by reason of his or their cure, benefice, or other spiritual promotion or charge, in any of his or their open sermon, preaching, or collation, that he or they shall make, declare, preach, or pronounce, in any church, chapel, churchyard, or in any other place or places, used, frequented, or appointed, or that hereafter shall be used or appointed to be preached in; or if any person or persons shall maliciously, willingly, or of purpose, molest, let, disturb, vex, disquiet, or otherwise trouble, any parson, vicar, parish priest, or curate, or any lawful priest, preparing, saying, doing, singing, ministering or celebrating the mass, or other such divine service, sacraments or sacramentals, as was most commonly frequented and used in the last year of the reign of the late sovereign lord King Henry the Eighth, or that at any time hereafter shall be allowed, set forth, or authorized, by the Queen's Majesty; or, if any person or persons shall unlawfully, contemptuously, or maliciously, of their own power or authority, pull down, deface, spoil, or otherwise break, any altar or altars, or any crucifix or cross, in any church, chapel, or churchyard,' every such offender, his aidors, procurers, or abettors, may be apprehended by any constable or churchwarden of the place where such offence shall be committed, or by any other officer or person then being present at the time of the said offence, and being so apprehended, shall be brought before some justice of the peace, by whom he shall, upon due accusation, be committed forthwith; and within six days next after the accusation the said justice, with one other justice, shall

(*f*) *Wilson v. Greaves*, 1 Burr. 240.

(*g*) *Id. ibid.* And by Lord Mansfield, C. J., in the same case, 'We proceed to punish, they to amend.'

(*h*) *Dethick's case*, 1 Leon. 248.

(*i*) 1 Hawk. P. C. c. 63, s. 28.

(*j*) *Id. ibid.* sec. 29. See notes (*a*) and (*e*), p. 652.

diligently examine the offence; and if the two justices find the person guilty, by proof of two witnesses, or confession, they shall commit him to gaol for three months, and further to the quarter sessions next after the end of the three months; at which sessions he is upon repentance to be discharged, finding surety for his good behaviour for a year; and if he will not repent, he is to be further committed till he does.' (k)

The disturbance of a minister in saying the present common prayer is within this statute; for the express mention of such divine service as should be afterwards authorized by Queen Mary impliedly includes such service also as should be authorized by her successors, upon the principle that as the King never dies, a prerogative given generally to one goes of course to others. (l)

The 1 Mary, sess. 2, c. 3, merely gave to the common law cognizance of an offence, which was before punishable by the ecclesiastical law; and in order to be within that statute, the party must maliciously, wilfully, or of purpose, molest the person celebrating divine service. The plaintiff on a Sunday presented a notice to the parish clerk, and desired him to read it. The clerk, after consulting the minister, refused to do so. After the Nicene Creed had been read, and whilst the minister was walking from the communion table to the vestry-room, and whilst no part of the service was actually going on, the plaintiff stood up in his pew and read a notice that a vestry would be held to choose churchwardens, whereupon the minister desired a constable to take him out of the church, which the constable did, and detained him an hour after the service was over, and then allowed him to go upon promising to attend before a magistrate the next day. It was held, that although the constable might be justified in removing him from the church, and detaining him until the service was over, he could not detain him afterwards to take him before a magistrate under this statute. Abbot, C. J., said, 'had the notice been read by the plaintiff whilst any part of the service was actually going on, we might have thought that he had done it on purpose to molest the minister; but the act having been done during an interval when no part of the service was in the course of being performed, and the party apparently supposing that he had a right to give such a notice, I am not prepared to say that the 1 Mary, sess. 2, c. 3, warranted his detention in order that he might be taken before a justice.' (m)

The statute further provides, that persons rescuing offenders so apprehended as aforesaid, or hindering the arrest of offenders, shall suffer like imprisonment, and pay a fine of five pounds for each offence. (n) And if any offenders be not apprehended, but escape, the escape is to be presented at the quarter sessions, and the inhabitants of the parish where the escape was suffered are to forfeit five pounds. (o)

Precedents are to be met with of indictments for breaking the

(k) 1 Mary, sess. 2, c. 3, ss. 2, 3, 4, 5, 6. *Qu.*, how far is this Act repealed by the 1 Eliz. c. 2.

(l) 1 Hawk. P. C. c. 68, s. 31, Gibs. 372.

(m) Williams v. Glenister, 2 B. & C. 699.

It was also held that the case did not come within the 1 Will. & M. c. 18, *post*, p. 655.

(n) Sec. 7.

(o) Sec. 8.

windows of a church, by firing a gun against them: (p) but it has been doubted whether such an indictment is sustainable, as being for a mere trespass. (q)

By the 24 & 25 Vict. c. 100, s. 36, 'Whosoever shall, by threats or force, obstruct or prevent, or endeavour to obstruct or prevent, any clergyman or other minister in or from celebrating divine service or otherwise officiating in any church, chapel, meeting house, or other place of divine worship, or in or from the performance of his duty in the lawful burial of the dead in any churchyard or other burial place, or shall strike or offer any violence to, or shall, upon any civil process, or under the pretence of executing any civil process, arrest any clergyman or other minister who is engaged in, or to the knowledge of the offender is about to engage in, any of the rites or duties in this section aforesaid, or who to the knowledge of the offender shall be going to perform the same or returning from the performance thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court to be imprisoned for any term not exceeding two years, with or without hard labour.' (r)

By the Burials Act, 1880 (43 & 44 Vict. c. 41), which provides for burials without the rites of the Church of England, s. 7, 'All burials under this Act, whether with or without a religious service, shall be conducted in a decent and orderly manner, and every person guilty of riotous, violent, or indecent behaviour at any burial under this Act, or wilfully obstructing such burial or any such service as aforesaid thereat, or who shall in any such churchyard or graveyard as aforesaid deliver any address not being part of or incidental to a religious service permitted by this Act, and not otherwise permitted by any lawful authority, or who shall, under colour of any religious service or otherwise in any such churchyard or graveyard, wilfully endeavour to bring into contempt or obloquy the Christian religion, or the belief or worship of any church or denomination of Christians, or the members or any minister of any such church or denomination, or any other person, shall be guilty of a misdemeanor.'

By sec. 8, 'All powers and authorities now existing by law for the preservation of order and for the prevention and punishment of disorderly behaviour in any churchyard or graveyard may be exercised in any case of burial under this Act in the same manner and by the same persons as if the same had been a burial according to the rites of the Church of England.'

The 1 Will. & M. c. 18, s. 18, which was passed for the purpose of exempting Protestants dissenting from the Church of England from the penalties of certain laws therein mentioned, enacts, 'that if any

(p) 2 Chit. Crim. L. 23.

(q) Id. *ibid.*, and see *ante*, p. 204.

(r) This clause is new in England, except that part which applies to the arrest of any clergyman while performing divine service, or going to perform the same, or returning from the performance thereof, which was contained in both the 9 Geo. 4, c. 31, s. 23, and 10 Geo. 4, c. 34, s. 27 (1.). The rest of the clause is framed on the Irish Acts of the 27 Geo. 3, c. 15, s. 5; 40 Geo. 3, c. 96, s. 5; 5 Geo. 4, c. 25, s. 5; and 5 Vict. sess. 2,

c. 28, ss. 7, 19. The amendments consist in including ministers not of the Church of England and Ireland, and all places of divine worship, and all burial places, and in adding the endeavour to prevent or obstruct, the offering any violence to, and the arrest under pretence of executing any civil process of, any clergyman or minister engaged in or about to engage in any of the rites or duties mentioned in this clause. As to hard labour, &c., see *ante*, pp. 80, 81.

person or persons shall, willingly and of purpose, maliciously or contemptuously, come into any cathedral or parish church, chapel, or other congregation permitted by this Act, and disquiet or disturb the the same, or misuse any preacher or teacher; such person or persons, upon proof thereof before any justice of peace, by two or more sufficient witnesses, shall find two sureties to be bound by recognizance in the penal sum of fifty pounds; and in default of such sureties shall be committed to prison, there to remain till the next general or quarter sessions; and upon conviction of the said offence at the said general or quarter sessions, shall suffer the pain and penalty of twenty pounds, to the use of the King.' (s)

Before this statute the Court of King's Bench refused to grant a *certiorari* to remove an indictment at the sessions against a person not behaving himself modestly and reverently at the church during divine service; for, although the offence was punishable by ecclesiastical censures, the Court considered it properly to come within the cognizances of the justices of the peace. (t) An indictment upon the statute, found at the quarter sessions, may be removed by *certiorari* before verdict, notwithstanding the words of the statute, which seem at the first view to confine the cognizance of the offence to the justices in the first instance, and in the next to the quarter sessions. (u)

The oaths taken by a preacher under this Act are matter of record, and cannot be proved by parol evidence; but it is not necessary, upon an indictment for disturbing a dissenting congregation, to prove that the minister has taken the oaths. (v) It is no defence to such an indictment that the defendant committed the outrage for the purpose of asserting his right to the situation of clerk. (w) And it has been held that a congregation of foreign Lutherans, conducting the service of their chapel in the German language, are within the protection of the statute. (x) Upon the conviction of several defendants, each of them is liable to a penalty of twenty pounds. (y)

The 1 Will. & M. c. 18, only applies where the thing is done wilfully, and of purpose to disturb the congregation or misuse the minister. (z)

By the 52 Geo. 3, c. 155, s. 12, 'If any person or persons do and shall wilfully and maliciously or contemptuously disquiet or disturb any meeting, assembly, or congregation of persons assembled for religious worship, permitted or authorized by this Act, or any former Act or Acts of Parliament, or shall in any way disturb, molest, or misuse any preacher, teacher, or person officiating at such meeting, assembly, or congregation, or any person or persons there assembled; such person or persons so offending, upon proof thereof before any justice of the peace by two or more credible witnesses, shall find two sureties to be bound by recognizances in the penal sum of fifty pounds to answer for such offence; and in default of such sureties shall be committed to prison, there to remain till the next general or quarter sessions; and upon conviction of the said offence at the said general or quarter ses-

(s) This Act is repealed, see 34 & 35 Vict. c. 48, schedule 1, p. 2, except ss. 7, 18, and part of s. 11.

(t) R. v. —, 1 Keb. 491. Burn's Just. tit. *Public Worship*.

(u) R. v. Hube, 5 T. R. 542.

(v) R. v. Hube, Peake, R. 131.

(w) Id. *ibid*.

(x) Id. *ibid*.

(y) R. v. Hube, 5 T. R. 542.

(z) Per Abbott, C. J. Williams v. Glenister, *ante*, p. 654.

sions shall suffer the pain and penalty of forty pounds.' By sec. 14 nothing contained in the Act shall extend to *Quakers*, nor to any meetings or assemblies for religious worship held or convened by them.

It has been holden upon this statute, in conformity to the decision which has been mentioned upon the 1 Will. & M. c. 18, (a) that an indictment found at the quarter sessions may be removed into the Court of King's Bench by *certiorari* before trial, (b) and may be tried at the assizes.

A similar provision to that contained in the 1 Will. & M. c. 18, s. 18, (c) relating to Protestant dissenters, is enacted in the 31 Geo. 3, c. 32, s. 10, with respect to Roman Catholic congregations, or assemblies of religious worship permitted by the latter statute.

The 18 & 19 Vict. c. 86, recites the 1 Will. & M. sess. 1, c. 18, and 52 Geo. 3, c. 155, and enacts that nothing contained in these Acts or in the 15 & 16 Vict. c. 36, shall apply, (1), to any congregation or assembly for religious worship held in any parish or ecclesiastical district, and conducted by the incumbent, or in case the incumbent is not resident, by the curate of such parish or district, or by any person authorized by them respectively; (2), to any congregation or assembly for religious worship meeting in a private dwelling-house or on the premises belonging thereto; (3), to any congregation or assembly for religious worship meeting occasionally in any building or buildings not usually appropriated to purposes of religious worship. And no person permitting any such congregation to meet as herein-mentioned in any place occupied by him shall be liable to any penalty for so doing. (d)

The 23 & 24 Vict. c. 32, s. 2, renders liable to summary conviction any person guilty of riotous, violent or indecent behaviour in any church or chapel of the Church of England and Ireland, or in any chapel of any religious denomination,¹ or in any place of religious

(a) *R. v. Hube, supra.*

(b) *R. v. Wadley*, 4 M. & S. 508.

(c) *Ante*, p. 655.

(d) By sec. 2, so much of the 2 & 3 Will. 4, c. 115, as relates to Roman Catholics, and of the 9 & 10 Vict. c. 59, as relates to Jews,

is to be read as applicable to the laws to which Protestant dissenters are subject after the passing of this Act. See the 18 & 19 Vict. c. 81, as to registering places of religious worship.

AMERICAN NOTE.

¹ Such statutes as the above are not required in America, where all forms of religious worship are equally favoured. Bishop i. s. 542. But on the other hand there have been many statutes passed in America for the purpose of protecting all sorts of meetings. Thus in Massachusetts a statute protects 'any school or other assembly of people met for a lawful purpose within the place of such meeting or out of it,' and this was held applicable to a temperance meeting. *C. v. Porter*, 1 Gray, 476. In Virginia any person maliciously or contemptuously disturbing any congregation assembled in any church, meeting-house, or other place of religious worship, is liable to be punished, and this was held to protect a Methodist

camp-ground at night after the services were over, and the worshippers were retired to rest. *C. v. Jennings*, 3 Grat. 624; though a contrary decision seems to have been come to in Missouri. *S. v. Edwards*, 32 Mo. 548; *S. v. Jones*, 53 Mo. 486. The law in Texas and Alabama seems to agree with that in Virginia, but Tennessee follows Missouri. There have been various decisions on the words 'religious worship' and 'schools.' The question, What is a disturbance? appears to be a question for the jury, *C. v. Porter*, 1 Gray, 476, and must vary according to the nature of the meeting and the usual conduct of such persons as attend it. See Bishop ii. ss. 308, 309, 310. In most statutes the word 'wilfully' is used.

worship certified under the 18 & 19 Vict. c. 81, whether during the celebration of divine service or at any other time, or in any church-yard or burial ground, or who molests, disturbs, &c., any preacher or clergyman as therein mentioned. (e)

The facts attending disturbances of religious assemblies may sometimes authorise proceedings at common law for a conspiracy or a riot: (f) and we have seen that by the 24 & 25 Vict. c. 97, s. 11, if persons riotously assembled begin to demolish or pull down any church or chapel, or any chapel for the religious worship of persons dissenting from the worship of the United Church of England and Ireland, they will be guilty of felony. (g)

(e) And the section applies even although the violent behaviour took place in asserting a *bona fide* claim of right. *Asher v. Calcraft*, 18 Q. B. D. 607.

(f) See *Preced.* 2 Chit. Crim. L. 29.

(g) *Ante*, p. 565.

CHAPTER THE THIRTIETH.

OF BIGAMY.¹

THE offence of having a plurality of wives at the same time is more correctly denominated *polygamy*; but, the name *bigamy* having been more frequently given to it in legal proceedings, it may perhaps be a means of more ready reference to treat of the offence under the latter title. (a) Originally this offence was considered of ecclesiastical cognizance only; and though the 4 Edw. 1, stat. 3, c. 5, treated it as a capital crime, it appears still to have been left of doubtful temporal cognizance, until the 1 Jac. 1, c. 11, declared that such offence should be felony.

The provisions of this statute were in several respects defective. A person whose consort had been abroad for seven years, though known to be living, might have married again with impunity. And so might a person who was only divorced *a mensâ et thoro*. The 9 Geo. 4, c. 31, therefore repealed the statute of James, and that Act is repealed by the 24 & 25 Vict. c. 95.

By the 24 & 25 Vict. c. 100, s. 57, 'Whosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or elsewhere, (b) shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and any such offence may be dealt with, inquired of, tried, determined, and punished in any county or place in England or Ireland where the offender shall be apprehended or be in custody, in the same manner in all respects as if the offence had been actually committed in that county or place. Provided that nothing in this section contained shall extend to any

(a) Bigamy, in its proper signification, is said to mean only being twice married, and not having a plurality of wives at once. According to the canonists, bigamy consisted in marrying two virgins successively one after the death of the other; or in once

marrying a widow. 4 Black. Com. 163, note (b). And see Bac. Abr. tit. *Bigamy*, in the notes.

(b) See 1 Hale, 692, 693; 1 East, P. C. c. 12, s. 2, p. 465; R. v. Topping, Dears. C. C. 647.

AMERICAN NOTE.

¹ See *Gahajas v. P.*, 1 Parker, C. R. 378; *Hayes v. P.*, 25 N. Y. 390. As to proving first marriage see *S. v. Hilton*, 8 Rich. 434; *Carmichael v. S.*, 12 Ohio (N. S.), 553; *Langtry v. S.*, 20 Ala. 536; *King v.*

S., 40 Geo. 244; *Bord v. S.*, 21 Gratt. 800; *S. v. Sears*, 16 Ind. 352; *P. v. Lambert*, 5 Mich. 349. The criminality of bigamy in America rests entirely on statute. See *Bishop* i § 502.

second marriage contracted elsewhere than in England and Ireland by any other than a subject of her Majesty, or to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such persons to be living within that time, or shall extend to any person who, at the time of such second marriage, shall have been divorced from the bond of the first marriage, or to any person whose former marriage shall have been declared void by the sentence of any Court of competent jurisdiction.' (c)

The proviso in this statute contains exceptions in respect of four cases, in which a second marriage is no felony within the statute.

The *first exception* is that the statute shall not extend 'to any second marriage contracted elsewhere than in England and Ireland by any other than a subject of her Majesty.'

The *second exception* is that it shall not extend to 'any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time.' (d)

Where there has been such absence, the burden of proof is not upon the prisoner to show that it was not known to him or her that the wife or husband was living within such time. On an indictment for bigamy, it was proved that the prisoner and his wife had lived apart for seven years, and that the prisoner then married again. There was no evidence of the prisoner's knowledge of the existence of his first wife at the time he married again. The prisoner was convicted. Held, that the burden of proof that the prisoner did not know that his wife was alive at the time he contracted the second marriage was not on the prisoner, and that the conviction could not be sustained. (e)

But where there was no evidence of any separation or of the date when the prisoner last saw his wife, it was held that the presumption was that the first wife was living at the time of the second marriage, although it took place seventeen years after the first marriage. (f)

There has been some doubt as to whether if the prisoner had at the time of the second marriage a reasonable and honest belief that his wife was dead (although she had not been absent for seven years) he could be convicted; but it has now been decided by the full Court that a *bonâ fide* belief upon reasonable grounds in her death at the time of the second marriage, is a good defence to the indictment. (g)

The prisoner was convicted of bigamy. The first marriage was with Victor, in the year 1836. The second marriage was with Lumley, on the 9th of July, 1847. The prisoner lived with Victor till the middle of 1843, when they separated, and from that time no more had been

(c) This clause is taken from the 9 Geo. 4, c. 31, s. 22, and 10 Geo. 4, c. 34, s. 26 (1).

(d) See 1 Hale, 693; 3 Inst. 88; 4 Black. Com. 164; 1 East, P. C. c. 12, s. 3, p. 466; R. v. Cullen, 9 C. & P. 681; R. v. Jones, C. & M. 614; R. v. Briggs, Dears. & B. C. C. 98; 26 L. J. M. C. 7.

(e) R. v. Curgerwen, 35 L. J. M. C. 58;

L. R. 1 C. C. R. 1. See R. v. Heaton, 3 F. & F. 819.

(f) R. v. Jones, 15 Cox C. C. 284.

(g) R. v. Tolson, 23 Q. B. D. 168, per Lord Coleridge, C. J., Hawkins, Stephen, Cave, Day, A. L. Smith, Wills, Grantham and Charles, JJ. (Denman, Field, Manisty, JJ., and Pollock and Huddleston, BB., dissenting).

heard of him. There was no evidence as to his age. The judge at the trial directed the jury that it was a presumption of law that Victor was alive at the time of the second marriage. Held, that there was no presumption of law that life continued for seven years, or for any other period after the time of the latest proof of the life of the party, and that it was a question of fact for the jury, under the circumstances of each case, whether a person be alive or dead at any time within the interval of seven years, at the termination of which the protection afforded by statute in cases of bigamy comes into operation, and the conviction was quashed. (*h*)

If a man marries again after his wife has been absent for seven years and shall not have been known by him to be living within that time during her life, the second marriage is null and void. (*i*)

In 1864 the prisoner married Ellen Earle, and while she was still alive he, in April, 1868, married Ada Leslie. He was convicted of bigamy for this, and in 1879, he married Charlotte Lavers, and while she was still alive he, in September, 1880, married Edith Miller. For this last marriage he was again indicted for bigamy, the indictment charging that "his wife Charlotte" was then alive. There was no evidence that Ellen Earle was alive at the date of the prisoner's marriage to Charlotte Lavers, — which would have made that marriage invalid, — and the judge held that under the circumstances the burden of proving that Ellen Earle was alive at that date lay on the prisoner. He was convicted, but the Court quashed the conviction on the ground that it was a question for the jury whether upon the facts proved Ellen Earle was alive at the date of the prisoner's marriage to Charlotte Lavers. (*j*) If Ellen Earle was alive at the date of the prisoner's marriage to Charlotte Lavers that marriage was void, although under the proviso of the statute the prisoner could not be convicted of bigamy for contracting it; and that marriage being void, the subsequent marriage with Edith Miller would not be bigamous, unless the prisoner could be shown to have known of Ellen Earle's having been alive within the seven years, and even

(*h*) *R. v. Lumley*, 38 L. J. M. C. 86, L. R. 1 C. C. R. 196, *et per cur.* In an indictment for bigamy it is incumbent on the prosecutor to prove to the satisfaction of the jury that the husband or wife, as the case may be, was alive at the date of the second marriage, and that is purely a question of fact. The existence of the party at an antecedent period may or may not afford a reasonable inference that he was living at the subsequent date. If, for example, it were proved that he was in good health on the day preceding the second marriage, the inference would be strong, almost irresistible, that he was living on the latter day, and the jury would in all probability find that he was so. If, on the other hand, it were proved that he was then in a dying condition and nothing further was proved, they would probably decline to draw that inference. Thus the question is entirely for the jury. The law makes no presumption either way. The cases cited of *R. v. Twynning*, 2 M. & W. 894; *R. v. Harborne*,

2 A. & E. 540; and *Doe d. Nepean v. Knight*, 2 B. & A. 386, appear to establish this proposition. Where the only evidence is that the party was living at a period which is more than seven years prior to the second marriage, there is no question for the jury. The proviso in the Act then comes into operation, and exonerates the prisoner from criminal culpability, though the first husband or wife be proved to have been living at the time when the second marriage was contracted. The Legislature by this proviso sanctions a presumption that a person who has not been heard of for seven years is dead; but the proviso affords no ground for the converse proposition, viz. that when a party has been seen or heard of within seven years a presumption arises that he is still living. That is always a question of fact. See *Murray v. R.*, 7 Q. B. 700; *R. v. Apley*, 1 Cox, C. C. 71.

(*i*) 4 B. C. Com. 164, note (*z*).

(*j*) *R. v. Wiltshire*, 6 Q. B. D. 366.

in that case he could not have been convicted on the indictment as it stood.

The *third exception* provides that the Act shall not extend 'to any person who at the time of such second marriage shall have been divorced from the bond of the first marriage.' A divorce, therefore, *a mensâ et thoro*, which was held sufficient under the 1 Jac. 1, (*k*) is now no longer an exception. Nor would a judicial separation under the 20 & 21 Vict. c. 85, s. 16, suffice, for it is to have the effect of a divorce *a mensâ et thoro*. (*l*) It was held under the 1 Jac. 1, that if there be a divorce *a vinculo matrimonii*, and an appeal by one of the parties, though this suspends the sentence, and may possibly repeal it, yet a marriage pending that appeal will be aided by the exception. (*m*) In a case upon the 1 Jac. 1, the question arose whether a divorce by the Commissary or Consistorial Court of Scotland would operate so as to excuse a person, who, having been married in England, had been divorced by that Court, and had then married again in England, from the penalties of bigamy. And, from the decision of the judges, it appears, that, if the first marriage has taken place in England, it will not be a defence to prove a divorce *a vinculo matrimonii* before the second marriage, if such divorce were out of England; unless the divorce were upon a ground, which, by the law of England, would warrant such a divorce: the divorces and sentences referred to in the third section of the 1 Jac. 1, being divorces and sentences of the ecclesiastical courts within the limits to which that statute applies. The prisoner was indicted for bigamy; both his marriages were in England; but before his second marriage his wife had obtained a divorce *a vinculo* from him in the Commissary Court of Scotland. It appeared that he took his wife into Scotland, that she might be induced to institute a suit against him there; and that he cohabited with a prostitute there, for the very purpose of irritating his wife, and furnishing ground for the divorce. A case being reserved and argued, the judges were unanimous, that no sentence or act of any foreign country or state could dissolve an English marriage *a vinculo* for grounds on which it was not liable to be dissolved *a vinculo* in England; and that no divorce of an ecclesiastical court was within the exception in the third section of the statute, unless it was the divorce of a Court within the limits to which that statute extended. (*n*) The judges gave no opinion upon the husband's conduct, in drawing on

(*k*) 1 Hale, 694. 3 Inst. 89. 1 Hawk. P. C. c. 42, s. 5. 4 Black. Com. 164. Middleton's case, Old Bailey, 14 Car., 2 Kel. 27. And see 1 East, P. C. c. 12, s. 5, p. 467.

(*l*) See sec. 27 of the Act for the cases in which a marriage may be dissolved.

(*m*) 3 Inst. 89. 1 Hale, 694, citing Co. P. C. c. 27, p. 89, and stating further that if the sentence of divorce be repealed, a marriage afterwards is not aided by the exception, though there was once a divorce. A marriage within the time allowed for an appeal, under the 20 & 21 Vict. c. 85, s. 56, would be void. See *Chichester v. Mure*, 32 L. J. P. & M. 146.

(*n*) It seems to admit of some doubt

whether this case be any authority upon the present Act. The words of the 1 Jac. 1, c. 11, were 'divorced by any sentence in the Ecclesiastical Court.' The words in the 24 & 25 Vict. c. 100, s. 57, are, 'divorced from the bond of the first marriage.' These words are so much more general, that it may be contended that they except every case where according to the laws of the country where the divorce takes place, there is a legal divorce *a vinculo matrimonii*, and the words 'any court of competent jurisdiction' in the next clause, instead of the words 'the Ecclesiastical Court,' in the 1 Jac. 1, c. 11, seem to favour this view of the exception. C. S. G.

his wife to sue for the divorce, because the jury had not found fraud. (*o*)

This case has been much commented upon in a decision of the House of Lords, (*p*) in which it was held that the English courts will recognize as valid the decision of a competent Christian tribunal, dissolving the marriage between a domiciled native in the country where such tribunal has jurisdiction, and an English woman, when the decree of divorce is not impeached by any species of collusion or fraud, and this although the marriage may have been solemnized in England, and may have been dissolved for a cause which would not have been sufficient to obtain a divorce in England.

The *fourth exception* is that the Act shall not extend 'to any person whose former marriage shall have been declared void by the sentence of any Court of competent jurisdiction.' It was resolved, upon the 1 Jac. 1, by all the judges, that a sentence of the spiritual court against a marriage, in a suit of jactitation of marriage, is not conclusive evidence, so as to stop the counsel for the crown from proving the marriage; the sentence having decided on the invalidity of the marriage only collaterally, and not directly. And further, admitting such sentence to be conclusive, yet that the counsel for the crown may avoid the effect of such sentence, by proving it to have been obtained by fraud or collusion. (*q*) There is no exception in the Act where marriages are within the age of consent. (*r*)

With respect to the first marriage, the validity of it must be proved, and with respect to the second marriage, it must be shown that a form of marriage known to and recognized by the law as capable of producing a valid marriage has been gone through. (*s*) What constitutes validity in the one case and a lawful form of marriage in the other, has been the subject of a great number of statutes and decisions, which will be found in the following pages, but it is proposed to consider in the first place the above important distinction with respect to the two marriages. The words of the statute are, 'whosoever being married shall marry any other person,' and it was thought that the same word being used with respect to both marriages, if the first must be a valid marriage, the second must also (but for the fact of the first marriage) be a valid marriage. (*t*) But it has now been decided that the words should be read as though they were, 'whosoever being married shall go through the form and ceremony of marriage,' and that the form and ceremony gone through must be such a one as is known to and recognized by the law as capable of producing a valid marriage, and that such a circumstance as that the parties are within the forbidden degree of consanguinity will not prevent the marriage from being bigamous. Where a married woman married her deceased sister's husband, (*u*) it

(*o*) *R. v. Lolley*, MS. Bayley, J., and R. & R. 237. This case is referred to by the Lord Chancellor, and also by Mr. Brougham, in *Tovey v. Lindsay*, 1 Dow's Rep. 117. And see 5 Ev. Coll. Stat. 348, note (4). Upon the important subject of the dissolution of marriages, celebrated under the English law, by the Consistorial Court of Scotland, see a publication of Reports of some Decisions of that Court,

by James Fergusson, Esq., Advocate, one of the Judges.

(*p*) *Harvey v. Farnie*, 8 Ap. Cas. 43.

(*q*) *Duchess of Kingston's case*, Dom. Proc. 16 Geo. 3. 11 St. Tri. 262. 1 Leach, 146. 1 Hawk. P. C. c. 42, s. 11.

(*r*) See *R. v. Birmingham*, 8 B. & C. 29, *post*, p. 693.

(*s*) *R. v. Allen*, *post*, p. 664.

(*t*) *R. v. Fanning*, 10 Cox, C. C. 411.

(*u*) Cited *infra*.

was held that although such second marriage was void under the 5 & 6 Will. 4, c. 52, s. 2, yet she had committed the crime of bigamy. (*v*) A Protestant went through the form of marriage by a Romish priest with a Roman Catholic. This marriage was void under the 19 Geo. 2, c. 13, and it was held by the Court of Criminal Appeal in Ireland that such marriage being void could not be bigamous, although the first wife was alive. (*w*) But this decision was overruled in the following case. The prisoner's first wife being dead, he married again, and subsequently went through the form of marriage with his first wife's niece. The marriage was held to be void, but it was also held that the prisoner was rightly convicted of bigamy. (*x*)

Where in order to establish a charge of bigamy in a divorce suit it was proved that the husband married a woman in Australia according to the forms of the Kirk of Scotland, but there was no proof that such forms were recognized as legal by the laws of the colony, it was held that the bigamy was not established. (*y*)

Principals in the second degree and accessories before the fact are punishable in the same manner as principals in the first degree; and accessories after the fact are liable to be imprisoned for any term not exceeding two years, with or without hard labour. (*z*)

Where an indictment charged a woman with bigamy, and the man, with whom she contracted the second marriage, with inciting and counselling the woman to commit the offence of bigamy, it was held that if the man knew at the time of the marriage that she was a married woman, and her husband alive, he might be convicted of counselling her to commit the crime of bigamy. (*a*)

The indictment in the preceding case did not contain any count charging the man as principal in the second degree; but there is no doubt, where a man marries a woman, knowing such woman to have a husband alive at the time of such marriage, that he is a principal in the second degree, as he is present and aids and assists the woman in committing the felony. (*b*)

The 24 & 25 Vict. c. 100, s. 57, provides that the offender may be

(*v*) *R. v. Brawn*, 1 C. & K. 144, per Lord Denman, C. J.

(*w*) *R. v. Fanning*, 5 Car. & P. 412.

(*x*) *R. v. Allen*, L. R. 1 C. C. R. 367; 41 L. J. M. C. 97, *et per cur.* :— 'In thus holding, it is not at all necessary to say that forms of marriage unknown to the law, as was the case in *Burt v. Burt*, would suffice to bring a case within the operation of the statute. We must not be understood to mean that every fantastic form of marriage to which parties might think proper to resort, or that a marriage ceremony performed by an unauthorised person, or in an unauthorised place, would be a "marrying" within the meaning of the 57th section of the 24 & 25 Vict. It will be time enough to deal with a case of this description when it arises. It is sufficient for the present purpose to hold, as we do, that where a person already bound by an existing marriage goes through a form of marriage known to and recognised by the law as capable of producing a valid marriage, for

the purpose of a pretended and fictitious marriage, the case is not the less within the statute by reason of any special circumstances, which independently of the bigamous character of the marriage, may constitute a legal disability in the particular parties, or make the form of marriage resorted to specially inapplicable to their individual case.'

(*y*) *Burt v. Burt*, 29 L. J. P. & M. 133, and this decision was upheld in *R. v. Allen*, *supra*. It has been held by a majority of the Court in Ireland that where the first marriage is shown to have been contracted in a foreign state according to the laws of the Roman Catholic Church it will be presumed to be valid without proof of the law of that state relating to marriage. *R. v. Griffin*, 14 Cox, C. C. 308.

(*z*) 24 & 25 Vict. c. 100, s. 67.

(*a*) *R. v. Brawn*, 1 C. & K. 144. Lord Denman, C. J.

(*b*) I know such to have been the opinion of Lord Denman, C. J., and Alderson, B., in *R. v. Brawn*. C. S. G.

tried in the county where he shall be 'apprehended (c) or be in custody.' But the provision of the statute is only cumulative, and the party may be indicted where the second marriage was, though he be never apprehended, and so may be outlawed; for in general where a statute creating a new felony directs that the offender may be tried in the county in which he is apprehended, but contains no negative words, he may be tried in that county in which the offence was committed. (d)

Where the indictment is preferred in a county not where the second marriage was, but where the prisoner was apprehended or in custody, it need not state that fact; for it will appear by the caption that he was in custody of the sheriff of the county in which the indictment was found. (e)

A first marriage *de facto*, subsisting in fact at the time of the second marriage, was sufficient to bring a case within the 1 Jac. 1, though such first marriage were voidable by reason of consanguinity, affinity, or the like; for it was a marriage in judgment of law until it was avoided. (f) And now by the 5 & 6 Will. 4, c. 54, s. 1, all marriages, celebrated before the 31st of August, 1835, between persons being within the prohibited degrees of *affinity*, shall not be annulled for that cause by any sentence of the ecclesiastical court, unless pronounced in a suit depending on the 31st of August, 1835, provided that nothing hereinbefore contained shall affect marriages between persons being within the prohibited degrees of *consanguinity*; and by sec. 2, 'all marriages celebrated after the said 31st of August, between persons within the prohibited degrees of *consanguinity* or *affinity* shall be absolutely null and void to all intents and purposes whatsoever.' Where, therefore, a marriage now takes place within the prohibited degrees of consanguinity or affinity, as such marriage is wholly void, a second marriage will not amount to the crime of bigamy. Where, therefore, on an indictment for bigamy, it appeared that the prisoner had married two sisters, one after the death of the other, and the latter marriage was alleged in the indictment as the legal marriage, it was held that he was entitled to be acquitted, as that marriage was null and void to all intents and purposes. (g) This statute extends to the illegitimate as well as the legitimate child of a late wife's parents. Therefore a marriage with the illegitimate sister of a deceased wife is void. (h) So a marriage of a man with the daughter of the illegitimate

(c) *R. v. Gordon*, R. & R. 48. Lord Digby's case, Hutt, 131.

(d) 1 Hale, 694. 3 Inst. 87. Starkie, 11.

(e) *R. v. Whiley*, rightly reported 1 C. & K. 150, erroneously reported 2 M. C. C. R. 186; *R. v. Smythies*, 1 Den. C. C. R. 498; 2 C. & K. 878. In *R. v. Fraser*, R. & M. C. C. R. 407, the first marriage was laid in Kent, the second in Surrey, the venue was Middlesex, and it was alleged that the prisoner was apprehended without stating any place, and the conviction held bad, but no suggestion was made that the defect was cured by the caption; this case, therefore, may now be considered no authority. See *R. v. O'Connor*, 5 Q. B. 34. See *R. v. Treharne*,

R. & M. 298. Where an indictment for bigamy alleged that the prisoner was apprehended in Gloucestershire, and this was not proved; Channell, B., allowed the indictment to be amended by stating that he was in custody in that county. *R. v. Smith*, 1 F. & F. 36.

(f) 3 Inst. 88.

(g) *R. v. Chadwick*, 11 Q. B. 173.

(h) *R. v. St. Giles in the Fields*, 11 Q. B. 173. Where a woman proved that she had a sister seven years older than herself, and that they were brought up together with their parents, and that she always believed that they were sisters, Erle, J., held this was sufficient evidence to prove that they were sisters. And the witness having also

half-sister of his deceased wife is void. (*i*) And the Act extends to the marriages of British subjects abroad. Where, therefore, Mr. Brook was duly married, according to the laws of Denmark, near Altona in Denmark, to the lawful sister of his deceased wife, and he and his second wife were then domiciled in England, and had merely gone over to Denmark on a temporary visit; it was held that this marriage, though valid in Denmark, was absolutely void in England. (*j*) But it has been ruled that though a lawful canonical marriage need not be proved, yet a marriage in fact (whether regular or not) must be shown; (*k*) which it seems must be understood where there is *primâ facie* evidence of a lawful marriage. (*l*) Where the first marriage, which was with a Roman Catholic woman, was by a Romish priest in England, not according to the ritual of the Church of England, and the ceremony was performed in Latin, which the witnesses did not understand, and could not therefore swear that the ceremony of marriage according to the Church of Rome was read; it was directed that the defendant should be acquitted. (*m*) Willes, C. J., who tried him, seemed to be of opinion that a marriage by a priest of the Church of Rome was a good marriage, (*n*) if the ceremony according to that church could be proved; namely, the words of the contracting part of it.

The former Marriage Act, 26 Geo. 2, c. 33, required all marriages to be by banns or licence: and declared that all marriages solemnized in any other place than a church or public chapel (unless by special licence), or solemnized without publication of banns or licence, should be null and void to all intents and purposes. It contained also special provisions as to the publication of *banns*; and, as to marriages by *licence*, it provided that all such marriages, where either of the parties, not being a widower or widow, was under the age of twenty-one years, had without the consent of the father of such of the parties so under age (if then living) first had and obtained; or if dead, of the guardian or guardians of the person of the party so under age, lawfully appointed, or one of them; and in case there was no such guardian or guardians, then of the mother (if living and unmarried); or if there was no mother living and unmarried, then of a guardian or guardians of the person appointed by the Court of Chancery; should be absolutely null and void to all intents and purposes whatsoever. (*o*) But these pro-

proved that her sister married M. in 1846 and died in 1848, and that the witness married M. in 1849, Erle, J., held that this showed the latter marriage to be void. *R. v. Young*, 5 Cox, C. C. 296.

(*i*) *R. v. Brighton*, 1 Best & S. 447.

(*j*) *Brook v. Brook*, 3 Smale & G. 481. 9 H. L. C. 193. Such affinity can only be constituted by marriage, and not by sexual intercourse. *Wing v. Taylor*, 2 Swabey T. 278.

(*k*) By Denison, J., referred to by the Court in *Morris v. Miller*, 1 Black. R. 632.

(*l*) *R. v. Brampton*, 10 East, 287, note (*b*).

(*m*) *Lyons's case*, Old Bailey, 1738. 1 East, P. C. c. 12, s. 10, p. 469, citing Serjeant Foster's MS.

(*n*) To this Mr. East (*id. ibid.*) subjoins a *quære*, and says that it must at least be

understood of the marriage of persons of that communion.

(*o*) Sec. 11. By sec. 12 provision was made for a petition to the Lord Chancellor, &c., where the guardians or mother were not in a situation to consent, or to refuse to consent. By sec. 4 licences were to be granted to solemnize matrimony in the church or chapel of such parish only where one of the parties had resided for four weeks before. But by sec. 10 proof of the actual dwelling in the parishes, &c., where a marriage was by banns, or of the usual place of abode of one of the parties, where a marriage was by licence, was made unnecessary after the solemnization of the marriage, and evidence was not to be received in either of these cases to prove the contrary, in any suit touching the validity of the marriage.

visions as to marriages by licence were repealed as to any marriages thereafter to be solemnized by the 3 Geo. 4, c. 75, s. 1, which passed on the 22nd of July, 1822, and came into operation on the 1st of September following: and it was further enacted, that in all cases of marriage solemnized by licence before the passing of this Act of 3 Geo. 4, without any such consent, and where the parties had continued to live together as husband and wife till the death of one of them, or till the passing of the Act, or had only discontinued their cohabitation for the purpose, or during the pending of any proceedings touching the validity of such marriage, such marriage, if not otherwise invalid, should be deemed good and valid to all intents and purposes. (*p*)

A pauper, not being a widow, and being under age, was married by licence in 1808, without the consent of her father, who was then living, and continued to live with her husband till 1825, when she married another man, her first husband being still alive; it was held that the first marriage was rendered valid by 3 Geo. 4, c. 75, s. 2, because the parties had lived together till that Act passed, and was not rendered invalid by the pauper's subsequent marriage to another person. (*q*) But where two minors were married by licence and without consent of parents, in 1816; and, after cohabiting for a few months, the owner of the house where they lodged compelled the husband to leave it for his misconduct, and he never lived with his wife afterwards, and died in 1817; and shortly after the separation he on several occasions had declared that he would never live with her again, giving as one reason that she was not his lawful wife; but some evidence was given that after the separation she had received small sums which were ultimately allowed out of the rent of the husband's land, but whether by his direction or not did not appear; it was held that the marriage was not rendered valid by the 3 Geo. 4, c. 75, s. 2. (*r*)

A prisoner was married on the 30th of August, 1822, by licence, and without the consent of either of her parents, she being between sixteen and seventeen years of age; it was held, on a case reserved, that the marriage was valid, for under the 3 Geo. 4, c. 75, which passed on the

(*p*) 3 Geo. 4, c. 75, s. 2. Sec. 3 provided that the Act should not render valid any marriage declared invalid by any Court of competent jurisdiction before the passing of the Act; nor any marriage where either party should at any time afterwards, during the life of the other party, have lawfully intermarried with any other person. Nor (by sec. 4) any marriage, the invalidity of which had been established before the passing of the Act, upon the trial of any issue touching its validity, or touching the legitimacy of any person alleged to be the descendant of the parties to such marriage. Nor (by sec. 5) any marriage the validity of which, or the legitimacy of any person alleged to be the lawful descendant of the parties married, had been duly brought into question in proceedings in any cause, &c., in which judgments, or decrees, or orders of Court, had been pronounced or made before the passing of the Act, in consequence of or

from the effects of proof in such causes, &c., of the validity of such marriage, or the illegitimacy of such descendant. By sec. 6, if before the Act, any property had been possessed, or any title of honour enjoyed on the ground of the invalidity of any marriage, by reason that it was solemnized without consent, then although no sentence had been pronounced against the validity of such marriage, the right and interest in such property or title of honour should in no manner be affected or prejudiced. And by sec. 7 nothing in the Act was to affect any act done before the passing of the Act, under the authority of any Court, or in the administration of any personal estate or effects, or the execution of any will or testament, or the performance of any trust.

(*q*) *R. v. St. John Delpike*. 2 B. Ad. 226.

(*r*) *Poole v. Poole*, 2 Tyrw. R. 76.

22nd of July, 1822, the 26 Geo. 2, c. 33, s. 11, had ceased to operate, and the provisions as to marriages by licences in the 3 Geo. 4, c. 75, did not come into force till the first of September following. (*s*)

The 3 Geo. 4, c. 75, contained also enactments as to the granting of licences, the consent of parents and guardians, and the publication of banns, which have been repealed by the 4 Geo. 4, c. 17, which enacted, that licences should and might be granted by the same persons, and in the same manner and form, and, in the case of minors, with the same consent, and banns be published in the same manner and form as licences and banns were respectively regulated by the 26 Geo. 2, c. 33; and enacted also (by section 2) that all marriages which had been or should be solemnized under licences granted, or banns published, conformably to the provisions of the 3 Geo. 4, c. 75, should be good and valid; and that no marriage solemnized under any licence granted in the form or manner prescribed by either the 26 Geo. 2, c. 33, or the 3 Geo. 4, c. 75, should be deemed invalid on account of want of consent of any parent or guardian. The old Marriage Act was then in a great measure revived, though only for a short period. The 4 Geo. 4, c. 5, was passed to render valid certain marriages which had been solemnized by licences granted through error, after the passing of the 3 Geo. 4, c. 75, by or in the name of bodies corporate or persons their officers or surrogates, other than the Archbishops of Canterbury and York, and the bishops within their respective dioceses, who were alone authorised to grant such licences by the 3 Geo. 4, c. 75; but this provision of the 4 Geo. 4, c. 5, applies only to marriages solemnized by such erroneous licences granted after the 3 Geo. 4, and before the passing of the 4 Geo. 4, c. 5.

The 4 Geo. 4, c. 76, (*t*) reciting that it is expedient to amend the laws respecting marriages in England, enacts, that, after the 1st day of November, 1823, so much of the 26 Geo. 2, c. 33, as was in force immediately before the passing of this Act, and also the 4 Geo. 4, c. 17, shall be repealed, save and except as to any acts, matters, or things, done under the provisions of either of the said Acts, before the said 1st day of November, as to which the said Acts are respectively to be of the same force and effect, as if this Act had not been made.

Sec. 2. 'After the 1st day of November (1823), all banns of matrimony shall be published in an audible manner in the parish church, or in some public chapel, in which chapel banns of matrimony may now or may hereafter be lawfully published, of or belonging to such parish or chapelry, wherein the persons to be married shall dwell, according to the form of words prescribed by the rubric prefixed to the office of matrimony in the Book of Common Prayer, upon three Sundays preceding the solemnization of marriage, during the time of morning service, or of evening service (if there shall be no morning service in such church or chapel upon the Sunday upon which such banns shall be so published), immediately after the second lesson; and whensoever it shall happen that the persons to be married shall dwell in divers parishes or chapelries, the banns shall in like manner be published in the church, or in such chapel as aforesaid, belonging to such parish or chapelry wherein each of the said persons shall dwell;

(*s*) *R. v. Wanly*, R. & M. C. C. R.

(*t*) See 36 & 37 Vict. c. 91.

and that all other the rules prescribed by the said rubric concerning the publication of banns, and the solemnization of matrimony, and not hereby altered, shall be duly observed; and that in all cases where banns shall have been published, the marriage shall be solemnized in one of the parish churches or chapels where such banns shall have been published, and in no other places whatsoever.'

Sec. 3. 'The bishop of the diocese, with the consent of the patron and the incumbent of the church of the parish in which any public chapel, having a chapelry thereunto annexed, may be situated, or of any chapel situated in an extra-parochial place, signified to him under their hands and seals respectively, may authorize, by writing under his hand and seal, the publication of banns and the solemnization of marriages in such chapel for persons residing within such chapelry or extra-parochial place respectively; and such consent, together with such written authority, shall be registered in the registry of the diocese.'

Sec. 4. 'In every chapel in respect of which such authority shall be given as aforesaid, there shall be placed in some conspicuous part of the interior of such chapel a notice in the words following: "Banns may be published, and marriages solemnized in this chapel."'

Sec. 5. 'All provisions now in force, or which may hereafter be established by law, relative to providing and keeping marriage registers in any parish churches, shall extend and be construed to extend to any chapel in which the publication of banns and solemnization of marriages shall be so authorized as aforesaid, in the same manner as if the same were a parish church; and everything required by law to be done relative thereto by the churchwardens of any parish church, shall be done by the chapelwarden, or other officer exercising analogous duties in such chapel. (u)

Sec. 6. 'On or before the said 1st day of November, and from time to time afterwards as there shall be occasion, the churchwardens and chapel wardens of churches and chapels, wherein marriages are solemnized, shall provide a proper book of substantial paper, marked and ruled respectively in manner directed for the register book of marriages; and the banns shall be published from the said register book of banns by the officiating minister, and not from loose papers, and after publication shall be signed by the officiating minister, or by some person under his direction.'

Sec. 7. 'No parson, vicar, minister, or curate, shall be obliged to publish the banns of matrimony between any persons whatsoever, unless the persons to be married shall, seven days at the least before the time required for the first publication of such banns respectively, deliver, or cause to be delivered to such parson, vicar, minister, or curate, a notice in writing, dated on the day on which the same shall be so delivered, of their true Christian names and surnames, and of the house or houses of their respective abodes within such parish or chapelry as aforesaid, and of the time during which they have dwelt, inhabited, or lodged, in such house or houses respectively.'

Sec. 8. 'No parson, minister, vicar, or curate, solemnizing marriages after the first day of November next, between persons, both or one of

(u) See as to the registration of marriages, 6 & 7 Will. 4, c. 86, ss. 1, 30, 31.

whom shall be under the age of twenty-one years, after banns published, shall be punishable by ecclesiastical censures for solemnizing such marriages without consent of parents or guardians, unless such parson, minister, vicar, or curate, shall have notice of the dissent of such parents or guardians; and in case such parents or guardians, or one of them, shall openly and publicly declare or cause to be declared, in the church or chapel where the banns shall be so published, at the time of such publication, his, her, or their dissent to such marriage, such publication of banns shall be absolutely void.'

Sec. 9. 'Wherever a marriage shall not be had within three months after the complete publication of banns, no minister shall proceed to the solemnization of the same, until the banns shall have been republished on three several Sundays in the form and manner prescribed in this Act, unless by licence duly obtained according to the provisions of this Act.'

Sec. 10. 'No licence of marriage shall, from and after the said first day of November, be granted by any archbishop, bishop, or other ordinary, or person having authority to grant such licences, to solemnize any marriage in any other church or chapel than in the parish church, or in some public chapel of or belonging to the parish or chapelry within which the usual place of abode of one of the persons to be married shall have been for the space of fifteen days immediately before the granting of such licence.'

Sec. 11. 'If any caveat be entered against the grant of any licence for a marriage, such caveat being duly signed by or on the behalf of the person who enters the same, together with his place of residence, and the ground of objection on which his caveat is founded, no licence shall issue till the said caveat, or a true copy thereof, be transmitted to the judge out of whose office the licence is to issue, and until the judge has certified to the registrar that he has examined into the matter of the caveat, and is satisfied that it ought not to obstruct the grant of the licence for the said marriage, or until the caveat be withdrawn by the party who entered the same.'

Sec. 12. 'All parishes where there shall be no parish church or chapel belonging thereto, or none wherein divine service shall be usually solemnized every Sunday, and all extra-parochial places whatever, having no public chapel wherein banns may be lawfully published, shall be deemed and taken to belong to any parish or chapelry next adjoining, for the purposes of this Act only; and where banns shall be published in any church or chapel of any parish or chapelry adjoining to any such parish or chapelry where there shall be no church or chapel, or none wherein divine service shall be solemnized as aforesaid, or to any extra-parochial place as aforesaid, the parson, vicar, minister, or curate, publishing such banns, shall, in writing under his hand, certify the publication thereof in the same manner as if either of the persons to be married had dwelt in such adjoining parish or chapelry.'

Sec. 13. 'If the church of any parish, or chapel of any chapelry, wherein marriages have been usually solemnized, be demolished in order to be rebuilt, or be under repair, and on such account be disused for public service, it shall be lawful for the banns to be proclaimed in a church or chapel of any adjoining parish or chapelry

in which banns are usually proclaimed, or in any place within the limits of the parish or chapelry which shall be licensed by the bishop of the diocese for the performance of divine service, during the repair or rebuilding of the church as aforesaid; and where no such place shall be so licensed, then, during such period as aforesaid, the marriage may be solemnized in the adjoining church or chapel wherein the banns have been proclaimed, and all marriages heretofore solemnized in other places within the said parishes or chapelries than the said churches or chapels, on account of their being under repair, or taken down in order to be rebuilt, shall not be liable to have their validity questioned on that account, nor shall the ministers who have so solemnized the same be liable to any ecclesiastical censure, or to any other proceeding or penalty whatsoever.' This enactment being defective in not providing that marriages might be solemnized in the places licensed for the proclamation of banns; nor that marriages might be solemnized by licence in an adjoining church or chapel; nor that the validity of marriages *thereafter* solemnized in other places than the churches and chapels out of repair, should not be questioned on that account; nor that the ministers who should *thereafter* solemnize such marriages should not be liable to ecclesiastical censure, &c.; the 5 Geo. 4, c. 32, enacts, that 'all marriages which have been heretofore solemnized, or which shall be hereafter solemnized in any place within the limits of such parish or chapelry so licensed for the performance of divine service, during the repair or rebuilding of the church of any parish, or chapel of any chapelry, wherein marriages have been usually solemnized; or if no such place shall be so licensed, then in a church or chapel of any adjoining parish or chapelry in which banns are usually proclaimed, whether by banns lawfully published in such church or chapel, or by licence lawfully granted, shall not have their validity questioned on account of their having been so solemnized, nor shall the ministers who have so solemnized the same be liable to an ecclesiastical censure, or to any other proceeding.' And that all licences granted by any person having authority to grant them for the solemnization of marriages in a church or chapel, wherein marriages have been usually solemnized, shall be deemed to be licences for the solemnization of marriages in any place within the limits of such parish or chapelry, which shall be licensed by the bishop for the performance of divine service, during the repair or rebuilding of any such church or chapel, or if no place shall be so licensed, then in the church or chapel of any adjoining parish or chapelry wherein marriages have been usually solemnized. (v) And also that all banns proclaimed, and all marriages solemnized, according to the provisions of this Act in any place so licensed, within the limits of any parish or chapelry, during the repair or rebuilding of the church, &c., shall be considered as proclaimed and solemnized in the church, &c., and shall be so registered accordingly. (w)

The 4 Geo. 4, c. 76, s. 14, enacts, 'for avoiding all fraud and collusion in obtaining of licences for marriage, that before any such licence be granted, one of the parties shall personally swear before the surro-

(v) Sec. 2.

(w) Sec. 3. Many other Acts have passed to render valid marriages in particular churches and chapels.

gate, or other person having authority to grant the same, that he or she believeth that there is no impediment of kindred or alliance, or of any other lawful cause, nor any suit commenced in any ecclesiastical court, to bar or hinder the proceeding of the said matrimony according to the tenor of the said licence; and that one of the said parties hath, for the space of fifteen days immediately preceding such licence, had his or her usual place of abode within the parish or chapelry within which such marriage is to be solemnized; and where either of the parties, not being a widower or widow, shall be under the age of twenty-one years, that the consent of the person or persons whose consent to such marriage is required under the provisions of this Act has been obtained thereto: provided always, that if there should be no such person or persons having authority to give such consent, then upon oath made to that effect by the party requiring such licence, it shall be lawful to grant such licence notwithstanding the want of any such consent.'

Sec. 15. 'It shall not be required of any person applying for such licence to give any caution or security, by bond or otherwise, before such licence is granted, anything in any Act or canon to the contrary thereof notwithstanding.'

Sec. 16. 'The father, if living, of any party under twenty-one years of age, such parties not being a widower or widow; or, if the father shall be dead, the guardian or guardians of the person of the party so under age, lawfully appointed, or one of them; and, in case there shall be no such guardian or guardians, then the mother of such party, if unmarried; and, if there shall be no mother unmarried, then the guardian or guardians of the person appointed by the Court of Chancery, if any, or one of them, shall have authority to give consent to the marriage of such party; and such consent is hereby required for the marriage of such party so under age, unless there shall be no person authorized to give such consent.' (x)

Sec. 17. 'In case the father or fathers of the parties to be married, or of one of them, so under age as aforesaid, shall be *non compos mentis*, or the guardian or guardians, mother or mothers, or any of them, whose consent is made necessary as aforesaid to the marriage of such party or parties, shall be *non compos mentis*, or in parts beyond the seas, or shall unreasonably, or from undue motives, refuse, or withhold his, her, or their consent, to a proper marriage, then it shall and may be lawful for any person desirous of marrying, in any of the before-mentioned cases, to apply by petition to the Lord Chancellor, Lord Keeper, or the Lords Commissioners of the Great Seal of Great Britain for the time being, Master of the Rolls, or Vice-Chancellor of England, who is and are respectively hereby empowered to proceed upon such petition in a summary way; and in case the marriage proposed shall upon examination appear to be proper, the said Lord Chancellor, Lord Keeper, or Lords Commissioners of the Great Seal for the time being, Master of the Rolls, or Vice-Chancellor, shall judicially declare the same to be so; and such judicial declaration shall be deemed and taken to be as good and effectual, to all intents and purposes, as if the father, guardian or guardians, or mother of the person so petitioning, had consented to such marriage.'

(x) This section is merely directory, see *R. v. Birmingham*, *post*, p. 693.

Sec. 18. 'From and after the said first day of November, no surrogate, hereafter to be deputed by any ecclesiastical judge who hath power to grant licences, shall grant any such licence until he hath taken an oath before the said judge, or before a commissioner appointed by commission under the seal of the said judge, which commission the said judge is hereby authorized to issue, faithfully to execute his office according to law, to the best of his knowledge, and hath given security by his bond in the sum of one hundred pounds to the bishop of the diocese for the due and faithful execution of his said office.'

Sec. 19. 'Whenever a marriage shall not be had within three months after the grant of a licence by any archbishop, bishop, or any ordinary or person having authority to grant such licence, no minister shall proceed to the solemnization of such marriage until a new licence shall have been obtained, unless by banns duly published according to the provisions of this Act.'

Sec. 20. 'Nothing hereinbefore contained shall be construed to extend to deprive the Archbishop of Canterbury and his successors, and his and their proper officers, of the right which hath hitherto been used, in virtue of a certain statute made in the twenty-fifth year of the reign of the late King Henry the Eighth, intituled, "An Act concerning Peter-pence and Dispensations," of granting special licences to marry at any convenient time or place.' (y)

Sec. 22. 'If any persons shall knowingly and wilfully intermarry in any other place than a church, or such public chapel wherein banns may be lawfully published, unless by special licence as aforesaid, or shall knowingly and wilfully intermarry without due publication of banns, or licence from a person or persons having authority to grant the same first had and obtained, or shall knowingly and wilfully consent to or acquiesce in the solemnization of such marriage by any person not being in holy orders, the marriages of such persons shall be null and void to all intents and purposes whatsoever.' (z)

Sec. 26. 'After the solemnization of any marriage under a publication of banns, it shall not be necessary in support of such marriage to give any proof of the actual dwelling of the parties in the respective parishes or chapelries wherein the banns of matrimony were published; or, where the marriage is by licence, it shall not be necessary to give any proof that the usual place of abode of one of the parties, for the space of fifteen days as aforesaid, was in the parish or chapelry where the marriage was solemnized; nor shall any evidence in either of the said cases be received to prove the contrary, in any suit touching the validity of such marriage.' (a)

(y) By sec. 21, persons solemnizing marriage in any other place than a church or chapel, or without banns or licence, or under pretence of being in holy orders, shall be transported for fourteen years, the prosecution to be commenced within three years.

(z) By sec. 23, where a marriage is solemnized between parties, one of whom is under age, and not a widower or widow, contrary to the provisions of the Act, by false oath or fraud, the guilty party shall

forfeit all property accruing from the marriage.

(a) Upon an enactment nearly similar, it was determined, in a prosecution for bigamy, where the first marriage was proved to have been by banns, that it was no objection that the parties did not reside in the parish where the banns were published and the marriage was celebrated. The provision of the statute was considered as an express answer to the objection; and it appears not to have been adverted to when

Sec. 28. 'All marriages shall be solemnized in the presence of two or more credible witnesses, besides the minister who shall celebrate the same; and immediately after the celebration an entry shall be made in the register.'

Sec. 30. 'This Act, or anything therein contained, shall not extend to the marriages of any of the royal family.'

Sec. 31. 'Nothing in this Act contained shall extend to any marriages amongst the people called Quakers, or amongst the persons professing the Jewish religion, where both the parties to any such marriage shall be of the people called Quakers, or persons professing the Jewish religion respectively.' (b)

The 6 & 7 Will. 4, c. 85, (c) s. 1, enacts, that 'notwithstanding anything in this Act contained, all the rules prescribed by the rubric concerning the solemnizing of marriages shall continue to be duly observed by every person in holy orders of the Church of England who shall solemnize any marriage in England: provided always, that where by any law or canon in force before the passing of this Act it is provided that any marriage may be solemnized after publication of banns, such marriage may be solemnized in like manner on production of the registrar's certificate as hereinafter provided; (d) provided also, that nothing in this Act contained shall affect the right of the Archbishop of Canterbury and his successors, and his and their proper officers, to grant special licences to marry at any convenient time and place, or the right of any surrogate or other person now having authority to grant licences for marriages.'

Sec. 2. 'The Society of Friends, commonly called Quakers, and also persons professing the Jewish religion, may continue to contract and solemnize marriage according to the usages of the said society and of the said persons respectively; and every such marriage is hereby declared and confirmed good in law, provided that the parties to such marriage be both of the same society, or both persons professing the Jewish religion respectively, provided also, that notice to the registrar shall have been given, and the registrar's certificate shall have issued in manner hereinafter provided.' (e)

the point was reserved for the opinion of the judges. *R. v. Hind, R. & R. 253.*

(b) By sec. 33, the Act only extends to England.

(c) By 37 & 38 Vict. c. 35 (passed 16th July, 1874), this Act is repealed in part.

(d) The 1 Vict. c. 22, s. 36, after reciting this provision, enacts, 'that the giving the notice to the superintendent registrar, and the issue of the superintendent registrar's certificate, as in the said Act and by this Act provided, shall be used and stand instead of the publication of banns to all intents and purposes where no such publication shall have taken place; and every parson, vicar, minister, or curate in England shall solemnize marriage after such notice and certificate as aforesaid in like manner as after due publication of banns: provided always that the church wherein any marriage according to the rites of the Church of England shall so be solemnized shall be within the district of the superin-

tendent registrar by whom such certificate as aforesaid shall have been issued.'

(e) The 23 & 24 Vict. c. 18, recites this clause, and sec. 12 of the 7 & 8 Vict. c. 81 (l.), and enacts 'that after the 30th of June, 1860, marriages may be contracted and solemnized according to the usages of the said Society of Friends, called Quakers, in England and Ireland respectively, not only in the case provided for by the said recited provisions, but also in cases where one only or where neither of the parties to the marriage shall be a member of the said society; [provided that the party or parties who shall not be a member or members of the said society shall profess with or be of the persuasion of the said society:] provided also that no person who is not a member of the said society shall be married according to the usages thereof, unless he or she shall be authorized thereto, under or in pursuance of some general rule or rules of the said society, in England and Ireland respec-

Sec. 3. 'The superintendent registrar of births and deaths of every union, parish, or place shall be, in right of his office, superintendent registrar of marriages within such union, parish or place, and such union, parish, or place shall be deemed the district of each superintendent registrar of marriages.'

Sec. 4. 'In every case of marriage intended to be solemnized in England after the said first day of March, (f) according to the rites of the Church of England (unless by licence or by special licence, or after publication of banns), and in every case of marriage intended to be solemnized in England after the said first day of March, according to the usages of the Quakers or Jews, or according to any form authorized by this Act, one of the parties shall give notice under his or her hand to the superintendent registrar of the district within which the parties shall have dwelt for not less than seven days then next preceding, or if the parties dwell in the districts of different superintendent registrars shall give the like notice to the superintendent registrar of each district, and shall state therein the name and surname and the profession or condition of each of the parties intending marriage, the dwelling place of each of them, and the time not being less than seven days during which each has dwelt therein, and the church or other building in which the marriage is to be solemnized; provided that if either party shall have dwelt in the place stated in the notice during more than one calendar month, it may be stated therein that he or she hath dwelt there one month and upwards.' (g)

tively; and a copy of such general rule or rules purporting to be signed by the recording clerk for the time being of the said society in London and in Dublin respectively, shall be admitted as evidence of such general rule or rules in all proceedings touching the validity of any such marriage.' By sec. 2, all enactments then in force relating to marriages according to the usages of the said society are extended to every marriage contracted under this Act.

The part within brackets is repealed by the 37 & 38 Vict. c. 66, the Statute Law Revision Act, 1875.

By 35 Vict. c. 10, s. 1, 'From and after the 1st day of January, 1873, the said recited Act of the 23rd and 24th years of the reign of Her present Majesty, chapter 18, shall be construed and shall take effect as if the words next hereinafter specified were omitted therefrom, namely, "Provided always, that the party or parties who shall not be a member or members of the said society shall profess with or be of the persuasion of the said society." Provided that no marriage shall be valid under this Act, unless when notice of the intention to solemnize such marriage is given to the superintendent-registrar in England, or (as the case may be) to the registrar of marriages in Ireland, as required by law, a certificate shall be produced to such superintendent-registrar or registrar of marriages, purporting to be signed by some registering officer of the said Society of Friends in England or in Ireland respectively, to the effect that the party by whom or on whose behalf such

notice is given, or each such party (as the case may be), is authorised thereto, under or in pursuance of some general rule or rules of the said society in England or Ireland respectively, and such certificate shall be for all purposes conclusive evidence that the party by whom or on whose behalf such notice is given, or each such party (as the case may be), is duly authorised to proceed to the accomplishment of such marriage according to the usages of the said society, and the register of such marriage, or a copy thereof duly certified according to law, shall be conclusive evidence of the due production of such certificate as aforesaid, but no such certificate shall be required in cases where the party giving such notice shall declare, either verbally or in writing, if thereunto required, that both the parties to the intended marriage are either members of the said society or in profession with or of the persuasion thereof.'

All marriages solemnized in England before July 1, 1837, and in Ireland before April 1, 1845, according to the usages of the Quakers or Jews, are rendered valid by the 10 & 11 Vict. c. 58, provided the parties were both Quakers or both persons professing the Jewish religion. As to marriage of Jews in Ireland, see 7 & 8 Vict. c. 81, s. 18; 34 & 35 Vict. c. 49, s. 28. See 19 & 20 Vict. c. 119, s. 21, *post*, p. 687.

(f) See note to sec. 1, *ante*, p. 674.

(g) By 1 Vict. c. 23, s. 10, the registrar-general may unite two or more districts, and by sec. 11 may divide districts. See the 19 & 20 Vict. c. 119, s. 3, *post*, p. 683.

Sec. 5. 'The superintendent registrar shall file all such notices, and keep them with the records of his office, and shall also forthwith enter a true copy of all such notices fairly into a book, to be for that purpose furnished to him by the registrar-general, to be called "the marriage notice book," the cost of providing which shall be defrayed in like manner as the cost of providing register books of births and deaths; (h) and the marriage notice book shall be open at all reasonable times without fee to all persons desirous of inspecting the same; and for every such entry the superintendent registrar shall be entitled to have a fee of one shilling.'

By sec. 8 the registrar-general is to furnish the superintendent registrars with forms of certificates, which are to be distinguished in certain ways where the marriage is by licence, and where it is without licence.

Sec. 9. 'Any person authorised in that behalf may forbid the issue of the superintendent registrar's certificate by writing at any time before the issue of such certificate the word 'forbidden' opposite to the entry of the notice of such intended marriage in the marriage notice book, and by subscribing thereto his or her name and place of abode, and his or her character, in respect of either of the parties, by reason of which he or she is so authorised; and in case the issue of any such certificate shall have been so forbidden the notice and all proceedings thereupon shall be utterly void.'

Sec. 10. 'After the said first day of March, (i) the like consent shall be required to any marriage in England solemnized by licence as would have been required by law to marriages solemnized by licence immediately before the passing of this Act; and every person whose consent to a marriage by licence is required by law is hereby authorised to forbid the issue of the superintendent registrar's certificate, whether the marriage is intended to be by licence or without licence.'

Sec. 11. 'After the said first day of March (i) every superintendent registrar shall have authority to grant licences for marriage in any building registered as hereinafter provided within any district under his superintendence, or in his office; and every superintendent registrar shall four times in every year, on such days as shall be appointed by the registrar-general, make a return to the registrar-general of every licence granted by him since his last return, and of the particulars stated concerning the parties: provided always, that no superintendent registrar shall grant any such licence until he shall have given security by his bond in the sum of one hundred pounds to the registrar-general for the due and faithful execution of his office: provided also, that nothing herein contained shall authorise any superintendent registrar to grant any license for marriage in any church or chapel in which marriages may be solemnized according to the rites of the Church of England, or in any church or chapel belonging to the Church of England or licensed for the celebration of Divine worship according to the rites and ceremonies of the Church of England, or any licence for marriage in any registered building which shall not be within his district.'

Sec. 13. 'Any person, on payment of five shillings, may enter a

(h) Repealed as to the costs of registers by the 21 & 22 Vict. c. 25, s. 6.

(i) See note to sec. 1, *ante*, p. 674.

caveat with the superintendent registrar against the grant of a certificate or a licence for the marriage of any person named therein; and if any caveat be entered with the superintendent registrar, such caveat being duly signed by or on behalf of the person who enters the same, together with his or her place of residence, and the ground of objection on which his or her caveat is founded, no certificate or licence shall issue or be granted until the superintendent registrar shall have examined into the matter of the caveat, and is satisfied that it ought not to obstruct the grant of the certificate or licence for the said marriage, or until the caveat be withdrawn by the party who entered the same; provided that in cases of doubt it shall be lawful for the superintendent registrar to refer the matter of any such caveat to the registrar-general, who shall decide upon the same; provided likewise, that in case of the superintendent registrar refusing the grant of the certificate or licence, the person applying for the same shall have a right to appeal to the registrar-general, who shall thereupon either confirm the refusal or direct the grant of the certificate or licence.'

By Sec. 14, 'No marriage after such notice as aforesaid, unless by virtue of a licence to be granted by the superintendent registrar, shall be solemnized or registered in England until after the expiration of twenty-one days after the day of the entry of such notice as aforesaid.'

Sec. 15. 'Whenever a marriage shall not be had within three calendar months after the notice shall have been so entered by the superintendent registrar, the notice and certificate, and any licence which may have been granted thereupon, and all other proceedings thereupon, shall be utterly void; and no person shall proceed to solemnize the marriage, nor shall any registrar register the same, until new notice shall have been given, and entry made, and certificate thereof given, at the time and in the manner aforesaid.' (j)

Sec. 18. 'Any proprietor or trustee of a separate building, certified according to law as a place of religious worship, may apply to the superintendent registrar of the district, in order that such building may be registered for solemnizing marriages therein, and in such case shall deliver to the superintendent registrar a certificate, signed in duplicate by twenty householders at the least, that such building has been used by them during one year at the least as their usual place of public religious worship, and that they are desirous that such place should be registered as aforesaid, each of which certificates shall be countersigned by the proprietor or trustee by whom the same shall be delivered; and the superintendent registrar shall send both certificates to the registrar-general, who shall register such building accordingly in a book to be kept for that purpose at the general register office; and the registrar-general shall indorse on both certificates the date of the registry, and shall keep one certificate with the other records of the general register office, and shall return the other certificate to the superintendent registrar, who shall keep the same with the other records of his office; and the superintendent registrar shall enter the date of the registry of such building in a book to be fur-

(j) By sec. 16, the superintendent registrar's certificate or licence is to be delivered to the person by or before whom the marriage is solemnized.

nished to him for that purpose by the registrar-general, and shall give a certificate of such registry under his hand, on parchment or vellum, to the proprietor or trustee by whom the certificates are countersigned, and shall give public notice of the registry thereof by advertisement in some newspaper circulating within the county, and in the "London Gazette." (k)

Sec. 20. 'After the expiration of the said period of twenty-one days, or of seven days if the marriage is by licence, marriages may be solemnized in the registered building stated as aforesaid in the notice of such marriage, between and by the parties described in the notice and certificate, according to such form and ceremony as they may see fit to adopt: provided nevertheless, that every such marriage shall be solemnized with open doors, between the hours of eight and twelve in the forenoon, (l) in the presence of some registrar of the district in which such registered building is situate, and of two or more credible witnesses: provided also, that in some part of the ceremony, and in the presence of such registrar and witnesses, each of the parties shall declare,

"I do solemnly declare, that I know not of any lawful impediment why I, *A. B.*, may not be joined in matrimony to *C. D.*"

And each of the parties shall say to the other,

"I call upon these persons here present to witness that I, *A. B.*, do take thee, *C. D.*, to be my lawful wedded wife [or husband]."

Provided also, that there be no lawful impediment to the marriage of such parties.'

Sec. 21. 'Any persons who shall object to marry under the provisions of this Act in any such registered building may, after due notice and certificate issued as aforesaid, contract and solemnize marriage at the office and in the presence of the superintendent registrar and some registrar of the district, and in the presence of two witnesses, with open doors, and between the hours aforesaid, making the declaration and using the form of words hereinbefore provided in the case of marriage in any such registered building.' (m)

Sec. 26. 'With the consent under the hand and seal of the patron and incumbent respectively of the church of the parish or district in which may be situated any public chapel with or without a chapelry thereunto annexed, or any chapel duly licensed for the celebration of divine service according to the rites and ceremonies of the Church of England, or any chapel the minister whereof is duly licensed to officiate therein according to the rites and ceremonies of the Church of England, or without such consent after two calendar months' notice in writing given by the registrar of

(k) By sec. 19, on the removal of the same congregation the new place of worship may be immediately registered, instead of the one disused, and after such substitution it shall not be lawful to solemnize any marriage in such disused building.

(l) Now eight in the forenoon and three in the afternoon. See 49 Vict. c. 14, *post*, p. 687.

(m) Sec. 22 regulates the marriage fees of the registrar. By sec. 23, the registrar is to register all marriages solemnized before him in books to be sent by the registrar-general, and copies of the marriage register book are to be given quarterly to the superintendent registrar.

the diocese to such patron and incumbent respectively, the bishop of the diocese may, if he shall think it necessary for the due accommodation and convenience of the inhabitants, authorise by a licence under his hand and seal the solemnization of marriages in any such chapel for persons residing within a district the limits whereof shall be specified in the bishop's licence, and under such provisions as to the amount, appropriation, or apportionment of the dues, and as to other particulars, as to the said bishop may seem fit, and as may be specified in the said licence; provided that it shall be lawful for any patron or incumbent who shall refuse or withhold consent to the grant of any such licence to deliver to the bishop under his or her hand and seal, a statement of the reasons for which such consent shall have been so refused or withholden; and no such licence shall be granted by any bishop until he shall have inquired into the matter of such reasons; and every instrument of consent of the patron and incumbent, or, if such consent be refused or withholden, a copy of the notice under the hand of the registrar, and every statement of reasons alleged as aforesaid by the patron or incumbent, with the bishop's adjudication thereupon under his hand and seal, shall be registered in the registry of the diocese; and thenceforth and until the said licence be revoked marriages solemnized in such chapel shall be as valid to all intents and purposes as if the same had been solemnized in the parish church, or in any chapel where marriages might heretofore have been legally solemnized.' (n)

Sec. 30. 'All provisions which shall from time to time be in force relative to marriages, and to providing, keeping, and transmitting register books and copies of registers of marriages solemnized in any parish church, shall extend to any chapel in which the solemnization of marriages shall be authorised as aforesaid, in the same manner as if the same were a parish church, and everything required by law to be done relating thereto by the rector, vicar, curate, or churchwardens respectively, of any parish church shall be done by the officiating minister, chapelwarden, or other person exercising analogous duties in such chapel respectively.'

Sec. 31. 'Notwithstanding any such licence as aforesaid to solemnize marriages in any such chapel, the parties may, if they think fit, have their marriage solemnized in the parish church, or in any chapel in which heretofore the marriage of such parties or either of them might have been legally solemnized.' (o)

Sec. 42. 'If any persons (p) shall knowingly and wilfully intermarry after the said first day of March under the provisions of this

(n) Sec. 27 provides for the appropriation of fees on marriages performed in such chapels. By sec. 28, the patron or incumbent may appeal to the archbishop against such licences.

(o) By sec. 32 the bishop, with consent of the archbishop, may revoke such licences; in which case, by sec. 33, the registers are to be sent to the incumbent of the parish church. By sec. 34, the registrars of the dioceses are to send to the register office, yearly, lists of the licensed chapels within their districts, and a list of all chapels and

buildings registered, to be printed. By sec. 36 the registrar may ask certain particulars of the parties. By sec. 37 all persons vexatiously entering caveats are liable to costs and damages. By sec. 39 (amended by 37 & 38 Vict. c. 35), all persons unduly solemnizing marriage are guilty of felony. By sec. 40 the superintendent registrars who unduly issue certificates are guilty of felony; and by section 41 all prosecutions are to be commenced within three years. See also 1 Vict. c. 22, s. 3.

(p) See *post*, p. 690.

Act in any place other than the church, chapel, registered building, or office or other place specified in the notice and certificate as aforesaid, or without due notice to the superintendent registrar, or without certificate of notice duly issued, or without licence, in case a licence is necessary under this Act, or in the absence of a registrar or superintendent registrar where the presence of a registrar or superintendent registrar is necessary under this Act, the marriage of such persons, except in any case hereinafter excepted, shall be null and void: Provided always, that nothing herein contained shall extend to annul any marriage legally solemnized according to the provisions of an Act passed in the fourth year of his late Majesty George the Fourth, intituled "An Act for amending the Laws respecting the Solemnization of Marriages in England." (q)

The 1 Vict. c. 22, (r) s. 23, enacts, that 'the registrar-general, under the direction of one of her Majesty's principal secretaries of state, shall take order that the solemn declaration and form of words provided to be used in the case of marriages under the said Act for marriages be truly and exactly translated into the Welsh tongue, and shall cause the same so translated to be furnished to every registrar of marriages throughout Wales, and in all places where the Welsh tongue is commonly used; and it shall be lawful to use the declaration and form of words so translated, and published by authority, in all places where the Welsh tongue is commonly used or preferred, in such manner and form and to the same intents and purposes as by the said Act is prescribed in the English tongue.'

Sec. 33. 'The banns of marriage of any persons may be published in any chapel licensed by the bishop, according to the provisions of the said Act for marriages, for the solemnization of marriages, in which those persons might lawfully be married: and instead of the notice required by the said Act the words "Banns may be published and marriages may be solemnized in this chapel" shall be placed in some conspicuous part in the interior of every such chapel.'

Sec. 34, reciting, that 'doubts may arise whether under the said recited Acts it is lawful for the bishop to license chapels for marriages between parties one only of whom resides within the district specified in such licence;' enacts that 'all such licences shall be construed to extend to and authorise marriages in such chapels between parties one or both of whom is or are resident within the said district; provided always, that where the parties to any marriage intended to be solemnized after publication of banns shall reside within different ecclesiastical districts the banns for such marriage shall be published as well in the church or chapel wherein such marriage is intended to be solemnized as in the chapel licensed under the provisions of the said recited Act for the other district within which one of the parties is resident, and if there be no such

(q) By sec. 44, the provisions of the Registry Act are extended to this Act.

By sec. 45, 'this Act shall extend only to England, and shall not extend to the marriage of any of the royal family.'

(r) The 37 & 38 Vict. c. 35, repeals this Act in part, namely, "for marriages in England," and sec. 32.

chapel then in the church or chapel in which the banns of such last-mentioned party might be legally published if the said recited Act had not been passed.'

Sec. 35. 'Any building which shall have been licensed and used during one year next before registration for public religious worship as a Roman Catholic chapel exclusively shall be taken to be a separate building for the purpose of being registered for the celebration of marriages, notwithstanding the same shall be under the same roof with any other building, or shall form a part only of a building.'

The 3 & 4 Vict. c. 72, s. 1, reciting the 4 Geo. 4, c. 76, 6 & 7 Will. 4, c. 85, and 1 Vict. c. 22, and that it is expedient to restrain marriages under the 6 & 7 Will. 4, from being solemnized out of the district in which one of the parties dwells, unless either of the parties dwells in the district, within which there is not any registered building, enacts, 'that it is not and shall not be lawful for any superintendent registrar to give any certificate of notice of marriage where the building in which the marriage is to be solemnized, as stated in the notice, shall not be within the district wherein one of the parties shall have dwelt for the time required by the said Act of his late Majesty, except as hereinafter is enacted.'

Sec. 2. 'It shall be lawful for any party intending marriage under the provisions of the said Act of his late Majesty, in addition to the notice required to be given by that Act, to declare at the time of giving such notice, by indorsement thereon, the religious appellation of the body of Christians to which the party professeth to belong, and the form, rite, or ceremony which the parties desire to adopt in solemnizing their marriage, and that, to the best of his or her knowledge and belief, there is not within the district in which one of the parties dwells any registered building in which marriage is solemnized according to such form, rite, or ceremony, and the district nearest to the residence of that party in which a building is registered wherein marriage is so solemnized, and the registered building within such district in which it is intended to solemnize their marriage; and after the expiration of seven days or twenty-one days, as the case may require, under the said Act of his late Majesty, it shall be lawful for the superintendent registrar to whom any such notice shall have been given to issue his certificate, according to the provisions of that Act; and after the issuing of such certificate the parties shall be at liberty to solemnize their marriage in the registered building stated in such notice: Provided always, that after any marriage shall have been solemnized it shall not be necessary in support of such marriage to give any proof of the truth of the facts herein authorised to be stated in the notice, nor shall any evidence be given to prove the contrary in any suit touching the validity of such marriage.' (s)

Sec. 5. 'Notwithstanding anything herein or in the said recited Acts or either of them contained, the Society of Friends commonly called Quakers, and also persons professing the Jewish religion, may lawfully continue to contract and solemnize marriage accord-

ing to the usages of the said society and of the said persons respectively, after notice for that purpose duly given, and certificate or certificates duly issued, pursuant to the provision of the said recited Act of his late Majesty, notwithstanding the building or place wherein such marriage may be contracted or solemnized be not situate within the district or either of the districts (as the case may be) in which the parties shall respectively dwell.'

The 19 & 20 Vict. c. 119, which came into force Jan. 1, 1857, recites that it is expedient to alter and amend the 6 & 7 Will. 4, c. 85, 1 Vict. c. 22, and 3 & 4 Vict. c. 72, and by sec. 1 enacts, 'In case of any party intending marriage under the provisions of any of the said recited Acts or of this Act, no notice of such intended marriage shall be read or published before the guardians of any Poor-law union or parish or place, or be transmitted by any superintendent registrar to the clerk of any such guardians.'

Sec. 2. 'In case any party shall intend marriage, under the provisions of any of the said recited Acts or of this Act, the party so intending marriage shall, at the time of giving to the superintendent registrar or respective superintendent registrars, as the case may be, the notice required by the said recited Acts or either of them, make and sign or subscribe a solemn declaration in writing, in the body or at the foot of such notice, that he or she believes that there is no impediment of kindred or alliance or other lawful hindrance to the said marriage, and that the parties to the said marriage, in case the marriage is intended to be had without licence, have, for the space of seven days immediately preceding the giving of such notice, had their usual place of abode and residence within the district of the superintendent registrar or respective superintendent registrars to whom such notice or notices, as the case may be, shall be so given; or, in case such marriage is intended to be had by licence, that one of the said parties hath for the space of fifteen days immediately preceding the giving of such notice had his or her usual place of abode and residence within the district of the superintendent registrar to whom such notice shall be so given; and when either of the parties intending marriage, and not being a widower or widow, shall be under the age of twenty-one years, the party making such declaration shall further declare that the consent of the person or persons whose consent to such marriage is by law required has been given, or (as the case may be) that there is no person whose consent to such marriage is by law required; and every declaration so made as aforesaid shall be signed and subscribed, by the party making the same, in the presence of the superintendent registrar to whom the notice of marriage containing such declaration is given, or in the presence of his deputy, or of some registrar of births and deaths or of marriages for the district in which the party giving such notice resides, or of the deputy of such registrar, who shall respectively attest the same by adding thereto his name, description, and place of abode; and no certificate or licence for marriage shall be issued or granted pursuant to any such notice as aforesaid unless the said notice be accompanied by such solemn declaration duly made and signed or subscribed and attested as aforesaid; and every person who shall knowingly or wilfully make and sign or subscribe any false

declaration, or who shall sign any false notice for the purpose of procuring any marriage under the provisions of any of the said recited Acts or this Act, shall suffer the penalties of perjury.' (t)

Sec. 3. 'Every notice of marriage which shall be given under the provisions of any of the said recited Acts or of this Act, after this Act shall have come into operation, shall be in the form of Schedule (A.) to this Act annexed, or to the like effect; and in every case where the marriage is intended to be had and solemnized under the provisions of the said recited Act of the third and fourth years of Her Majesty, chapter seventy-two, such notice, shall, in addition to the several particulars comprised in the said schedule, contain the declaration required to be made by one of the parties to such intended marriage, pursuant to the second section of the said last-mentioned Act; and the superintendent registrar to whom any such notice of marriage shall be so given shall forthwith enter the particulars and the date thereof, and the name of the party giving the same, into the marriage notice book; and for every such entry the superintendent registrar shall be entitled to have a fee of one shilling.'

Sec. 4. 'In case any party shall intend marriage without licence under the provisions of any of the said recited Acts or of this Act, the superintendent registrar to whom notice of such intended marriage has been given shall cause the notice of marriage, or a true and exact copy thereof, as entered in the marriage notice book, under the hand of such superintendent registrar, to be suspended or affixed in some conspicuous place in the office of the said superintendent registrar during twenty-one successive days next after the day of the entry of such notice in his "Marriage notice book," before any marriage shall be solemnized in pursuance of such notice, and after the expiration of twenty-one days next after the day of the entry of such notice in his "Marriage notice book," the superintendent registrar shall issue under his hand, upon the request of the party giving such notice, a certificate in the form or to the effect of the certificate set forth in Schedule (B.) to this Act annexed, provided that in the meantime no lawful impediment to the issuing of such certificate be shown to the satisfaction of the same superintendent registrar, and provided the issue of such certificate shall not have been forbidden in the manner provided by either of the said firstly and secondly recited Acts by some person or persons authorized in that behalf; and every such certificate shall state the particulars set forth in the said notice, and the day on which the same notice was entered, and that the issue of such certificate has not been forbidden by any person or persons authorized in that behalf; and for every such certificate the superintendent registrar shall be entitled to have and receive a fee of one shilling; and at any time within three calendar months next after the day of the entry of such notice the intended marriage may be solemnized under the authority of the said certificate; and every superintendent registrar's certificate for marriage duly issued under the provisions of this Act shall have the

(t) A man may change his surname by use and reputation, and if by use and reputation he has acquired a new one, he is not indictable under the 19 & 20 Vict.

c.19, s. 2, for using the new name in signing a notice for the purpose of procuring his marriage under the 6 & 7 Will. 4, c. 85. *R. v. John Smith*, 4 F. & F. 1099.

same force, validity, and effect as the like certificate issued under the provisions of the said recited Acts or either of them would have had in case this Act had not been passed.'

Sec. 5. 'In case any party shall intend marriage by licence under the provisions of any of the said recited Acts or of this Act, notice of such intended marriage shall not be suspended in the office of the superintendent registrar, but the party giving the same shall state therein that such marriage is intended to be celebrated by licence.'

Sec. 6. 'In any case of marriage intended to be solemnized by licence, under the provisions of either of the said two firstly recited Acts or of this Act, between parties both of whom do not dwell in the same superintendent registrar's district, it shall not be required that notice of such intended marriage shall be given to more than one superintendent registrar, but a notice to the superintendent registrar of the district in which one of the parties so intending marriage resides shall be sufficient; and it shall not be required that the said notice shall state how long each of the said parties has resided in his or her dwelling-place, but only how long the party residing in the district in which the notice is given has so resided.' (u)

Sec. 9. 'Every superintendent registrar receiving notice of an intended marriage to be solemnized by licence as aforesaid shall, after the expiration of one whole day next after the day of the entry of such notice in his "Marriage notice book," issue under his hand, upon the request of the party giving such notice, a certificate in the form or to the effect of the certificate set forth in the said Schedule (B.) to this Act annexed, and also a licence to marry, provided that in the meantime no lawful impediment to the issuing of such certificate be shown to the satisfaction of the same superintendent registrar, and provided the issue of such certificate shall not have been forbidden in the manner provided by either of the said firstly and secondly recited Acts by some person or persons authorized in that behalf; and every such certificate shall state the particulars set forth in the said notice, and the day on which the same notice was entered, and that the issue of such certificate has not been forbidden by any person or persons authorized in that behalf; and for every such certificate the superintendent registrar shall be entitled to have and receive a fee of one shilling; and, at any time within three calendar months next after the day of the entry of such notice, the intended marriage may be solemnized under the authority of the said licence; and every superintendent registrar's certificate and licence for marriage duly issued under the provisions of this Act shall have the same force, validity, and effect as the like certificate and licence issued under the provisions of the said recited Acts or either of them would have had in case this Act had not been passed.'

Sec. 10. 'The form of a licence for marriage so to be granted as aforesaid to any party or parties, by the superintendent registrar of

(u) By sec. 7, notice of marriage without licence may be given in Ireland if one of the parties reside there, and marriages where such notices have been given in Ireland are legalised; and by sec. 8, a

certificate of proclamation of banns in Scotland as to a party resident there is made equivalent to the superintendent registrar's certificate.

any district as aforesaid, shall be in the form or to the effect of the licence set forth in Schedule (C.) to this Act annexed; and for every such licence the superintendent registrar granting the same shall be entitled to have and receive of the party requiring the same the sum of one pound ten shillings, over and above the amount paid for the stamps necessary on granting such licence.'

Sec. 11. 'No such marriage as aforesaid shall be solemnized in any such registered building without the consent of the minister or of one of the trustees, owners, deacons, or managers thereof, nor in any registered building of the Church of Rome without the consent of the officiating minister thereof, nor in any church or chapel of the united Church of England and Ireland without the consent of the minister thereof, nor in such latter case by any other than a duly qualified clergyman of the said united church, or with any other forms or ceremonies than those of the said united church, any statute or statutes to the contrary notwithstanding.'

Sec. 12. 'If the parties to any marriage contracted at the registry office of any district conformably to the said recited Acts or any of them, or to the provisions of this Act, shall desire to add the religious ceremony ordained or used by the church or persuasion of which such parties shall be members to the marriage so contracted, it shall be competent for them to present themselves for that purpose to a clergyman or minister of the church or persuasion of which such parties shall be members, having given notice to such clergyman or minister of their intention so to do; and such clergyman or minister, upon the production of their certificate of marriage before the superintendent registrar, and upon the payment of the customary fees (if any), may, if he shall see fit, in the church or chapel whereof he is the regular minister, by himself or by some minister nominated by him, read or celebrate the marriage service of the persuasion to which such minister shall belong: Provided always, that no minister of religion who is not in holy orders of the united Church of England and Ireland shall under the provisions of this Act officiate in any church or chapel of the united Church of England and Ireland; but nothing in the reading or celebration of such service shall be held to supersede or invalidate any marriage so previously contracted, nor shall such reading or celebration be entered as a marriage among the marriages in the parish register: Provided also, that at no marriage solemnized at the registry office of any district shall any religious service be used at the registry office.'

Sec. 13. 'When any marriage is intended to be solemnized between parties not of the Society of Friends commonly called Quakers, or not professing the Jewish religion, by licence under the provisions of the before-recited Act of the third and fourth years of her Majesty, chapter seventy-two, in a registered building situated in a district within which neither of the parties resides, it shall be lawful for the superintendent registrar to whom notice of such intended marriage shall have been given to grant to the party applying for the same a licence for such marriage to be solemnized in the registered building stated in such notice; and every licence and certificate granted in pursuance of this enactment shall be as valid and effectual to all intents and purposes as if the same had been granted by the superintendent

registrar of the district in which the registered building wherein the marriage is intended to be solemnized is situated.'

Sec. 14. 'When any marriage is intended to be solemnized, under the provisions of any of the before-recited Acts or of this Act, in the usual place of worship of the parties so intending marriage, or one of them, and such place of worship shall be a registered building situated out of the district of their, his, or her residence, it shall be lawful for the superintendent registrar or respective superintendent registrars to whom notice of such marriage shall have been given to grant to the party applying for the same a licence or certificate, as the case may be, for such marriage to be solemnized in the registered building stated in such notice, provided such building be situated not more than two miles beyond the limits of the district in which the notice of such marriage has been given, and the party giving notice of such marriage shall at the time of giving the same state therein, in addition to the description of the building in which the marriage is to be solemnized, that it is the usual place of worship of one of the parties, and shall also state the name of the party whose usual place of worship it is; and every licence and certificate granted in pursuance of this enactment shall be as valid and effectual, to all intents and purposes, as if the same had been granted by the superintendent registrar of the district in which the registered building wherein the marriage is intended to be solemnized is situated.' (v)

Sec. 17. 'After any marriage shall have been solemnized, under the authority of any of the said recited Acts or of this Act, it shall not be necessary in support of such marriage to give any proof of the actual dwelling or of the period of dwelling of either of the parties previous to the marriage within the district stated in any notice of marriage to be that of his or her residence, or of the consent to any marriage having been given by any person whose consent thereto is required by law, or that the registered building in which any marriage may have been solemnized had been certified according to law as a place of religious worship, or that such building was the usual place of worship of either of the parties, nor shall any evidence be given to prove the contrary in any suit or legal proceedings touching the validity of such marriage; and all marriages which heretofore have been or which hereafter may be had or solemnized, under the authority of any of the said recited Acts or of this Act, in any building or place of worship which has been registered pursuant to the provisions of the said Act passed in the sixth and seventh years of his late Majesty King William the Fourth, chapter eighty-five, but which may not have been certified as required by law, shall be as valid in all respects as if such place of worship had been so certified.' (w)

(v) By sec. 15, the registrar-general may appoint registrars of marriages; and the appointments of registrars of marriages by superintendent registrars are to be subject to his approval. By sec. 16, the registrar of marriages may appoint a deputy, and where such registrar dies or ceases to hold the office, his deputy is to be registrar until a new registrar is appointed.

(w) By sec. 18, persons making false declarations, or giving false notices, or for-

bidding the granting of a certificate by falsely representing their consent to be required by law, are liable to the penalties of perjury. By sec. 19, in the case of fraudulent marriages, the guilty party is to forfeit all the property accruing from the marriage. By sec. 20, nothing in the Act is to alter the provisions of the existing Acts, except when they are at variance with this Act.

Sec. 21. 'Any marriage according to the usages of the Society of Friends commonly called Quakers, or to the usages of persons professing the Jewish religion respectively, where the parties thereto are both members of the said Society or both persons professing the Jewish religion respectively, may be solemnized by licence (which licence the superintendent registrar to whom notice of the intended marriage shall have been given is hereby authorized to grant, in the form or to the effect set forth in the said Schedule (C.) to this Act annexed), as effectually in all respects as if such marriage were solemnized after the issue of a certificate by such superintendent registrar in the manner provided by the said recited Acts or any of them; and the provisions in this present Act contained in relation to the solemn declaration to be made by the party intending marriage, and to the statement to be contained in the notice of such intended marriage that such marriage is intended to be celebrated by licence, and to the notice to be given of any such intended marriage by licence, and to the giving of certificates in the form or to the effect set forth in Schedule (B.) to this Act annexed, and to the fee and stamp to be paid for such licence, shall be applicable in all respects to every such marriage to be solemnized by licence according to the usages of the said Society or to the usages of persons professing the Jewish religion respectively.' (x)

Sec. 23. 'Every marriage solemnized under any of the said recited Acts or of this Act shall be good and cognizable in like manner as marriages before the passing of the first-recited Act according to the rites of the Church of England.' (y)

The 20 Vict. c. 19, provides for the turning of certain extraparochial places into parishes, and where any such place has a church or chapel of the Church of England within it, the bishop of the diocese may authorise the publication of banns and the solemnization of marriages by banns or licence in it. (z) And all the provisions as to keeping of marriage registers are extended to such church or chapel. (a)

The 23 & 24 Vict. c. 24, renders marriages celebrated in any such church or chapel valid where both or either of the parties reside in such district, provided the banns are published in both districts where the parties reside in different districts. By the 49 Vict. c. 14, (1) 'From and after the passing of this Act it shall be lawful to solemnize a marriage at any time between the hours of eight in the forenoon and three in the afternoon.' By subsection (2), 'No person shall be subject to any proceedings in any court ecclesiastical or temporal for solemnizing matrimony between the aforesaid hours of eight in the forenoon and three in the afternoon.'

The marriage Acts do not specify what shall be necessary to be observed in the publication of banns, or that the banns shall be published in the *true names* of the parties; but it must be understood as the clear intention of the legislature that the banns shall be published

(x) By sec. 22, the registrar-general is to furnish marriage register books and forms to each certified secretary of a synagogue of British Jews.

(y) Sec. 24 recites the 15 & 16 Vict. c. 36, and enacts that the registrar-general

shall allow searches, and give extracts from the returns of certified places of worship. By sec. 25, the Act does not extend to Scotland or Ireland.

(z) Sec. 9.

(a) Sec. 10.

in the true names, because it requires that notice in writing shall be delivered to the minister of the true Christian names and surnames of the parties seven days before the publication; and, unless such notice be given, he is not obliged to publish the banns. But a publication in the name which the party has assumed, and by which he is known in the parish, appears to be sufficient, and would, indeed, be the proper publication where the party is not known by his real name. Thus, where a person, whose baptismal and surname was Abraham Langley, was married by banns by the name of George Smith, having been known in the parish where he resided and was married by that name only from his first coming into the parish till his marriage, which was about three years, the marriage was held valid. (b) And a marriage by licence, not in the party's real name, but in the name which he had assumed, because he had deserted, he being known by that name only in the place where he lodged and was married, and where he had resided sixteen weeks, was also held valid. Lord Ellenborough, C. J., said, 'If this name had been assumed for the purpose of fraud in order to enable the party to contract marriage, and to conceal himself from the party to whom he was about to be married, that would have been a fraud on the marriage Act and the rights of marriage, and the Court would not have given effect to any such corrupt purpose. But where a name has been previously assumed, so as to have become the name which the party has acquired by reputation, that is, within the meaning of the marriage Act, the party's true name.' (c)

Under the 26 Geo. 2, c. 33, if there was a total variation of a name or names, that is, if the banns were published in a name or names totally different from those which the parties, or one of them, ever used, or by which they were ever known, the marriage in pursuance of that publication was invalid; and it was immaterial in such cases, whether the misdescription had arisen from accident or design, or whether such design was fraudulent or not. The pauper and her husband were married in 1817, by banns, by the names of Mary White and Joseph Betts. The husband had been baptized as the son of J. and M. Betts. M. Betts was the daughter of S. Wilson, and her husband having absconded shortly after their marriage, the pauper's husband was brought up by S. Wilson, and always called by the name of Wilson, and never called or known by any other name either before or after his marriage. The pauper was the daughter of J. and M. Hodgkinson, and was never called or known by any name except Hodgkinson till after her marriage, but in the register of her baptism she was described as 'Mary the daughter of S. White and his wife,' which entry was believed to have been a mistake of the clergyman who baptized her. It was held that the marriage was void. Whether the husband was sufficiently designated by the name of Betts it was unnecessary to inquire, as the Court were clearly of opinion that the woman was never known by, and never used the surname of 'White,' so as to make that, in any latitude of construction, 'a true name' within the meaning of the 26 Geo. 2, c. 33, s. 2. (d)

(b) *R. v. Billingham*, 3 M. & S. 250.

(d) *R. v. Tibshelf*, 1 B. & Ad. 190.

(c) *R. v. Burton-upon-Trent*, 3 M. & S. 537.

But under the 26 Geo. 2, c. 33, if there were a partial variation of name only, as the alteration of a letter or letters, or the addition or suppression of one Christian name, or the names had been such as the parties had used, and been known by, at one time, and not at another; in such cases the publication might, or might not be void; the supposed misdescription might be explained, and it became a most important part of the inquiry, whether it was consistent with honesty of purpose, or arose from a fraudulent intention. (*e*)

But the words of the 4 Geo. 4, c. 76, s. 22, are wholly different from those of the 26 Geo. 2, c. 33, s. 8, and it has been held that in order to invalidate a marriage under the 4 Geo. 4, c. 76, s. 22, it must be contracted with a knowledge by *both* parties that no due publication of the banns has taken place. Where, therefore, J. C. told Susannah Spencer that he would see the banns properly published, and she took no steps in the matter, and he told her that they had been published, but procured the banns to be published in the name of Agnes Watts, which name she had never borne; and in performing the service, the clergyman applied to her the name of Agnes, till which time she believed she was about to be married by her own name, and she did not know, until after the marriage, that the banns had been published in a wrong name; it was held that the marriage was valid. (*f*) But where both the man and the woman were aware that the banns had been published in a manner to conceal the identity of one of them, it was held that the marriage was void. (*g*)

Edward Croxall Tongue, a minor, of the age of seventeen years, and Mary Ann Allen, a widow, of the age of thirty-five years, were married in 1833 by banns, which were published in the names of Edward Tongue, bachelor, and Mary Ann Allen, spinster; the entry in the register was in the same names and descriptions, and was signed Edward Tongue. The marriage was clandestine and without the knowledge or consent of the parents of Tongue, who was baptized by the names of Edward Croxall Tongue, and though known to some persons by the name of Croxall Tongue or Tongue only, was never known by the name of Edward Tongue. It was admitted that the woman was cognizant of the fraud and intended it; and it was held that as the entry in the register was, Edward Tongue and Mary Ann Allen were married by banns, it was impossible for him not to have known of the publication of the banns; and the signature of only one of his Christian names showed that he must have known that the banns had been published in that name only; and, therefore, he, with the woman, knowingly and wilfully intermarried without due publication of banns. (*h*)

(*e*) Per Lord Tenterden, C. J. Ibid. See *Sullivan v. Sullivan*, 2 Hagg. C. R. 254; *Frankland v. Nicholson*, 3 M. & S. 261, 1 Phil. R. 147; *Pougett v. Tomkins*, 3 M. & S. 263; *Mather v. Ney*, 3 M. & S. 265.

(*f*) *R. v. Wroxtton*, 4 B. & Ad. 640, 1 N. & M. 712; *Gompertz v. Kensit*, 41 L. J. Ch. 382; *R. v. Kay*, 16 Cox C. C. 292.

(*g*) *Wiltshire v. Wiltshire*, 3 Hagg. Ecc. R. 332.

(*h*) *Tongue v. Tongue*, 1 Moore. P. C. 90. There was also evidence that it was the regular course to make the parties examine the entry in the banns book before a marriage, and see that their names and descriptions were right, and the witness added that she should not have been present at the marriage as a witness, unless the banns had been regularly published.

One Wood was baptized and had always been known by the name of Bower Wood, and never by the name of John Wood, and his banns were published in the name of John Wood; after the first publication the wife told Wood that the name John Wood was wrong. He said it was one of his names, though he had never been called by it; she asked him why he used the name John? He said it was for fear any of his relations should know of his marrying her. She wished him to use the name of Bower; he said he should be disinherited if he did; she asked him if the marriage would be legal under the name of John; he said it would. It was a long time before she would consent to being married to him in the name of John. She did so because he said if she loved him she would marry him in that name, and would trust to him afterwards. On the 12th of April, 1852, they were married in the names of Margaret Midgley and John Wood. Cresswell, J. O., held that there was not a due publication of banns, as Wood was described in them as John Wood, and both parties were aware of this misdescription when the marriage was solemnized, and therefore the marriage was invalid. (*i*)

It seems that the assuming a fictitious name, upon the second marriage, will not prevent the offence from being complete. (*j*) And it was decided to be no ground of defence, that upon the second marriage (which was by banns) the parties passed by false Christian names when the banns were published, and when the marriage took place; and it was further holden that the prisoner, having written down the names for the publication of the banns, was precluded thereby from saying that the woman was not known by the name he delivered in, and that she was not rightly described by that name in the indictment. The indictment was against the prisoner for marrying Anna Timson whilst he had a wife living: the second marriage was by banns; and, it appeared, that the prisoner wrote the note for the publication of the banns, in which the woman was called Anna, and that she was married by that name, but that her real name was Susannah. Upon a case reserved two questions were made: one, whether this marriage was not void, because there was no publication of banns by the woman's right name, and that, if the second marriage were void, it created no offence: and the other question was, whether the charge of the prisoner's marrying Anna was proved. But the judges held, unanimously, that the second marriage was sufficient to constitute the offence; and that, after having called the woman 'Anna' in the note he gave in for the publication of banns, it did not lie in the prisoner's mouth to say, that she was not known as well by the name of Anna as by that of Susannah, or that she was not rightly called by the name of Anna in the indictment. (*k*)

So where the prisoner contracted the second marriage in the maiden name of his mother, and the woman he married had also made use of her mother's maiden name, it was unanimously resolved by all the judges that the prisoner was rightly convicted. (*l*) So

(*i*) *Midgley v. Wood*, 30 Law J., D. & M. 57.

(*j*) *R. v. Allison*, *post*, p. 713. And see *R. v. Allen*, *ante*, p. 664, and the question as to the second marriage there discussed.

(*k*) *R. v. Edwards*, MS. Bayley, J., and R. & R. 283.

(*l*) *Palmer's case*, 1 Deac. Dig. Cr. L. 147. Rosc. C. E. 280.

where the second wife had never gone or been known by the name of Thick, but had assumed it when the banns were published, that her neighbours might not know she was the person intended, it was held that the parties could not be allowed to evade the punishment for their offence, by contracting a concertedly invalid marriage. (*m*) But where it was proved, by a person present at the prisoner's second marriage, that the woman was married to him by the name of Hannah Wilkinson (the name laid in the indictment), but there was no other proof that the woman was in fact Hannah Wilkinson; it was held that the proof was insufficient, and that to make it sufficient there should have been proof that the prisoner was married to a certain woman by the name of, and who called herself H. Wilkinson, whereas, in fact, there was no proof that such was her name, or that she had ever before gone by that name; and if the banns had been published in a name which was not her own, and which she had never gone by, the marriage would be invalid. (*n*)

The prisoner was married a second time before the registrar, describing himself as Benjamin Rea, his true name being Edward Rea. There was no evidence to show the wife knew of this, and the man was held to be rightly convicted of bigamy, as the effect of the statute 6 & 7 Will. 4, c. 85, ss. 4, 42, is to render invalid a marriage where both the parties, and not one only, knowingly intermarry without due notice. (*o*)

A marriage celebrated under a licence, in which one of the parties is described by a name wholly different from his own, is not therefore void. George Rudman was taken into custody as the reputed father of a child, of which a woman was pregnant, and married her by licence. He gave his name as George Neate at the times of the apprehension and marriage, and was named so in the licence, but had never gone by that name before; and the Court of Queen's Bench held this marriage valid. (*p*)

Where a marriage was solemnized by licence, in which the woman's name was Margaret Bevan; her baptismal name and that by which she was commonly called being 'Margaret Lea Bevan'; the licence was obtained in the altered name by the man, who knowingly, and by direction of the woman, suppressed the name of 'Lea,' and gave false places of residence, in order that the surrogate might not know who the woman was, and that the intended marriage might be kept secret from her friends; it was held that the question was whether the woman was married without a 'licence from a person or persons having authority to grant the same.' There was no doubt the person who granted the licence had authority to grant it, and it came therefore to the question whether this was a licence for the woman. It was clear that an altered name might represent a person; therefore the name 'Margaret Bevan' might represent her, and as the licence

(*m*) *R. v. Penson*, 5 C. & P. 412. *Gurney* B. See *R. v. Orgill*, 9 C. & P. 80.

(*n*) *Drake's case*, 1 Lewin, 25. *Parka, J.* No point was suggested as to this being the second marriage.

(*o*) *R. v. Rea*, L. R. 1 C. C. R., 41 L. J. M. C. 92. The Court did not say there would have been no offence if both parties

had known of the false statement. See *Holmes v. Simmons*, L. R. 1 P. & M. 523.

(*p*) *Lane v. Goodwin*, 4 Q. B. 361. But if a licence were obtained for one person with the intention that it should be used for another, such a licence might not be valid. *Patteson, J.* *Ibid.*

was obtained for her and by her direction from a person who had authority to grant it, the marriage was not void. (g)

On the trial of an ejectment in 1842, a marriage was said to have taken place in August in 1784, at a private house under a special licence from the Archbishop of Canterbury. There was some evidence of cohabitation and reception: but the plaintiff's counsel offered in evidence an affidavit made for the purpose of obtaining a special licence to be married at a private house, and a fiat signed by the Archbishop, directing a licence to be made out, as prayed, for a marriage between the parties; both which documents were produced from the Office of Faculties, the proper ecclesiastical office. No search had been made for the original licence; and there was proof that such licences were not kept in any regular custody, but were generally handed over to the officiating clergyman and not taken back from him. A copy of the register of the parish of St. Pancras, which stated the marriage to have been at a private house, by special licence, and professed to be signed by the parties, was also offered in evidence. Objection was taken to the fiat as being secondary evidence of the contents of the licence, for which no search had been made; but the evidence was admitted; and the Court of Queen's Bench held that it was properly received, as the fiat was an act done in the course of official duty, showing that two persons bearing the names of the lessor of the plaintiff's parents were at that time engaged in taking measures for contracting a marriage; and that it might properly be taken into consideration by the jury as confirming the evidence of their union, which arose from cohabitation and reception. The affidavit and register were proofs of the same general fact. (r)

A marriage solemnized by licence since the 4 Geo. 4, c. 76, without consent of parents, where one of the parties is a minor, is valid: for the section, which requires such consent, is only directory. (s) The pauper, being under the age of twenty-one years, was married in 1826, by licence, without the consent of his father, who was then living; it was objected that this marriage was void under the 4 Geo. 4, c. 76, for want of the father's consent; but it was held that the marriage was valid. The language of sec. 16 (t) is merely to *require* consent; it does not proceed to make the marriage void, if solemnized without consent. Sec. 22 declares that certain marriages shall be null and void, and a marriage by licence without consent is not specified; and if there were any doubt, it is removed by sec. 23, which in

(g) *Bevan v. M'Mahon*, 30 Law J., D. & M. 61.

(r) *Doe dem. Earl of Egremont v. Grazebrook*, 4 Q. B. 406. In the argument it is said that 'the performance of a ceremony was proved;' but the ceremony was shown to have been performed in a private house. 'The same parties went through the ceremony, which, at any rate, was professedly a marriage.' See *Doe dem. France v. Andrews*, 15 Q. B. 756, as to the entry in the register.

(s) If the prisoner prove that his first marriage took place while he was a minor, and while the 26 Geo. 2, c. 38, was in force,

it must be shown on the part of the prosecution, that such marriage, if by licence, was with the proper consent. *R. v. Butler*, Mich. T. 1803. *MS. Bayley, J., and R. & R. 61*; *R. v. Morton, cor. Wilson, J., Newcastle*, 1789. *MS. Bayley, J., and R. & R. 19*, note (a). *James's case, R. & R. 17*. Though illegitimate children are regarded by the law as not having any father, yet they were held to be within the marriage Act of 26 Geo. 2; *R. v. Hodnett*, 1 T. R. 96; *R. v. Edmonton*, Cald. 435; *Horne v. Liddiard*, Rep. by Dr. Croke; *Priestley v. Hughes*, 11 East, 1.

(t) See the sec. *ante*, p. 672.

such a case enacts, not that the marriage shall be void, but that all the property accruing from the marriage shall be forfeited. (*u*)

Unless a clergyman in holy orders was present at the marriage ceremony, the marriage was null and void at common law before the marriage Act. Where, therefore, A., a member of the Established Church in Ireland, went, in 1829, accompanied by B., a Presbyterian, to the house of C., a regularly placed minister of the Presbyterians of the parish where C. resided, and there entered into a present contract of marriage with the said B., the minister performing a religious ceremony between them, according to the rites of the Presbyterian church, and A. and B. lived together as man and wife for some time afterwards; but A., afterwards during B.'s life, married another person in a parish church in England; it was held, on an indictment for bigamy, that the first contract thus entered into was not sufficient to support the indictment. (*v*)

But the preceding case must not be taken to decide that marriages of British subjects in the colonies, or on board ship or elsewhere, where a clergyman cannot be obtained, are invalid. Indeed in a case in India where no clergyman could be obtained, it was held that the preceding decision did not apply. (*w*)

The law does not admit of any difference, as to the manner in which a marriage is to be celebrated, between the marriage of a clergyman and a layman, and consequently if the bridegroom be a clergyman in holy orders, and perform the ceremony himself, no other clergyman being present, the marriage is invalid. (*x*)

Where, on an indictment for bigamy, it appeared that the first marriage professed to be under the provisions of the 6 & 7 Will. 4, c. 85, and the superintendent registrar produced the register returned to him by the registrar, who proved that he was present at the marriage, that it was registered, that the parties signed their names, and he witnessed it; and the superintendent registrar produced the register of the place where the marriage was celebrated, and the certificate he issued was produced and proved by him. A witness stated that he was present at the marriage, and that notice of it was duly given to the superintendent registrar, but the latter did not produce it, and said, if he had received it, he had left it at home; it was contended, on behalf of the prisoner, that it was incumbent on

(*u*) *R. v. Birmingham*, 8 B. & C. 29, S. C. 2 M. & R. 280. *R. v. Clark*, 2 Cox, C. C. 183.

(*v*) *R. v. Millis*, 10 Cl. & F. 534. March, 1843. In the Queen's Bench in Ireland, Perrin and Crampton, JJ., held the first marriage good; but Pennefather, C. J., and Burton, J., held it to be void. In order that error might be brought in the House of Lords, Perrin, J., withdrew his opinion, and judgment was given for the prisoner. In the House of Lords, Lords Brougham, Denman, and Campbell held the first marriage good; but the Lord Chancellor (Lyndhurst), Lord Cottenham, and Lord Abinger held it void; whereupon, according to the ancient rule in the law, *semper præsumitur pro negante*, judgment was given for the defendant; and in *Beamish v. Beamish*, *infra*, it was

held that this judgment was as much binding as if it had pronounced *nemine dissente*. On the authority of this case, it was held that a marriage solemnized at the consulate office at Beyrout in Syria, according to the rites of the Church of England, between two British subjects who were members of that church, by an American missionary, who was not a priest in holy orders, was void. *Catherwood v. Caslon*, 13 M. & W. 261. 1844. See the 55 & 56 Vic. c. 23, *post*, p. 704 *et seq.* See *R. v. Mainwaring*, 26 L. J. M. C. 10; *Dear. & B.* 132.

(*w*) *Maclean v. Cristall*, Per. Oriental Cas. 75. And the Lords, in *Beamish v. Beamish*, *infra*, expressly declared that this question was not decided by the preceding case.

(*x*) *Beamish v. Beamish*, 9 H. L. C. 274.

the prosecution to show that the first marriage was celebrated in the registered building specified in the notice and certificate, to prove that due notice had been given to the superintendent registrar, and that the certificate of the notice had been duly issued. But, on a case reserved, all the judges present held the evidence sufficient. (y)

Upon an indictment for bigamy, which alleged that the prisoner, in July, 1848, married Eliza Goodman in a Wesleyan chapel duly licensed for marriages, and afterwards in her lifetime married E. Outley, a witness proved that he was present at the first marriage at the Wesleyan chapel at Dunstable, in the presence of the registrar, and signed the register as a witness, and that the parties lived together as man and wife for two or three years. A witness proved that a certificate of this marriage was examined by him with the register book, kept at the office of the superintendent registrar of the district of Luton, within which Dunstable was, and that it was correct, and that it was signed by the superintendent registrar. This certificate contained a copy of the register, which the registrar certified to be correct. The witness also proved that he examined another certificate with the register book at the office of the superintendent registrar, and that it was correctly extracted, and was signed by the superintendent registrar in his presence. (z) The witness also proved that another document was signed in his presence by the superintendent registrar, and that he examined it with the register at his office, and found it was correctly extracted. (a) The reception of these documents was objected to, on the ground that certificates were not admissible to prove a marriage in a Wesleyan chapel, or that it was a place in which a marriage could be legally solemnized, or that, if admissible, they must be authenticated by the official seal of the registrar, and not under hand only. But the documents were admitted, and the prisoner convicted; and it was held that the conviction was right, upon the ground that, independently of the two last-mentioned documents, there was *prima facie* evidence that the chapel was duly registered, and was therefore a place in which marriages might be legally solemnized. The presence of the registrar at the marriage, the fact of the ceremony taking place, and the entry in the registrar's book, aided, as they were, by the presumption *omnia ritè esse acta*, afforded *prima facie* evidence that the chapel was a duly registered place, in which marriages might be legally celebrated. (b) So where on an indictment for bigamy the prisoner was shown to

(y) *R. v. Hawes*, 1 Den. C. C. 270. As the production of the original register of marriages cannot be enforced, a witness, who has seen the register, may prove the handwriting of a party to a marriage therein registered, although such register be not produced. *Sayer v. Glossop*, 2 Exc. R. 409.

(z) This certificate was, 'I, the undersigned, T. E. Austin, Superintendent Registrar of the district of Luton, &c., do hereby certify that the Wesleyan chapel, situate at Dunstable, in the county of Bedford, was duly registered for the solemnization of marriages, pursuant to the Act 6 & 7 Will. 4, c. 85, on the twenty-eighth day of November, 1845. Given under my hand, &c., Thos. Erskine Austin.'

(a) This document was, 'Henry Manwaring and Eliza Goodman were married after notice, read at the Board of Guardians of the Luton Union, without licence. Thos. Erskine Austin, Superintendent Registrar.'

(b) *R. v. Manwaring*, D. & B. C. C. 132; Pollock, C. B., and Willes, J., thought that the certificate that the chapel had been duly registered was admissible and evidence of the fact. The 6 & 7 Will. 4, cc. 85, 86; 1 Vict. c. 22; 3 & 4 Vict. c. 92; 8 & 9 Vict. c. 113; 9 & 10 Vict. c. 119; and 14 & 15 Vict. c. 99, were referred to on the trial. Willes, J., said, 'It is a mistake to suppose that the provisions of the 14 & 15 Vict. c. 99, s. 14, are anything more than cumulative, or

have been secondly married at a Wesleyan chapel not registered under the 15 & 16 Vict. c. 36, in June 1857, and this marriage was proved by the registrar, who produced the certificate; it was objected that there was no proof of the second marriage, or that it was invalid, having taken place in an unlicensed chapel; but Wightman, J., overruled the objections. (c)

A marriage celebrated by banns, in a chapel erected after the 26 Geo. 2, c. 33, was passed, and not upon the site of any ancient church or chapel, was held to be void, although marriages had been *de facto* frequently celebrated there; the words of the statute 'in which chapel banns have been usually published' being held clearly to mean chapels existing at the time it was passed. (d) But as soon as this determination was known, the 21 Geo. 3, c. 53, was passed, making valid all marriages which *had been* celebrated in any parish church or public chapel, erected since the passing of the 26 Geo. 2, c. 33, and consecrated, and providing that the registers of such marriages should be received as evidence. The fourth section enacted, that the registers of marriages thereby made valid should, within twenty days after the 1st of August, 1781, be removed to the church of the parish in which such chapel should be situated; or, if it should be situated in an extra-parochial place, to the parish church next adjoining, to be kept with the registers of such parish. These provisions were extended by the 44 Geo. 3, c. 77, and the 48 Geo. 3, c. 127, to marriages celebrated in such chapels before the 23rd August, 1808; and the registers of such marriages are in like manner to be removed to parish churches, and transmitted to the bishop. The 6 Geo. 4, c. 92, recites, that since the 26 Geo. 2, c. 33, and the 44 Geo. 3, c. 77, divers churches and chapels had been erected in Eng-

that they give a rule and the only rule of evidence.' See *R. v. Craddock*, 3 F. & F. 837. Where in an action for goods sold there was a plea of coverture, and the defendant stated that she was married to J. Lambert in 1844, at a Roman Catholic chapel in George Street, Portman Square; that she and Lambert were both Roman Catholics, and were married by a priest in the way in which Roman Catholic marriages are ordinarily celebrated, and that they lived together for some years, and she produced a certificate of the marriage from the priest who performed the ceremony, and a certificate showing that the civil contract of marriage had been performed before the French Consul; but there was no proof that the person who performed the ceremony was a priest, or that the chapel was a place licensed for marriages, or that the registrar was present at the time; the Court of Common Pleas held that it might be presumed that the chapel was licensed and the registrar present, as well because the 6 & 7 Will. 4, c. 85, s. 39, declares, any person who wilfully solemnizes a marriage in any other place than a registered building or in the absence of the registrar, guilty of felony, as because the ordinary rule *omnia præsumuntur rite esse acta* ought to prevail in such

a case. *Sichel v. Lambert*, 15 C. B. (N. S.) 781. Where a marriage was solemnized in a building in a parish situate a few yards from the parish church, at a time when the parish church was disused in consequence of its undergoing repairs, and after divine service had been several times performed in such building, in the absence of any proof that the building was licensed by the bishop, it was presumed in favour of the marriage, to have been duly licensed. *R. v. Cresswell*, 1 Q. B. D. 446; 45 L. J. M. C. 77; 13 Cox, C. C. 126, *et per* Lord Coleridge, C. J. 'We are of opinion that the marriage service having been performed in the place where divine service was several times performed, the rule "*omnia præsumuntur rite acta*" applies, and that we must assume that the place was properly licensed, and that the clergyman performing the service was not guilty of the grave offence of marrying persons in an unlicensed place. The facts of the marriage and other church services being performed there by a clergyman are abundant evidence from which the court and a jury might assume that the place was properly licensed for the celebration of marriages.'

(c) *R. v. Tilson*, 1 F. & F. 54.

(d) *R. v. Northfield*, Dougl. 659.

land, Wales, and Berwick-upon-Tweed, which had been duly consecrated, and divers marriages had been solemnized therein since the passing of the 44 Geo. 3, c. 77; but by reason that in such churches and chapels banns of matrimony had not usually been published, before or at the time of passing the 26 Geo. 2, c. 33, nor any authority obtained for solemnizing marriages therein, under the provisions of the 4 Geo. 4, c. 76, such marriages had been or might be deemed to be void; and then enacts, that all marriages already solemnized in any church or public chapel in England, Wales, and Berwick-upon-Tweed, erected since the 26 Geo. 2, c. 33, and consecrated, shall be as good and valid in law as if such marriages had been solemnized in parish churches or public chapels, having chapel-ries annexed, and wherein banns had usually been published before or at the time of passing the 26 Geo. 2. By sec. 2, it shall be lawful for marriages to be in future solemnized in all churches and chapels erected since the 26 Geo. 2, c. 33, and consecrated, 'in which churches and chapels it has been customary and usual, before the passing of this Act, to solemnize marriages;' and that all marriages hereinafter (e) solemnized therein shall be as good and valid as if they had been solemnized in parish churches, &c., wherein banns had usually been published before or at the time of passing the 26 Geo. 2. And the registers of marriages solemnized in the churches or chapels, by the 6 Geo. 4, enacted to be valid in law, or copies thereof, are to be received as evidence, in the same manner as the registers of marriages in parish churches, &c., in which banns were usually published before or at the time of the 26 Geo. 2, c. 33, or copies thereof, are received; but liable to the same objections as would be available to exclude the latter from being received. (f) But such registers of marriages, solemnized in any public chapel, and made valid by the 6 Geo. 4, c. 92, are, within three months from the passing of the Act, to be removed to the parish church of the parish in which such chapel is situated; and if it be situated in an extra-parochial place, then to the parish church next adjoining, to be kept with the marriage registers of such parish, and in like manner as parish registers are directed to be kept by the 26 Geo. 2. (g)

Where a marriage was solemnized in a chapel, before the 6 Geo. 4, c. 92, there must be some evidence given that banns were usually published there before the passing of the 26 Geo. 2, c. 33; but it was *prima facie* sufficient for that purpose to produce an old register of marriages solemnized in the chapel before that Act, and a regular register of banns published there since, and to prove that within the recollection of witnesses banns had been published and marriages solemnized in it from time to time of late years. (h) But where on an indictment for bigamy it appeared that the first marriage was celebrated at the chapel of Great Barr, which was a chapel in the parish of Aldridge, in the year 1843, and that marriages had been solemnized there for the last twenty years, but no register was produced, nor any further evidence given as to the celebration of mar-

(e) *Sic*, it should be 'hereafter.'

(f) 6 Geo. 4, c. 92, s. 3.

(g) *Id.* sec. 4.

(h) *Taunton v. Wyvorn*, 2 Campb. R.

297. This case was tried in 1809, after the passing of the 26 Geo. 3, and before the 6 Geo. 4, c. 92.

riages or publication of banns there; Platt, B., held the evidence insufficient, as it was necessary to show either that the chapel was one in which banns had been usually published before the 26 Geo. 3, c. 33, or that the chapel was built and consecrated after that Act, and before the 6 Geo. 4, c. 92. (i)

By the 6 & 7 Vict. c. 37, s. 15, an Act to make better provision for the spiritual care of populous parishes, where any church or chapel has been consecrated as the church or chapel of any district constituted under the Act, such district is to be a new parish for ecclesiastical purposes, and 'it shall be lawful to publish banns of matrimony in such church, and according to the laws and canons in force in this realm to solemnize therein marriages;' and the several laws relating to the publication of banns and the performance of marriages and the registering thereof, shall apply to the church of such new parish, and to the perpetual curate thereof. And by the 8 & 9 Vict. c. 70, s. 10, an Act for amending the Church building Acts, banns of marriage may be published and marriages performed in the church of every consolidated chapelry formed in the manner therein mentioned.

The 7 & 8 Vict. c. 56, s. 3, reciting that by error banns have been published and marriages solemnized in chapels with districts assigned to them under the 59 Geo. 3, c. 134, 1 & 2 Will. 4, c. 38, 1 & 2 Vict. c. 107, and 3 & 4 Vict. c. 60, or some of them, but in which chapels banns could not be legally published nor marriages by law be solemnized, enacts that 'banns *already* (29th July, 1844) published and marriages *already* solemnized in such chapels as aforesaid shall not hereafter be questioned on account of the said banns having been published, or the said marriages solemnized in any such chapel as aforesaid, and the registers of all marriages so solemnized as aforesaid, or copies of such registers, shall be received in all courts of law and equity as evidence of such marriages respectively.' (j)

The 14 & 15 Vict. c. 97, s. 25, (k) enacts that, where by error and

(i) *R. v. Bowen*, 2 C. & K. 227, tried March 18, 1846. The 6 Geo. 4, c. 92, received the Royal Assent 5th July, 1825.

(j) Sec. 1 provides that where a district has been or shall be assigned to any church or chapel under the 3 & 4 Vict. c. 60, the Church Building Commissioners or the bishop may determine as to banns and marriages in any such church or chapel; and sec. 2 enacts that when and so soon as it shall be determined that banns of matrimony may be published and marriages solemnized in any such church or chapel, the bishop of the diocese within which such church or chapel shall be locally situated, whether in any parish or extraparochial place, or otherwise, shall certify the same, and such certificate shall be kept in the chest of the church or chapel with the books of registry thereof, and a copy thereof shall be entered in the books of the registry of Banns and Marriages, and a duplicate of such certificate shall be registered in the registry of the diocese, and such certificate shall be deemed and taken

to be conclusive evidence in all courts, and in all questions relating to any banns published or marriages solemnized in any such church or chapel, that the same might according to law respectively be published and solemnized in such church or chapel, and that all banns published and marriages solemnized in any such church or chapel according to the laws and canons in force within this realm in that behalf shall, after the granting of such certificate, be good to all intents and purposes whatsoever: provided always, that no banns or marriages respectively published or solemnized according to the laws and canons in force within the realm in that behalf in any church or chapel in which the same are authorized to be respectively published, solemnized, and had by the said recited Acts or this Act, or either of them, shall be invalid by reason of any such certificate not having been duly given, or registered or entered, as hereinbefore required.

(k) See 38 & 39 Vict. c. 66.

without fraud banns had been published or marriages solemnized, in the church of any parish or district in which they could not lawfully be published or solemnized, the banns *already* (7th August, 1851) published and marriages *already* solemnized, shall not be questioned by reason thereof, except where some suit was pending.

The 24 & 25 Vict. c. 16, s. 4, renders valid all banns published and all marriages solemnized before the 17th of May, 1861, in churches and chapels which had been duly consecrated, but in which banns could not legally be published nor marriages by law be solemnized; but the Act is not prospective. (*l*)

The 18 & 19 Vict. c. 81, s. 13, renders valid marriages had before the 30th July, 1855, in any building registered under the 6 & 7 Will. 4, c. 85, but not certified as required by any Act.

The 4 Geo. 4, c. 76, and 6 & 7 Will. 4, c. 85, only extend to that part of the United Kingdom called England. (*m*) With respect to marriages in Scotland, though the point was formerly much doubted, (*n*) it appears to have been afterwards settled that where minors domiciled in England withdrew themselves into Scotland, or places beyond the seas, for the purpose of evading the Marriage Act, their marriage under such circumstances was nevertheless valid. (*o*) In one case, a writer to the signet proved that, according to the law of Scotland, marriage is a civil contract solemnly and deliberately entered into, and as if the parties had a serious intention of living together as man and wife. The assent of both parties must, therefore, be very distinctly and clearly proved to have been given, in order to render the contract a valid one. It is not necessary to the validity of such contract, that the parties should afterwards live together as man and wife; but the fact of their afterwards living together as man and wife will operate to explain ambiguous words, if there be such, in the contract itself. (*p*) Where, therefore, the second marriage took place at Gretna Green, and upon the whole evidence the assent of the second wife was not 'distinctly and clearly proved,' and, though the parties had lived together afterwards, the evidence tended rather to show that they were living together in a state of concubinage, inasmuch as the prisoner still continued to address her by her maiden name, Alderson, B., directed the jury to find the prisoner not guilty. (*q*) And where, on an indictment for bigamy, to prove the second marriage in Scotland, a witness stated that she (being the sister of the second wife) was present at a ceremony performed by a minister of a con-

(*l*) The Act also indemnifies ministers who had solemnized any marriages in such churches and chapels, and makes the registers and copies of them admissible in evidence. Marriages in chapels, erected and consecrated since 26 Geo. 2, c. 33, were rendered valid by various other retrospective statutes; see 21 Geo. 3, c. 53; 44 Geo. 3, c. 77; 48 Geo. 3, c. 127; and see 6 Geo. 4, c. 92, noticed *ante*, p. 695.

(*m*) See *ante*, pp. 668, 674.

(*n*) See Burn's Just. tit. *Marriage*, and the observations of Lord Mansfield in *Robinson v. Bland*, 2 Burr. 1079.

(*o*) *Crompton v. Bearcroft*, Bull. N. P.

118; and see the opinion of Eyre, C. J., in reasoning upon the case of *Phillips v. Hunter*, 2 H. Bl. 412. And in *Ilderton v. Ilderton*, 2 H. Bl. 145, it was taken to be clear that a marriage, celebrated in Scotland, is such a marriage as would entitle the woman to her dower in England.

(*p*) See *De Thoren v. Att.-Gen.*, 1 Ap. Cas. 686. *Dysart Peerage Case*, 6 Ap. Cas. 489.

(*q*) *Graham's case*, 2 Lew. 97. In the same case the same learned judge refused to admit the certificate as evidence of the marriage.

gregation, but whether of the Kirk she did not know, in her private house in Edinburgh; that she herself was married in the same way, and that parties were always married in Scotland in private houses; that the prisoner and her sister lived together in her house as man and wife for a few days after the ceremony; and the jury found the prisoner guilty; upon the question being reserved whether the evidence was sufficient to justify the verdict, or whether some witness, conversant with the law of Scotland, should not have been called upon to say whether the facts proved constituted a valid marriage according to that law; it was held that some such witness ought to have been called, and that, even supposing that the witness had been a competent witness for such a matter, her evidence did not prove a marriage in fact. (r)

By the 19 & 20 Vict. c. 96, s. 1, 'After the 31st of December 1856, no irregular marriage contracted in Scotland by declaration, acknowledgment, or ceremony, shall be valid, unless one of the parties had at the date thereof his or her usual place of residence there, or had lived in Scotland for twenty-one days next preceding such marriage; any law, custom or usage to the contrary notwithstanding.'

By the Marriages Validity Act, 1886, (49 Vict. 3), 'No marriage solemnized or hereafter to be solemnized in any church in England after publication of banns in such church shall be or be deemed to have been invalid by reason only that one of the parties to such marriage was at the time of such publication, resident in Scotland, and that banns may have been published or proclaimed in any church of the parish or place in which such party was resident, according to the law or custom prevailing in Scotland, and not in the manner required for the publication of banns in England.'

Where a soldier on service with the British army in St. Domingo, in 1796, being desirous of marrying the widow of another soldier who had died there in the service, the parties went to a chapel in the town, and the ceremony was there performed by a person appearing and officiating as a priest; the service being in French, but interpreted into English by a person who officiated as clerk, and understood at the time by the woman to be the marriage service of the Church of England. This was held sufficient evidence, after eleven years' cohabitation, that the marriage was properly celebrated, although the woman stated that she did not know that the person officiating was a priest. Lord Ellenborough, C. J., in delivering his opinion, considered the case, first, as a marriage celebrated in a place where the law of England prevailed (supposing, in the absence of any evidence to the contrary, that the law of England, ecclesiastical and civil, was recognized by subjects of England in a place occupied by the king's troops, who would impliedly carry that law with them)

(r) *R. v. Povey*, Dears. C. C. 32. 22 L. J. M. C. 19. The Court said that the *Sussex Peerage Case*, 11 Cl. & F. 85, had settled the point that a person not *peritus virtute officii* or *virtute professionis*, was inadmissible to prove the law of a foreign country, and had overruled *R. v. Dent*, 1 C. & K. 97; as to this see Vol. III., Evidence,

and *R. v. Griffin*, 14 Cox C. C. 308, *ante*, p. 664. See *Lapsley v. Grierson*, 1 H. L. C. 498, that illicit cohabitation in Scotland begun in the lifetime of a husband, and continued after his death, continues to bear an illicit character, unless there be a clear change in its character after the death of the husband is known to the parties.

and held that it would be a good marriage by that law: for it would have been a good marriage in this country before the Marriage Act, and consequently would be so now in a foreign colony, to which that Act does not extend. In the second place, he considered it upon the supposition that the law of England had not been carried to St. Domingo by the king's forces, nor was obligatory upon them in this particular; and held that the facts stated would be evidence of a good marriage according to the law of that country, whatever it might be; and that upon such facts every presumption was to be made in favour of the validity of the marriage. (s)

Where (before the 7 & 8 Vict. c. 81, *post*, p. 701) a person was married at her father's house, in Ireland, in 1799, in the presence of the friends of both families, by a clergyman of the Church of England, who had been curate of the parish for eighteen years; the parish church was standing, but persons of respectability were usually married at their own houses; the parties lived together for several years following as man and wife. Upon objection to the validity of this marriage, Best, C. J., said, 'I know of no law which says that celebration in a church is essential to the validity of a marriage in Ireland. The English Marriage Act does not apply, and I am aware of no Irish law which takes marriages performed in that country out of the rules which prevailed in this before the passing of that Act.' *Dalrymple v. Dalrymple* (t) has placed it beyond a doubt that a marriage so celebrated as this has been would have been held valid in this country before the existence of that statute. (u) So where in support of a plea of coverture it was proved that Mrs. Quicke married Mr. Quicke at the house of the Rev. F. M'Guire, near Dublin, in 1842, and Mr. M'Guire's widow produced his letters of orders showing that he had been ordained deacon and priest by bishops of the Established Church, and also proved that when persons were married at their house, her husband always made an entry in a register book, which she produced, and also gave a certificate of the marriage to the persons married; and the register contained an entry of the marriage of Mr. and Mrs. Quicke, and Mrs. Quicke proved that she married Mr. Quicke as before mentioned, and produced the certificate given to her by Mr. M'Guire; Parke, B., held that the certificate was admissible as a part of the transaction; but not the register; and that the marriage was valid; for although it was not celebrated in a church, it was a valid marriage at common law before the 7 & 8 Vict. c. 81. (v)

Where a woman, being a Roman Catholic, and a man, being a Protestant, went in 1826 before Mr. Wood, a clergyman residing in Dublin, who, in his private house, read to them the marriage service, and in the course of it asked her whether she would be the wife of the man, and asked him whether he would be her husband, to which question both of them answered, 'I will;' Wood was reputed to be a clergyman of the Established Church, and a document purporting to be letters of orders signed and sealed by the late Archbishop of Tuam, dated in 1799, whereby the archbishop certified that he had ordained

(s) *R. v. Brampton*, 10 East, 282. See also as to Ceylon law, *Aronegary v. Vaigalie*, 6 Ap. Cas. 364.
(t) 2 Hagg. 54.

(u) *Smith v. Maxwell*, R. & M. N. P. R. 80.

(v) *Stockbridge v. Quicke*, 3 C. & K. 305.

Wood a priest, and which letters were found among Wood's papers at the time of his death in July 1829, was admitted without proof of the handwriting or seal of the archbishop as being more than thirty years old. It was held that this document was properly received in evidence, being above thirty years old: if it had been only signed there could have been no question as to its admissibility, but it was, in fact, also sealed; but although an archbishop is a corporation sole for many purposes, yet such a certificate has no relation to his corporate character, and the seal must be considered as the seal of the natural person, and not of the corporation; and consequently that there was sufficient evidence of the marriage. (*w*)

In a case before the 7 & 8 Vict. c. 81, *infra*, at the Old Bailey, a question was made, whether a marriage of a dissenter in Ireland, when performed by a dissenting minister in a private room, was valid. It was contended, on behalf of the prisoner, who was indicted for bigamy, that the marriage was illegal from the clandestine manner in which it was celebrated; and several Irish statutes were cited, from which it was argued that the marriage of dissenters in Ireland ought at least to be in the face of the congregation, and not in a private room. But the recorder is said to have been clearly of opinion that this marriage was valid, on the ground that as, before the Marriage Act, a marriage might have been celebrated in England in a house, and it was only made necessary, by the enactment of positive law, to celebrate it in a church, some law should be shown requiring dissenters to be married in a church, or in the face of the congregation, in Ireland, before this marriage could be pronounced to be illegal: whereas one of the Irish statutes, 21 & 22 Geo. 3, c. 25, (*x*) enacted, that all marriages between Protestant dissenters, celebrated by a Protestant dissenting teacher, should be good, without saying at what place they should be celebrated. (*y*)

The 7 & 8 Vict. c. 81, (*z*) amends the law of marriages in Ireland. Under this Act under certain circumstances a marriage may be solemnized in certain registered places of public worship and before a registrar.

Sec. 4 provides that marriages between parties, both or either of

(*w*) *R. v. Bathwick*, 2 B. & Ad. 639.

(*x*) And see 11 Geo. 2, c. 1 (now repealed). By 32 Geo. 3, c. 21, s. 12, Protestants may be married to Roman Catholics by clergymen of the Established Church; but sec. 13 contains a proviso that the Act shall not authorise Protestant dissenting ministers or Popish priests to celebrate marriage between Protestants of the *Established Church* and Roman Catholics. The clause, however, does not enact that such a marriage celebrated by a Protestant dissenting teacher shall be void. Such a marriage, celebrated by a *Popish priest*, would have been void by 19 Geo. 2, c. 13 (Irish); and the 33 Geo. 3, c. 21, s. 12, only authorises Popish priests to celebrate marriage between a Protestant and a Papist, where such Protestant and Papist have been first married by a Protestant clergyman. See the 3

& 4 Will. 4, c. 103, which repeals the penal enactments made by 6 Ann. (1.), 12 Geo. 1 (1.), 23 Geo. 2 (1.), 12 Geo. 3 (1.), 33 Geo. 3 (1.), against Catholic clergymen celebrating marriages between Protestants in Ireland, and see now the 33 & 34 Vict. c. 110, s. 39 (Irish), *post*, p. 703.

(*y*) *R. v. —*, Old Bailey, Jan. Sess. 1816, *cor.* Sir J. Silvester, Recorder. MS. The prisoner was an officer in the army; and his first marriage upon which this question was raised, took place in 1787, at Londonderry. The second marriage was celebrated in London according to the ceremonies of the Church of England.

(*z*) This Act was passed 9th August, 1844, and is amended by 9 & 10 Vict. c. 72, 26 & 27 Vict. c. 27, 33 & 34 Vict. c. 110, 34 & 35 Vict. c. 49, 36 Vict. c. 16, 37 & 38 Vict. c. 96. See 26 & 27 Vict. c. 90.

whom are Presbyterians, may be solemnized, according to the forms used by Presbyterians, in certified meeting-houses. (a)

Sect. 32. 'And be it enacted, that after any marriage shall have been solemnized it shall not be necessary in support of such marriage to give any proof of the actual dwelling of either of the parties previous to the marriage, within the district or presbytery (as the case may be), wherein such marriage was solemnized, for the time required by this Act, or of the consent of any person whose consent thereunto is required by law; and where a marriage shall have been solemnized in a certified Presbyterian meeting-house, it shall not be necessary to prove that either of the parties was a Presbyterian, or, if the marriage was by licence, that the certificate required to be delivered to the minister granting such licence had been so delivered, or, where the marriage was by banns, that a certificate of the publication of banns had been produced to the minister by whom the marriage was solemnized, in cases where such production is required by this Act; nor shall any evidence be given to prove the contrary of any of these several particulars in any suit touching the validity of such marriage, or in which such marriage shall be questioned.'

Sec. 49. 'And be it enacted, that except in the case of marriages by Roman Catholic priests, which may now be lawfully celebrated, if any person shall knowingly and wilfully intermarry after the said thirty-first day of March, in any place other than the church or chapel or certified Presbyterian meeting-house, in which banns of matrimony between the parties shall have been duly and lawfully published, or specified in the licence, where the marriage is by licence, or the church, chapel, registered building or office, specified in the notice and registrar's certificate or licence as aforesaid, or without due notice to the registrar, or without certificate of notice duly issued, or without licence from the registrar, in case such notice or licence is necessary under this Act, or in the absence of a registrar where the presence of a registrar is necessary under this Act, or if any person shall knowingly or wilfully, after the said thirty-first day of March, intermarry in any certified Presbyterian meeting-house without publication of banns, or any licence, the marriage of all such persons, except in any case hereinbefore excepted, shall be null and void.'

The 33 & 34 Vict. c. 110 (amended by 34 & 35 Vict. c. 49), also amends the law relating to marriages in Ireland. This Act contains provisions as to the churches in which marriages may be celebrated, and as to licences for marriages.

By sec. 38, a marriage may, notwithstanding anything to the contrary hereinbefore in this Act contained, be lawfully solemnized by a

(a) We have seen that a marriage before this Act by a Presbyterian minister in Ireland was held void. *R. v. Millis, ante*, p. 693. But the 5 & 6 Vict. c. 113, s. 1, renders all marriages celebrated in Ireland before the 12th August, 1842, by Presbyterian or other Protestant ministers or teachers, or those who at the time of such marriages had been such, of the same force as if they had been celebrated by clergymen of the united Church of England and Ireland. The 6 & 7 Vict. c. 39, renders all

similar marriages after the passing of the preceding Act, and before the passing of that Act, 28th July, 1843, valid. And the 7 & 8 Vict. c. 81, s. 83, contains a similar provision as to such marriages between the passing of the preceding Act and that Act. Sec. 2 of 5 & 6 Vict. c. 113, excepts marriages previously adjudged invalid; marriages where either of the parties had contracted another lawful marriage; and marriages respecting which prosecutions were pending when the Act passed, 12th August, 1842.

Protestant Episcopalian clergyman between a person who is a Protestant Episcopalian and a person who is not a Protestant Episcopalian, and by a Roman Catholic clergyman between a person who is a Roman Catholic and a person who is not a Roman Catholic, provided the following conditions are complied with :—

- 1st. That such notice is given to the registrar, and such certificate is issued as at the time of the passing of this Act is required by the 7 & 8 Vict. c. 81, as amended by the 26 Vict. c. 27, in every case of marriage intended to be solemnized in Ireland according to the rites of the united Church of England and Ireland, with the exception of marriages by licence or special licence, or after publication of banns.
- 2nd. That the certificate of the registrar is delivered to the clergyman solemnizing such marriage at the time of the solemnization of the marriage.
- 3rd. That such marriage is solemnized in a building set apart for the celebration of divine service, according to the rites and ceremonies of the religion of the clergyman solemnizing such marriage, and situate in the district of the registrar by whom the certificate is issued.
- 4th. With open doors.
- 5th. That such marriage is solemnized between the hours of eight in the forenoon and two in the afternoon, in the presence of two or more credible witnesses.

Sec. 39. 'There shall be repealed so much of an Act of the Parliament of Ireland, passed in the nineteenth year of the reign of King George the second, chapter thirteen, as provides that a marriage between a Papist and any person who hath been or hath professed himself or herself to be a Protestant at any time within twelve months before such celebration of marriage, if celebrated by a Popish priest, is to be void ; but any marriage solemnized by a Protestant Episcopalian clergyman, between a person who is a Protestant Episcopalian and a person who is not a Protestant Episcopalian, or by a Roman Catholic clergyman between a person who is a Roman Catholic and a person who is not a Roman Catholic, shall be void to all intents in cases where the parties to such marriage knowingly and wilfully intermarried without due notice to the registrar, or without certificate of notice duly issued, or without the presence of two or more credible witnesses, or in a building not set apart for the celebration of divine service, according to the rites and ceremonies of the religion of the clergyman solemnizing such marriage.'

By 34 & 35 Vict. c. 49, s. 27, whenever a licence for the marriage of a Roman Catholic with a person not a Roman Catholic shall have been issued, pursuant to ss. 25 or 26 of this Act, such marriage may lawfully be solemnized by a Roman Catholic clergyman between such persons. (b)

A marriage by licence, in Ireland, where one of the parties was under age at the time, and there was no consent of the father, was

(b) Before these Acts a marriage celebrated in Ireland between a Roman Catholic and a Protestant by a Roman Catholic priest was void. *Sunderland's case*, 1 Lew.

109 ; *R. v. Orgill*, 9 C. & P. 80 ; *Swift v. Swift*, 3 Knapp, 303 ; *Yelverton v. Yelverton*, House of Lords, per Lord Wensleydale.

not absolutely void, but only voidable within one year, under the 9 Geo. 2, c. 11, and if no proceedings were taken within the year to avoid the marriage, it was binding, and the party, if he married again (during the life of his wife) might be properly convicted of bigamy. (c)

A marriage, however, celebrated by a Roman Catholic priest between two Protestants is still illegal, and renders the person celebrating it liable to be indicted for felony. (d)

By the 42 & 43 Vict. c. 29, s. 2, 'All marriages, both of the parties being British subjects, which before the passing of this Act have been solemnized on board one of Her Majesty's vessels on a foreign station, in the presence of the officer commanding such vessel, whether solemnized according to any religious rite or ceremony, or contracted *per verba de presenti* shall be valid in like manner as if the same had been solemnized within Her Majesty's dominions with the due observance of all forms required by law; provided that this enactment shall not render valid any marriage which before the passing of this Act has been declared invalid by any court of competent jurisdiction in any proceeding touching such marriage, or any right dependent on the validity or invalidity thereof, or render valid any marriage where either of the parties has before the passing of this Act and during the life of the other party lawfully intermarried with any person.'

By the Foreign Marriage Act 1892, 55 & 56 Vict. c. 23,—

All marriages between parties of whom one at least is a British subject solemnized in the manner in this Act provided in any foreign country or place by or before a marriage officer within the meaning of this Act, shall be as valid in law as if the same had been solemnized in the United Kingdom with a due observance of all forms required by law.

2. In every case of a marriage intended to be solemnized under this Act, one of the parties intending marriage shall sign a notice, stating the name, surname, profession, condition, and residence of each of the parties, and whether each of the parties is or is not a minor, and give the notice to the marriage officer within whose district both of the parties have had their residence not less than one week then next preceding, and the notice shall state that they have so resided.

3.—(1) The marriage officer shall file every such notice, and keep it with the archives of his office, and shall also, on payment of the proper fee, forthwith enter in a book of notices to be kept by him for the purpose, and post up in some conspicuous place in his office a true copy of every such notice, and shall keep the same so posted up during fourteen consecutive days before the marriage is solemnized under the notice.

(2) The said book and copy posted up shall be open at all reasonable times, without fee, to the inspection of any person.

4.—(1.) The like consent shall be required to a marriage under this Act as is required by law to marriages solemnized in England.

(2.) Every person whose consent to a marriage is so required may, at any time before the solemnization thereof under this Act, forbid it by writing the word "forbidden" opposite to the entry of the in-

(c) *R. v. Jacobs*, R. & M. C. C. R. 140. of the consent of parents, &c., is unnecessary. But since the 7 & 8 Vict. c. 81, s. 32, proof

(d) See *R. v. Taggart*, 2 Cox, C. C. 50.

tended marriage in the book of notices, and by subscribing thereto his name and residence, and the character by reason of which he is authorized to forbid the marriage; and if a marriage is so forbidden the notice shall be void, and the intended marriage shall not be solemnized under that notice.

5. — (1.) Any person may on payment of the proper fee enter with the marriage officer a caveat, signed by him or on his behalf, and stating his residence and the ground of his objection against the solemnization of the marriage of any person named therein, and thereupon the marriage of that person shall not be solemnized until either the marriage officer has examined into the matter of the caveat and is satisfied that it ought not to obstruct the solemnization of the marriage, or the caveat is withdrawn by the person entering it.

(2.) In a case of doubt the marriage officer may transmit a copy of the caveat, with such statement respecting it as he thinks fit, to a Secretary of State, who shall refer the same to the Registrar-General, and the Registrar-General shall give his decision thereon in writing to the Secretary of State, who shall communicate it to the marriage officer.

(3.) If the marriage officer refuses to solemnize or to allow to be solemnized in his presence the marriage of any person requiring it to be solemnized, that person may appeal to a Secretary of State, who shall give the marriage officer his decision thereon.

(4.) The marriage officer shall forthwith inform the parties of and shall conform to any decision given by the Registrar-General or Secretary of State.

6. Where a marriage is not solemnized within three months, next after the latest of the following dates —

(a) the date on which the notice for it has been given to and entered by the marriage officer under this Act, or

(b) if on a caveat being entered a statement has been transmitted to a Secretary of State, or if an appeal has been made to a Secretary of State, then the date of the receipt from the Secretary of State of a decision directing the marriage to be solemnized, the notice shall be void, and the intended marriage shall not be solemnized under that notice.

7. Before a marriage is solemnized under this Act, each of the parties intending marriage shall appear before the marriage officer, and make, and subscribe in a book kept by the officer for the purpose, an oath —

(a) that he or she believes that there is not any impediment to the marriage by reason of kindred or alliance, or otherwise; and

(b) that both of the parties have for three weeks immediately preceding had their usual residence within the district of the marriage officer; and

(c) where either of the parties, not being a widower or widow, is under the age of twenty-one years, that the consent of the persons whose consent to the marriage is required by law has been obtained thereto, or, as the case may be, that there is no person having authority to give such consent.

8. — (1.) After the expiration of fourteen days after the notice of an intended marriage had been entered under this Act, then, if no

lawful impediment to the marriage is shown to the satisfaction of the marriage officer, and the marriage has not been forbidden in manner provided by this Act, the marriage may be solemnized under this Act.

(2.) Every such marriage shall be solemnized at the official house of the marriage officer, with open doors, between the hours of eight in the forenoon and three in the afternoon, in the presence of two or more witnesses, and may be solemnized by another person in the presence of the marriage officer, according to the rites of the Church of England, or such other form and ceremony as the parties thereto see fit to adopt, or may, where the parties so desire, be solemnized by the marriage officer.

(3.) Where such marriage is not solemnized according to the rites of the Church of England, then in some part of the ceremony, and in the presence of the marriage officer and witnesses, each of the parties shall declare.

"I solemnly declare, that I know not of any lawful impediment why I *A.B.* [*or C.D.*] may not be joined in matrimony to *C.D.* [*or A.B.*]."

And each of the parties shall say to the other,

"I call upon these persons here present to witness, that I. *A.B.* [*or C.D.*] take thee, *C.D.* [*or A.B.*], to be my lawful wedded wife [*or husband.*]"

9. — (1.) The marriage officer shall be entitled, for every marriage solemnized under this Act by him or in his presence, to have from the parties married the proper fee.

(2.) He shall forthwith register in duplicate every such marriage in two marriage register books, which shall be furnished to him from time to time for that purpose by the Registrar-General (through a Secretary of State), according to the form provided by law for the registration of marriages in England, or as near to that form as the difference of the circumstances admits.

(3.) The entry in each book of every such marriage shall be signed by the marriage officer, by the person solemnizing the marriage, if other than the marriage officer, by both the parties married, and by two witnesses of the marriage.

(4.) All such entries shall be made in regular order from the beginning to the end of each book, and the number of the entry in each duplicate shall be the same.

(5.) The marriage officer by whom or in whose presence a marriage is solemnized under this Act may ask of the parties to be married the several particulars required to be registered touching the marriage.

10. — (1.) In January in every year every marriage officer shall make and send to a Secretary of State, to be transmitted by him to the Registrar-General, a copy certified by him to be a true copy, of all the entries of marriages during the preceding year in the register book kept by him, and if there has been no such entry, a certificate of that fact; and every such copy shall be certified, and certificate given, under his hand and official seal.

(2.) The marriage officer shall keep the duplicate marriage register books safely until they are filled, and then send one of them to a

Secretary of State, to be transmitted by him to the Registrar General.

11. — (1.) For the purposes of this Act the following officers shall be marriage officers, that is to say : —

(a) Any officer authorised in that behalf by a Secretary of State by authority in writing under his hand (in this Act referred to as a marriage warrant); and

(b) Any officer who, under the marriage regulations hereinafter mentioned is authorised to act as marriage officer without any marriage warrant, and the district of a marriage officer shall be the area within which the duties of his office are exerciseable, or any such less area as is assigned by the marriage warrant or any other warrant of a Secretary of State, or is fixed by the marriage regulations.

(2.) Any marriage warrant of a Secretary of State may authorise to be a marriage officer —

(a) a British ambassador residing in a foreign country to the government of which he is accredited, and also any officer prescribed as an officer for solemnizing marriages in the official house of such ambassador;

(b) the holder of the office of British consul in any foreign country or place specified in the warrant; and

(c) a governor, high commissioner, resident, consular or other officer, or any person appointed in pursuance of the marriage regulations to act in the place of a high commissioner or resident, and this Act shall apply with the prescribed modifications to a marriage by or before a governor, high commissioner, resident, or officer so authorised by the warrant, and in such application shall not be limited to places outside Her Majesty's dominions.

(3.) If a marriage warrant refers to the office without designating the name of any particular person holding the office, then, while the warrant is in force, the person for the time being holding or acting in such office shall be a marriage officer.

(4.) A Secretary of State may, by warrant under his hand, vary or revoke any marriage warrant previously issued under this Act.

(5.) Where a marriage officer has no seal of his office, any reference in this Act to the official seal shall be construed to refer to any seal ordinarily used by him, if authenticated by his signature with his official name and description.

12. A marriage under this Act may be solemnized on board one of Her Majesty's ships on a foreign station, and with respect to such marriage —

(a) subject to the marriage regulations a marriage warrant of a Secretary of State may authorise the commanding officer of the ship to be a marriage officer;

(b) the provisions of this Act shall apply with the prescribed modifications.

13. — (1.) After a marriage has been solemnized under this Act it shall not be necessary, in support of the marriage, to give any proof of the residence for the time required by or in pursuance of this Act of either of the parties previous to the marriage, or of the consent of any person whose consent thereto is required by law, nor shall any evidence to prove the contrary be given in any legal proceeding touching the validity of the marriage.

(2.) Where a marriage purports to have been solemnized and registered under this Act in the official house of a British ambassador or consul, or on board one of Her Majesty's ships, it shall not be necessary in support of the marriage, to give any proof of the authority of the marriage officer by or before whom the marriage was solemnized and registered, nor shall any evidence to prove his want of authority, whether by reason of his not being a duly authorised marriage officer or of any prohibitions or restrictions under the marriage regulations or otherwise, be given in any legal proceeding touching the validity of the marriage.

14. If a marriage is solemnized under this Act by means of any wilfully false notice signed, or oath made by either party to the marriage, as to any matter for which a notice, or oath, is by this Act required, the Attorney General may sue for the forfeiture of all estate and interest in any property in England accruing to the offending party by the marriage; and the proceedings thereupon, and the consequences thereof, shall be the same as are provided by law in the like case with regard to marriages solemnized in England according to the rites of the Church of England.

15. If a person —

(a) knowingly and wilfully makes a false oath or signs a false notice, under this Act, for the purpose of procuring a marriage, or

(b) forbids a marriage under this Act by falsely representing himself to be a person whose consent to the marriage is required by law, knowing such representation to be false, such person shall suffer the penalties of perjury, and may be tried in any county in England and dealt with in the same manner in all respects as if the offence had been committed in that county.

16. — (1.) Any book, notice, or document directed by this Act to be kept by the marriage officer or in the archives of his office, shall be of such a public nature as to be admissible in evidence on its mere production from the custody of the officer.

(2.) A certificate of a Secretary of State as to any house, office, chapel, or other place being, or being part of, the official house of a British ambassador or consul shall be conclusive.

17. All the provisions and penalties of the Marriage Registration Acts, relating to any registrar or register of marriages or certified copies thereof, shall extend to every marriage officer, and to the registers of marriages under this Act, and to the certified copies thereof (so far as the same are applicable thereto), as if herein re-enacted and in terms made applicable to this Act, and as if every marriage officer were a registrar under the said Acts.

18. Subject to the marriage regulations, a British consul, or person authorised to act as British consul, on being satisfied by personal attendance that a marriage between parties, of whom one at least is a British subject, has been duly solemnized in a foreign country, in accordance with the local law of the country, and on payment of the proper fee, may register the marriage in accordance with the marriage regulations as having been so solemnized, and thereupon this Act shall apply as if the marriage had been registered in pursuance of this Act, except that nothing in this Act shall affect the validity of the marriage so solemnized.

19. A marriage officer shall not be required to solemnize a marriage, or to allow a marriage to be solemnized in his presence if in his opinion the solemnization thereof would be inconsistent with international law or the comity of nations ;

Provided that any person requiring his marriage to be solemnized shall, if the officer refuses to solemnize it or allow it to be solemnized in his presence, have the right of appeal to the Secretary of State given by this Act.

Sec. 20 regulates the fees to be taken.

21. — (1.) Her Majesty the Queen in Council may make regulations (in this Act referred to as the marriage regulations) —

(a) Prohibiting or restricting the exercise by marriage officers of their powers under this Act in cases where the exercise of those powers appears to Her Majesty to be inconsistent with international law or the comity of nations, or in places where sufficient facilities appear to Her Majesty to exist without the exercise of those powers for the solemnization of marriages to which a British subject is a party ; and

(b) Determining what offices, chapels, or other places are, for the purposes of marriages under this Act, to be deemed to be part of the official house or the office of a marriage officer ; and

(c) Modifying in special cases or classes of cases the requirements of this Act as to residence and notice, so far as such modification appears to Her Majesty to be consistent with the observance of due precautions against clandestine marriages ; and

(d) Prescribing the forms to be used under this Act ; and

(e) Adapting this Act to marriages on board one of Her Majesty's ships ; and to marriages by or before a governor, high commissioner, resident, or other officer, and authorising the appointment of a person to act under this Act in the place of a high commissioner or resident ; and

(f) Determining who is to be the marriage officer for the purpose of a marriage in the official house of a British ambassador, or on board one of Her Majesty's ships, whether such officer is described in the regulations or named in pursuance thereof, and authorising such officer to act without any marriage warrant ; and

(g) Determining the conditions under which and the mode in which marriages solemnized in accordance with the local law of a foreign country may be registered under this Act ; and

(h) Making such provisions as seem necessary or proper for carrying into effect this Act or any marriage regulations ; and

(i) Varying or revoking any marriage regulations previously made.

(2.) All regulations purporting to be made in pursuance of this section may be made either generally or with reference to any particular case or class of cases, and shall be published under the authority of Her Majesty's Stationery Office, and laid before both Houses of Parliament, and deemed to be within the powers of this Act, and shall while in force have effect as if enacted by this Act.

(3.) Any marriage regulations which dispense for any reason, whether residence out of the district or otherwise, with the requirements of this Act as to residence and notice, may require as a condition or consequence of the dispensation, the production of such notice,

certificate, or document, and the taking of such oath, and may authorise the publication or grant of such notice, certificate, or document, and the charge of such fees as may be prescribed by the regulations; and the provisions of this Act, including those enacting punishments with reference to any false notice or oath, shall apply as if the said notice, certificate, or document were a notice, and such oath were an oath, within the meaning of those provisions.

22. It is hereby declared that all marriages solemnized within the British lines by any chaplain or officer or other person officiating under the orders of the commanding officer of a British army serving abroad, shall be as valid in law as if the same had been solemnized within the United Kingdom, with a due observance of all forms required by law.

23. Nothing in this Act shall confirm or impair or in anywise affect the validity in law of any marriage solemnized beyond the seas, otherwise than as herein provided, and this Act shall not extend to the marriage of any of the Royal family.

24. In this Act, unless the context otherwise requires,—the expression ‘Registrar-General’ means the Registrar-General of births, deaths, and marriages in England:

The expression ‘Attorney General’ means her Majesty’s Attorney General, or if there is no such Attorney General, or the Attorney General is unable or incompetent to act, her Majesty’s Solicitor General, for England:

The expression ‘the Marriage Registration Acts’ means the Act of the session of the sixth and seventh years of the reign of King William the Fourth, chapter eighty-six, intituled ‘an Act for registering births, deaths, and marriages in England,’ and the enactments amending the same:

The expression ‘official house of a marriage officer’ means, subject to the provisions of any marriage regulations, the office at which the business of such officer is transacted, and the official house of residence of such officer, and, in the case of any officer, who is an officer for solemnizing marriages in the official house of an ambassador, means the official house of the ambassador:

The expression ‘consul’ means a consul-general, consul, vice-consul, pro-consul, or consular agent:

The expression ‘ambassador’ includes a minister and a *chargé d’affaires*.

The expression ‘prescribed’ means prescribed by marriage regulations under this Act.

25. This Act shall come into operation on the first day of January next after the passing thereof.

26. — (1.) The Acts specified in the schedule to this Act (e) are hereby repealed to the extent in the third column of that schedule mentioned.

Provided that—

(a) any Order in Council in force under any Act so repealed shall continue in force as if made in pursuance of this Act; and

(b) any proceedings taken with reference to a marriage, any register

(e) 4 Geo. IV. c. 91; 12 & 13 Vict. c. 14, s. 11; 53 & 54 Vict. c. 47; 54 & c. 68; 31 & 32 Vict. c. 61; 33 & 34 Vict. 55 Vict. c. 74.

book kept, and any warrant issued in pursuance of the Acts hereby repealed, shall have effect as if taken, kept, and issued in pursuance of this Act; and

(c) The fees which can be taken in pursuance of the Acts hereby repealed may continue to be taken in like manner as if fixed in pursuance of the Consular Salaries and Fees Act, 1891, and may be altered accordingly: and

(d) The forms prescribed by or in pursuance of the Acts hereby repealed may continue to be used as if prescribed by an Order in Council under this Act.

(2.) Every marriage in fact solemnized and registered by or before a British consul or other marriage officer in intended pursuance of any Act hereby repealed shall, notwithstanding such repeal or any defect in the authority of the consul or the solemnization of the marriage elsewhere than at the consulate, be as valid as if the said Act had not been repealed, and the marriage had been solemnized at the consulate by or before a duly authorised consul;

Provided that this enactment shall not render valid any marriage declared invalid before the passing of this Act by any competent court, or render valid any marriage either of the parties to which has, before the passing of this Act, lawfully intermarried with any other person.

By 28 & 29 Vict. c. 64, after reciting that laws 'have from time to time been made by the legislature of divers of her Majesty's possessions abroad for the purpose of establishing the validity of certain marriages previously contracted therein, but doubts are entertained whether such laws are in all respects effectual for the aforesaid purpose beyond the limits of such possessions,' it is enacted as follows:—

Sec. 1. 'Every law made or to be made by the legislature of any such possession as aforesaid, for the purpose of establishing the validity of any marriage or marriages contracted in such possession, shall have and be deemed to have had from the date of the making of such law, the same force and effect, for the purpose aforesaid, within all parts of her Majesty's dominions, as such law may have had, or may hereafter have, within the possession for which the same was made: provided that nothing in this law contained shall give any effect or validity to any marriage, unless at the time of such marriage both of the parties thereto were, according to the law of England, competent to contract the same.'

Sec. 2. 'In this Act the word "legislature" shall include any authority competent to make laws for any of her Majesty's possession abroad, except the Parliament of the United Kingdom and her Majesty in Council.'

Certain marriages of British subjects are legalized in Mexico by the 17 & 18 Vict. c. 88; in Moscow, Tahiti, and Ningpo by the 21 & 22 Vict. c. 46; at Lisbon, by the 22 & 23 Vict. c. 64; in the Ionian Islands by the 23 & 24 Vict. c. 86; (f) at Morro Velho, in the empire of Brazil, by the 30 & 31 Vict. c. 93; and provision is made

(f) This Act is repealed by 27 & 28 Vict. c. 77, s. 4. This latter Act contains provisions as to marriages in the Ionian Islands, and makes certain documents evidence.

for the transmission to the registrar-general of certificates of these marriages, &c.

Certain marriages in Odessa are legalized by the 30 & 31 Vict. c. 2; and see as to China, 31 & 32 Vict. c. 61.

Marriages in the colony and dependencies of Newfoundland were for some time regulated by the statute 5 Geo. 4, c. 68, which repealed a former statute, 57 Geo. 3, c. 51, upon the same subject. The 5 Geo. 4, c. 68, with the exception of a proviso in sec. 1, relating to marriages which had taken place before the 25th March, 1825, is repealed by the 36 & 37 Vict. c. 91.

In an action for criminal conversation the marriage of the plaintiff and his wife, who were both Quakers, had been performed according to the ceremonies of the sect, by a public declaration of the parties, at a monthly meeting of the society, of their becoming man and wife, and a certificate to the effect entered in a register, signed by the parties and by several subscribing witnesses. The register was produced and proved by one of the witnesses, and a member of the society proved the forms observed to be those usually considered as necessary to marriage among Quakers. (*g*)

Where two witnesses were called, who swore that they were present in the Jewish synagogue when a marriage took place, it was insisted that what took place in the synagogue was merely a ratification of a previous written contract, and as that contract was essential to the validity of the marriage, it ought to be produced and proved; and the contract, in the Hebrew tongue, was accordingly put in and proved. (*h*) So a Jewish divorce can only be proved by producing the document of divorce delivered by the husband to the wife. (*i*)

The law of France as to marriage may be proved by the production of a book, purporting to contain the code of France, and proved by oral testimony of a witness acquainted with the law of France, to contain the law of France. The articles of the law of France, which prescribe the forms essential to marriage, do not declare a marriage void for non-observance of those forms, but parol evidence is admissible to show that, by the law of France, a marriage in fact, without observance of the requisites prescribed by the articles, is void. (*j*)

It was formerly held that if an idiot contracted matrimony, it was good and should bind him: but modern resolutions appear to have proceeded upon the more reasonable doctrine of the civil law, by determining that the marriage of a lunatic, not being in a lucid interval, is absolutely void. And as it might be difficult to prove the exact state of the mind of the party at the actual celebration of the nuptials, the 15 Geo. 2, c. 30, has provided that if persons found lunatics under a commission, or committed to the care of trustees by any Act of Parliament, marry before they are declared of sound mind by the Lord Chancellor, or the majority of such trustees, the marriage shall be totally void. (*k*)

Upon indictments for bigamy it is not sufficient to prove a first marriage by cohabitation and reputation; but it is necessary to prove

(*g*) *Deane v. Thomas*, M. & M. 361. See the 11 & 12 Vict. c. 58, 23 & 24 Vict. c. 18, 32 Vict. c. 10, *ante*, pp. 674, 687.

(*h*) *Horn v. Noel*, 1 Camp. 61. *R. v. Althausen*, 17 Cox, C. C. 630.

(*i*) *Lacon v. Higgins*, 3 Stark. N. P. 178,

and *qu.*, whether such a divorce would be any defence to an indictment for bigamy. See the learned note of the reporters, *ibid.*

(*j*) *Moss v. Smith*, 1 Man. & Gr. 228.

(*k*) 1 Bl. Com. 438, 432.

what the courts call a marriage in fact, that is, an actual marriage. (*l*) The 4 Geo. 4, c. 76, s. 28, requires that marriages shall be solemnized in the presence of two or more credible witnesses, besides the minister who shall celebrate the same, and the 6 & 7 Will. 4, c. 86, s. 31, that it shall be registered in duplicate according to the form in the schedule, and that each entry shall be signed by the minister and parties married, and attested by two witnesses. But, upon a provision nearly similar in the former Marriage Act, it was held not to be necessary to call one of the subscribing witnesses to the register in order to prove the identity of the persons married; but that the register, or the copy of it, being produced, any evidence which satisfied the jury as to the identity of the parties was sufficient: as if their handwriting to the register were proved; or that bell-ringers were paid by them for ringing for the wedding, or the like. (*m*) The prisoner was indicted for marrying Ann Epton, whilst Jane, his former wife, was living; each marriage was proved by a witness who was present at the ceremony; and it appeared that at the first marriage the prisoner went by the name of Allison, and at the second by the name of Wilkinson. Chambre, J., doubted whether the evidence was sufficient without proof of the banns; but the judges held that it was. (*n*)

Upon an indictment for bigamy it was proved on the part of the prisoner that her first husband, before he married her had been in Canada, and that he was absent for about two years, and when he returned he said he had brought his wife with him, and a lady accompanied him, whom he treated as his wife, and every one else regarded her in that capacity; she had been heard of as being alive after the prisoner's first marriage; and thereupon Crompton, J., interposed, and said that there was evidence of a prior marriage, and, although there might be some technical difficulty in proving the marriage in Canada, still if there was reasonable doubt of the fact, the prisoner ought to be acquitted, and the jury said it was unnecessary to hear any more evidence. (*o*)

In one case it was ruled, that if A. takes B. to husband in Holland, and then, in Holland, takes C. to husband, living B., and then B. dies, and then A., living C., marries D., this is not marrying a second husband, the former being alive; the marriage to C., living B., being simply void. But if B. had been living, it would have been felony to have married D. in England. (*p*)

The prisoner was indicted for marrying E. Chant, widow, E. Rowe, his wife, being then alive; it appeared that E. Chant was, in fact and by reputation, a single woman; it was objected that she was improperly described in the indictment as a widow, and upon a case reserved the judges were unanimously of opinion that the misdescription was fatal, though it was not necessary to have stated more than the name of the party. (*q*) So where, on an indictment for bigamy describing

(*l*) *Catherwood v. Caslon*, 13 M. & W. 261.

(*m*) 1 East, P. C. c. 12, s. 11, p. 472. Bull. N. P. 27. See *Morris v. Miller*, 4 Burr. 2057. *Birt v. Barlow*, Dougl. 162.

(*n*) *R. v. Allison*, MS. Bayley, J., and R. & R. 109.

(*o*) *R. v. Wilson*, 3 F. & F. 119. See *Hamblin v. Shelton*, 3 F. & F. 133; and *Doe d. Fleming v. Fleming*, 4 Bing. R. 266, for similar evidence in civil cases.

(*p*) *Lady Madison's case*, 1 Hale, 693.

(*q*) *R. v. Deeley*, R. & M. C. C. R. 303. S. C. 4 C. & P. 579. But such a variance

the first wife as Ann Gooding, an examined copy of the certificate (*r*) of the marriage of the prisoner and Sarah Ann Gooding was put in, and there was no evidence to explain the difference in the names: Maule, J., directed an acquittal. (*s*)

On an indictment for bigamy a photograph which had been taken from the prisoner, and which she had said was that of her husband, was allowed to be shown to a witness present at the first marriage, and also to another witness who had known the man of whom the photograph was a likeness, in order to prove his identity with the person mentioned in the marriage certificate. (*t*)

The 6 & 7 Will. 4, c. 86 (an Act for registering births, marriages, and deaths in England), by sec. 38, enacts that all certified copies of entries purporting to be sealed or stamped with the seal of the register-office, shall be received as evidence of the birth, death, or marriage to which the same relates, without any further or other proof of such entry; and no certified copy purporting to be given in the said office shall be of any force or effect, which is not sealed or stamped as aforesaid. (*u*)

In one case it was held that proof of the prisoner's cohabiting with and acknowledging himself married to a former wife then living, such assertion being backed by his producing to the witness a copy of a proceeding in a Scotch court against him and his wife for having contracted the marriage improperly (the marriage, however, being still good according to that law) was sufficient evidence of the first marriage. The point being reserved, all the judges who were present held the conviction proper. Two of them observed that this did not rest upon cohabitation and bare acknowledgment, for the defendant had backed his assertion by the production of the copy of the proceeding; but some of the judges thought that the acknowledgment alone would have been sufficient, and that the paper produced in evidence was only a confirmation of such acknowledgment. (*v*) So where it was proved that the prisoner being charged with bigamy made a statement before a justice, in which he expressly declared that he had married his first wife, who was then present; Erskine, J., left the case to the jury, observing, that this was not an incautious statement made without due attention, but that the prisoner's mind was directed to the very point by the charge made against him. (*w*)

So where upon an indictment for bigamy it appeared that the prisoner returned from America with a woman described in the

may be amended under the 14 & 15 Vict. c. 100, s. 1.

(*r*) *Quere*, Register.

(*s*) *R. v. Gooding*, C. & M. 297. Maule, J., thought that 'evidence might perhaps be offered to explain the circumstance of this difference in the name of the prisoner's first wife, as she is described in the indictment, and as described in the marriage certificate; and even in the absence of such evidence, proof might be supplied that the woman was known by both names.'

(*t*) *R. v. Tolson*, 4 F. & F. 103.

(*u*) See also the 3 & 4 Vict. c. 92, 21 & 22 Vict. c. 25. See Vol. III., *Evidence*.

(*v*) *Truman's case*, Nottingham Spr. Assizes, 1795, decided upon by the judges in *East. T. 1795*, MS. Jud. 1 East, P. C. c. 12, s. 10, pp. 470, 471; where see some remarks as to the admission of a bare acknowledgment in evidence in a case of this nature. An admission or statement made by a prisoner is evidence against him, though it may under circumstances be entitled to little or no weight.

(*w*) *R. v. Dennis Upton*, Gloucester Spr. Ass. 1839. *R. v. Flaherty*, 2 C. & K. 782. See *Dickinson v. Coward*, 1 B. & A. 679, per Lord Ellenborough, C. J. See also 2 Stark. Evid. 251, 2nd edit.

indictment as Mary Carlisle, with whom he lived as his wife for some years afterwards; and that soon after his return he told her sister that he had been married to Mary Carlisle at New York by a Presbyterian minister, and he subsequently caused the bellman at Oldham to give public notice, which he did, that no one was to give credit to 'Mary, the wife of John Newton;' and some time afterwards Mary Newton, describing herself as his wife, complained to a magistrate of his having ill-treated her, and the prisoner attended before the magistrate, and did not deny the alleged marriage, but said he could no longer live with her on account of her jealousy, and consented to allow her eight shillings a week; Wightman, J., after consulting Creswell, J., told the jury that the question was, whether they were satisfied by the statements made by the prisoner on the various occasions referred to that he had been married to Mary Carlisle in America, and that such marriage was a valid one according to the law of that country. The jury were to say whether, as against the prisoner, it might not be taken, on the faith of his own repeated declarations, that the marriage had been a valid one according to the law in force at New York. That declarations lightly or hastily made were entitled to very little weight in such a case; but what the prisoner said deliberately, and when it was obviously his interest to deny marriage, if he did not know it to be a valid one, was undoubtedly evidence entitled to the very serious consideration of the jury. (x)

After proof of the first marriage the second wife may be a witness; but it is clear that the first and true wife cannot be admitted to give evidence against her husband. (y)

The prisoner was indicted for having married A. Walker, his first wife, A. Armstrong, being alive: the prisoner's first marriage with A. Armstrong was proved. The prisoner's defence was, that the first marriage was void, as A. Armstrong had a husband living at the time, and he proposed to call A. Armstrong to prove that fact; it was objected to her competency, that the fact of her marriage with the prisoner having been proved, she must be taken to be his lawful wife. Alderson, B., was at first inclined to think that she might be examined simply to the fact of her being the wife or not of the prisoner; but after conferring with Williams, J., he determined not to receive her evidence, but to reserve the point. (z) But where a woman, called as

(x) *R. v. Newton*, 2 M. & Rob. 503. S. C. as *R. v. Simmonsto*, 1 C. & K. 164. See *R. v. Savage*, 13 Cox, C. C. 178, where it seems Lush, J., refused to act on *R. v. Newton*.

(y) 1 Hale, 693. 1 East, P. C. c. 12, s. 9, p. 469, and 1 Hawk. c. 42, s. 8, where it is said that this rule has been so strictly taken that even an affidavit to postpone the trial made by the first wife has been rejected, and Old Bailey, Feb. Sess. 1786, is cited.

(z) *Peat's case*, 2 Lewin, 288. The prisoner was acquitted. The first impression of the very learned Baron seems to have been the correct one. The only ground on which the witness could be rejected was, that she was the lawful wife of the prisoner; for 'the general rule does not

extend to a wife *de facto*, but not *de jure*.' 2 Stark. Evid. 432 (2nd edit.). In *Wells v. Fletcher*, 5 C. & P. 12 S. C. 1 M. & Rob. 99, a woman called for the defendant on examination on the *voire dire*, said she had been married to the plaintiff, and on re-examination that she was married to another person previously; but not seeing him for thirty years, she thought he was dead, and therefore married the plaintiff, but afterwards found that her first husband was living; and Patteson, J., held that the witness was competent, as the second marriage was a nullity. If *Peat's case* had been an indictment for larceny, and the witness called for the prisoner had proved her marriage to him on the *voire dire*, *Wells v. Fletcher* shows that she might have been rendered competent by proving her previous

a witness against a prisoner, proved on the *voire dire* (a) that she married the prisoner in 1849, Erle, J., held that she might also prove on the *voire dire* that she had a sister seven years older than herself, and that they had been brought up together with their parents, and that she always believed that they were sisters, and that her sister had married the prisoner in 1846, and died in 1848; for if a person is questioned on the *voire dire* with the view to raise an objection to her competency, she may also be examined to remove that *primâ facie* ground of objection. (b)

A daughter wrote to her father in America, and in about two months afterwards received a letter in reply in his handwriting, dated the 31st of May, 1836; it was held that this was evidence that he was then alive. (c)

An indictment for bigamy under the 35 Geo. 3, c. 57, s. 1 (now repealed), alleging that the prisoner married A., and afterwards feloniously married C., 'the said A., his former wife, being then alive,' sufficiently charged the offence, without also alleging that the prisoner was still married to A., when he married C.; for a divorce from A. was not to be presumed. (d)

marriage, and it is difficult to see how proof by other evidence that she had married the prisoner, whether such evidence was given before or after she was called, could render her incompetent; for her evidence would not be inconsistent with such evidence, as it would admit the marriage with the prisoner, but show that it was void. *R. v. Bathwick*, 2 B. & Ad. 639, shows that the competency of the wife does not depend upon the marshalling of the evidence, or the particular stage of the case in which she may be called; if, therefore, in Peat's case the witness had been called before her marriage with the prisoner had been proved, and she would have been competent to prove her previous marriage, it is difficult to see how her marriage with the prisoner having been proved before she was called could render her incompetent, and it certainly would operate hardly on a prisoner, if such were the case, for the prosecutor might in the course of his case prove the marriage of the witness with the prisoner, and the prisoner might

have no one except the witness to prove the former marriage. It may be added that Lord Hale says that a second wife is not so much as a wife *de facto*. C. S. G.

(a) As to the meaning of *voire dire*, see Vol. III.

(b) *R. v. Young*, 5 Cox, C. C. 296.

(c) *Reed v. Norman*, 8 C. & P. 65. Lord Denman, C. J.; his lordship held in the same case, that the post-mark was evidence that the letter was put into the post, but that the letter might have been written at any time, and therefore proof was given that it was in reply to the daughter's letter; but this seems to have been unnecessary, for the date is *primâ facie* evidence of the time when an instrument is written. *R. v. Harborne*. *Sinclair v. Baggaley*, 4 M. & W. 313. *Hunt v. Massey*, 5 B. & Ad. 903. *Potez v. Glossop*, 2 Exch. R. 191. *Anderson v. Weston*, 6 B. N. C. 296. *Morgan v. Whitmore*, 6 Exch. 716.

(d) *Murray v. R.*, 7 Q. B. 700. *R. v. Apley*, 1 Cox, C. C. 71.

CHAPTER THE THIRTY-FIRST.

OF FORCIBLE ENTRY AND DETAINER.

A *FORCIBLE entry* or *detainer* is committed by violently taking or keeping possession of lands and tenements with menaces, force, and arms, and without the authority of the law. (a) It has been laid down in the books that, at common law, and before the passing of the statutes relating to this subject, if a man had a right of entry upon lands or tenements, he was permitted to enter with force and arms; and to detain his possession by force, where his entry was lawful: (b) and that even at this day he who is wrongfully dispossessed of his *goods*, may justify the retaking of them by force from the wrong-doer, if he refuse to redeliver them. (c) However, it is clear that, in many cases, an indictment will lie at common law for a forcible entry, if it contain, not merely the common technical words, 'with force and arms,' but also such a statement as shows that the facts charged amount to more than a bare trespass, for which no one can be indicted. (d) And in a case in the Court of King's Bench, it was mentioned, by the great judge who then presided in that Court, as a part of the law which ought to be preserved, that no one shall with force and violence assert his own title. (e) But on a subsequent day of the same term he said that the court wished that the grounds of their opinion in that case might be understood, and desired that it might not be considered as a precedent in other cases to which it did not apply. He then proceeded: 'Perhaps some doubt may hereafter arise respecting what Mr. Serjeant Hawkins says, that at common law the party may enter with force into that to which he has a legal title. But without giving any opinion concerning that *dictum* one way or the other, but leaving it to be proved or disproved whenever that question shall arise, all that we wish to say is, that our opinion in this case leaves that question untouched: it appearing by this indictment that the defendants unlawfully entered, and therefore the Court cannot intend that they had any title.' (f) There seems now to be no doubt that a party may be guilty of a forcible entry by vio-

(a) 4 Black. Com. 148.

(b) Dalt. Just. 297. Lamb. 135. Crom. 70 a, b. 2 Hawk. P. C. c. 64, ss. 1, 2, 3. Bac. Abr. tit. *Forcible Entry and Detainer*.

(c) 1 Hawk. P. C. c. 64, s. 1. Blades v. Higgs, 10 C. B. (N. S.) 713.

(d) R. v. Bake, 3 Burr. 1731. R. v. Bathurst, Say. 225, referred to in R. v. Storr, 3 Burr. 1699, 1702. R. v. Wilson, 8 T. R. 357, in which last case the indictment charged the defendants (twelve in number) with having *unlawfully and with*

a strong hand, entered, &c., and it was held good.

(e) By Lord Kenyon, C. J., R. v. Wilson, 8 T. R. 361, and in Taunton v. Costar, 7 T. R. 431, the same learned judge said, 'If the landlord had entered with a strong hand to dispossess the tenant by force [after the expiration of his term] he might have been indicted for a forcible entry;' and see Turner v. Meymot, 1 Bing. 158, 7 Moor. 574.

(f) 8 T. R. 364.

lently, and with force, entering into that to which he has a legal title. (g)¹ But where a breach of the peace is committed by a freeholder, who, in order to get into possession of his land, assaults a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public in the shape of an indictment for a forcible entry, he is not liable to the person wrongfully holding possession. (h)

Whatever may be the true doctrine upon this subject at common law, the statutes which have been passed respecting forcible entries and detainers are clearly intended to restrain all persons from having recourse to violent methods of doing themselves justice: and it is the more usual and effectual method to proceed upon these statutes, which give restitution and damages to the party grieved.

By the 5 Rich. 2, c. 8, 'none shall make entry into any lands and tenements, but in case where entry is given by the law; and in such case not with strong hand, nor with multitude of people, but only in a peaceable and easy manner,' on pain of imprisonment and ransom. This statute gave no speedy remedy, leaving the party injured to the common course of proceeding by indictment or action; and made no provision at all against forcible detainers. The 15 Rich. 2, c. 2, goes further, and enacts, that on complaint of forcible entry into lands and tenements, or other possessions whatsoever, 'to the justices of peace or any of them, the same justices or justice take sufficient power of the county, and go to the place where the force is made; and if they find any that hold such place forcibly after such entry made, they shall be taken and put in the next gaol, there to abide convict by the record of the same justices or justice,' until they make fine and ransom; and that the people of the county and the sheriff shall assist, &c., on pain of imprisonment and fine. 'And in the same manner it shall be done of them that make such forcible entries in benefices or offices of holy church.' But this statute gave no remedy against those who were guilty of a forcible detainer after a peaceable entry, nor against those who were guilty of both a forcible entry and forcible detainer, if they were removed before the coming of a justice of peace; and it gave no power to the justice to restore the party injured to his possession, and did not impose any penalty on the

(g) In *Newton v. Harland*, 1 M. & Gr. 644, the judges of the Court of Common Pleas seem to have been of opinion that a landlord who entered forcibly into the house of a tenant after the expiration of his term, would be guilty of a forcible entry, both at common law and under the statutes; and the only doubt was whether, supposing there was such a forcible entry upon a tenant after the expiration of the term, the possession thereby obtained was legal. See

further as to this, *Harvey v. Bridges*, 14 M. & W. 437; 1 Exch. R. 361; *Butcher v. Butcher*, 7 B. & C. 399; 1 M. & R. 220; *Hillary v. Gay*, 6 C. & P. 284; *Davison v. Wilson*, 11 Q. B. 890, 17 L. J. Q. B. 196; *Burling v. Read*, 11 Q. B. 904; *Pollen v. Brewer*, 7 C. B. (N. S.) 371; *R. v. Studd*, 14 W. R. 806; 14 L. T. N. S. 633; *Taylor v. Cole*, 3 T. R. 295.

(h) Per Parke, B., *Harvey v. Bridges*, *supra*.

AMERICAN NOTE.

¹ But in America it has been held that it is not a forcible entry for a man to enter by force premises of which his wife is in possession. *Morris v. Bowles*, Dana, 97. An entry under legal process, however unjustly obtained, is not indictable as a

forcible entry if the magistrate had jurisdiction, otherwise if he had none. *Sewell v. S.*, 61 Ga. 426; *S. v. Yarborough*, 70 N. C. 250; *Perry v. Tupper*, 70 N. C. 538.

sheriff for disobeying the precepts of the justices in the execution of the statute. Further enactments were therefore necessary. (i)

By the 8 Hen. 6, c. 9, s. 3, though the persons making forcible entries 'be present or else departed before the coming of the justices or justice, the same justices or justice, in some good town next to the tenements so entered, or in some other convenient place, according to their discretion, shall have or either of them shall have authority to inquire, by the people of the same county, as well of them that make such forcible entries in lands and tenements as of them which the same hold with force; and if it be found before any of them that any doth contrary to this statute, then the said justices or justice shall cause to re-seise the lands and tenements so entered or holden as afore, and shall put the party out in full possession as before.' And after making provision concerning the precepts of the justices to the sheriff to return a jury to inquire of forcible entries, the qualification of the jurors, and the remedy by action against those who obtain forcible possession of lands, &c., sec. 6 enacts, that mayors, &c., of cities, towns, and boroughs, having franchise, shall have in such cities, &c., like power to remove such entries, and in other articles aforesaid, rising within the same, as the justices of peace and sheriffs in counties. Sec. 7 provides, that 'they which keep their possessions with force in any lands or tenements, whereof they or their ancestors, or they whose estates they have in such lands and tenements, have continued their possessions in the same by three years or more, be not endamaged by force of this statute.' And by the 31 Eliz. c. 11, 'no restitution, upon any indictment of forcible entry, or holding with force, be made to any person or persons, if the person or persons so indicted hath had the occupation, or hath been in quiet possession by the space of three whole years together next before the day of such indictment so found, and his, her, or their estate or estates therein not ended or determined; which the party indicted shall and may allege for stay of restitution, and restitution to stay until that be tried, if the other will deny or traverse the same; and if the same allegation be tried against the same person or persons so indicted, then the same person or persons so indicted to pay such costs and damages to the other party as shall be assessed by the judges or justices before whom the same shall be tried; the same costs and damages to be recovered and levied as is usual for costs and damages contained in judgments upon other actions.'

The 15 Rich. 2, c. 2, gave magistrates a summary jurisdiction in all cases of forcible entry; but in cases of forcible detainer, only where there had been a previous forcible entry; notwithstanding that statute, a party who had acquired the possession of lands peaceably but unlawfully, might afterwards detain them forcibly; that was a mischief the 8 Hen. 6, c. 9, was intended to remedy; and it gives justices summary jurisdiction only in cases of forcible detainer, preceded by an *unlawful* entry, and therefore a conviction by justices on that statute merely stating an entry and a forcible detainer is insufficient. (j)

(i) Upon the imposing and levying the fine under this statute of Rich. 2, see 1 Hawk. P. C. c. 64, s. 8, and the cases

collected in Bac. Abr. tit. *Forcible Entry and Detainer* (A.) in the notes.

(j) *R. v. Oakley*, 4 B. & Ad. 307. See

In the construction of these statutes it has been holden, that if a lessee for years or a copyholder be ousted, and the lessor or lord disseised, and such ouster, as well as disseisin, be found in an indictment of forcible entry, the Court may, in their discretion, award a restitution of the possession to such lessee or copyholder; which was, by necessary consequence, a re-seisin of the freehold also, whether the lessor or lord had desired or opposed it. But it was a great question, whether a lessee for years or a copyholder, being ousted by the lessor or lord, could have a restitution of their possession within the equity of 8 Hen. 6, the words of which are, that the justice 'shall cause to re-seise the lands,' &c., and by which it seems to be implied that the party must be ousted of such an estate whereof he may be said to be seised, which must at least be a freehold. For the purpose of removing this doubt, it was enacted by 21 Jac. 1, c. 15, that such judges, justices, or justice of the peace as by reason of any Act of Parliament then in force were authorised to give restitution to tenants of any estate of freehold of their lands, &c., entered upon by force or withheld by force, shall have the like authority (upon indictment of such forcible entries or forcible withholdings) to give like restitution of possession to 'tenants for terms of years, tenants by copy of court roll, guardians by knight's service, tenants by elegit, statute merchant and staple.' It has been holden, that a tenant by the verge is not within this statute: but the propriety of this decision is doubted; as such person, having no other evidence of his title but by the copy of court roll, seems at least to be within the meaning, if not within the words, of the statute. (*k*)

If a lessor eject his lessee for years, and afterwards be forcibly put out of possession again by such lessee, he has no remedy for a restitution by force of any of the above-mentioned statutes: there seems, however, to be no doubt but that a justice of peace, &c., may remove the force, and commit the offender. (*l*)

The law upon these statutes respecting forcible entries and detainers may be further considered with reference —

- I. To the persons who may commit the offence, p. 720.
- II. To the nature of the possessions in respect of which it may be committed, p. 721.
- III. To the acts which will amount to a forcible entry, p. 722.
- And, IV. To the acts which amount to a forcible detainer, p. 724.

I. A man who breaks open the doors of his own dwelling-house, or of a castle, which is his own inheritance, but forcibly detained from him by one who claims the bare custody of it, cannot be guilty of a forcible entry or detainer within these statutes. (*m*)¹ Where a wife

R. v. Wilson, 1 A. & E. 627; R. v. Wilson, 3 Ad. & E. 817; Attwood v. Joliffe, 3 S. C. 116, as to the form of such a conviction.

(*k*) 1 Hawk. P. C. c. 64, s. 17.

(*l*) Id. *ibid.* ss. 17, 18.

(*m*) Bac. Abr. tit. *Forcible Entry, &c.*, (D.) 1 Hawk. P. C. c. 64, s. 32, where it is said also that a man will not be within the statutes who forcibly enters into land in the possession of his own lessee at will;

AMERICAN NOTE.

¹ It has been held in America that a mere custody of lands, &c., as distinguished from actual possession, is not sufficient, nor can a man commit forcible entry upon his

own premises held by a servant. C. v. Keeper of Prison, 1 Ashm. 140; S. v. Curtis, 4 Dev. & Bat. 222. See also S. v. Pearson, 2 N. H. 550.

was indicted with others for a forcible entry into a house, which she had taken for herself, but of which her husband had afterwards obtained possession with the landlord's consent, and it was objected that a wife could not be guilty of a forcible entry into the house of her husband; Lord Tenterden, C. J., said, 'although a wife certainly cannot commit a trespass on the property of her husband, I am by no means satisfied that, if she comes with strong hand, she may not be indictable for a forcible entry, which proceeds on the breach of the public peace.' 'As at present advised I think she may be guilty of a forcible entry, if her entry was made under circumstances of violence amounting to a breach of the public peace.' (n) But a joint tenant or tenant in common may offend against the statutes either by forcibly ejecting or forcibly holding out his companion; for though the entry of such a tenant be lawful *per my et per tout*, so that he cannot in any case be punished in an action of trespass at common law, yet the lawfulness of his entry does not excuse the violence, or lessen the injury, done to his companion; and, consequently, an indictment of forcible entry into a moiety of a manor, &c., is good. (o) Also where a man has been in possession of land for a great length of time by a defeasible title, and a claim is made by him who has a right of entry, the wrongful possessor, continuing his occupation, will be punishable for a forcible entry and detainer; because all his estate was defeated by the claim, and his continuance in possession afterwards amounts in the judgment of law to a new entry. (p) It does not follow from the decision in *R. v. Oakley* (q) that the 8 Hen. 6, c. 9, does not apply to the case of a tenant at will or for years, holding over after the will is determined or term expired, because the continuance afterwards may amount in judgment of law to a new entry. (r)

II. A person may be guilty of this offence by a force done to ecclesiastical possessions, as churches, vicarage houses, &c., as much as if it were done to a temporal inheritance. And it has been holden, as a general rule, that a person may be indicted for a forcible entry into any such incorporeal hereditament for which a writ of entry will lie, either by the common law, as for rent, or by statute, as for tithes, &c. It is, however, questioned whether there be any good authority that such an indictment will lie for a common or office; though it seems agreed that an indictment of forcible detainer lies against any one, whether he be the terre-tenant or a stranger, who shall forcibly disturb the lawful proprietor in the enjoyment of these possessions; as by violently resisting a lord in his distress for a rent, or by menacing a commoner with bodily hurt, if he dare put in his beasts into the common, &c. No one can come within the danger of these statutes by a violence offered to another in respect of a way, or such like easement which is no possession. But it seems that a man cannot be convicted, upon view, by force of the 15 Rich. 2, c. 2, of a forcible

but a *qu.* is subjoined. And see *R. v. Wilson*, 8 T. R. 364. *Taunton v. Costar*, 7 T. R. 431. *Turner v. Meymot*, 1 Bing. 158, and *Newton v. Harland*, *ante*, p. 718, note (g), which seem to show that the position in the text is erroneous. C. S. G.

(n) *R. v. Smyth*, 1 M. & Rob. 155. 5 C. & P. 201. And see *Doe v. Daly*, 8 Q. B. 934.

(o) 1 Hawk. P. C. c. 64, s. 33.

(p) *Id.* ss. 22, 34. *Crom.* 69. *Dalt.* c. 77. *Co. Lit.* 256.

(q) 4 B. & Ad. 307, *ante*, p. 719.

(r) Per Parke, J. *R. v. Oakley*, *supra*.

detainer of any incorporeal inheritance wherein he cannot be said to have made a precedent forcible entry. (s)

L. was mortgagee in fee of a dwelling house, the possession being left in the mortgagor. The mortgagor while in possession left the house to T. for a goods store. It was otherwise unoccupied. Early one morning, during the continuance of T.'s tenancy, L., without giving any notice to the mortgagor or to T., went to the house, in company with a carpenter and another man. The carpenter opened the front door, and the other man entered the house. L. and the carpenter remained on the doorstep, the latter being employed in putting on a new lock. While this was happening, T., and his brother-in-law, W., with several other persons came up, and T. and W. climbed into the house through a window, and after a slight struggle expelled L. and his men from the premises. L. indicted T. and W. and others for a forcible entry, riot, affray, and assault. T. and W. were tried and acquitted. They defended themselves by the same solicitor, and incurred joint costs. T. and W. then brought an action against L. for malicious prosecution, and obtained a verdict, subject to leave to move to enter a verdict for L., upon the grounds, first, that there was no reasonable and probable cause for the prosecution; second, that there was no evidence of malice; third, that there was no joint cause of action. The Court of Exchequer having set aside the verdict, and entered a verdict for L., and the Court of Exchequer Chamber having reversed the decision of the Court of Exchequer, — Held, reversing the decision of the Court of Exchequer Chamber, that there was reasonable and probable cause for the prosecution, inasmuch as the facts showed that T. and W. were, at the time of the expulsion of L., disturbing a possession which had been lawfully acquired by him. (t)

III. A *forcible entry* must be with a strong hand, with unusual weapons, or with menace of life or limb; it must be accompanied with some circumstances of actual violence or terror; and an entry which has no other force than such as is implied by the law in every trespass is not within these statutes. (u)¹ An entry may be forcible not only in respect of a violence actually done to the person of a man, as by beating him if he refuse to relinquish his possession; but also in respect of any other kind of violence in the manner of the entry, as by breaking open the doors of a house, whether any person be in it at the time or not, especially if it be a dwelling-house, and perhaps also by any act of outrage after the entry, as by carrying away the party's goods, &c., which being found in an assize of *novel disseisin*, will make the defendant a disseisor with force, and subject him to fine and imprisonment. (v) If a man enters to distrain for rent in

(s) 1 Hawk. P. C. c. 64, s. 31. Bac. Abr. tit. *Forcible Entry*, &c. (C.).

(t) Lows v. Telford, 45 L. J. Ex. 618. 1 Ap. Cas. 414.

(u) Bac. Abr. tit. *Forcible Entry*, &c. (D.) Dalt. 300. 1 Hawk. P. C. c. 64, s. 25.

(v) 1 Hawk. P. C. c. 64, s. 26.

AMERICAN NOTE.

¹ As to the acts necessary in America to constitute a forcible entry, see *S. v. Cargill*, 2 Brevard, 445; *Burt v. S.*, 3 Brev. 413; *C. v. Frison*, 1 Ashm. 140; *David-*

son v. Phillips, 9 Yerg. 93; *Childress v. Black*, *ibid.* 317; *S. v. Ross*, 4 Jones (Law), 315.

arrear with force, this is a forcible entry, because, though he does not claim the land itself, yet he claims a right and title out of it, which by these statutes he is forbid to exert by force; but if a man who has a rent be resisted from his distress with force, this is a forcible disseisin of the rent, for which he may recover treble damages in an assize, or may fine and imprison the party: but he cannot have a writ of restitution; for the statute does not give the justices power to reseise the rent, but only the lands and tenements themselves. (*w*) If one find a man out of his house, and forcibly withhold him from returning to it, and send persons to take peaceable possession of it in the party's absence, this according to the better opinion is a forcible entry. (*x*) And there may be a forcible entry where any person's wife, children, or servants, are upon the lands to preserve the possession; because whatever a man does by his agents is his own act; but his cattle being upon the ground do not preserve his possession, because they are not capable of being substituted as agents; and, therefore, their being upon the land continues no possession. (*y*)

Whenever a man, either by his behaviour or speech, at the time of his entry, gives those who are in possession of the tenements, which he claims, just cause to fear that he will do them some bodily hurt, if they will not give way to him, his entry is deemed forcible; whether he cause such a terror by carrying with him an unusual number of servants, or by arming himself in such a manner as plainly intimates a design to back his pretensions by force, or by actually threatening to kill, maim, or beat those who shall continue in possession, or by giving out such speeches as plainly imply a purpose of using force against those who shall make any resistance. (*z*) And there is no necessity that anyone should be assaulted; for if the entry be with such number of persons and show of force as is calculated to deter the rightful owner from sending them away, and resuming his own possession, that is sufficient. (*a*) But a forcible entry is not proved by evidence of a mere trespass, there must be proof of such force, or at least such a show of force, as is calculated to prevent any resistance. (*b*) And though a man enter peaceably, yet if he turn the party out of possession by force, or frighten him out of possession by threats, it is a forcible entry. (*c*) But threatening to spoil the party's goods, or destroy his cattle, or to do him any similar damage, which is not personal, if he will not quit the possession, seems not to amount to a forcible entry. (*d*)

If a person who pretends a title to lands, merely go over them either with or without a great number of attendants, armed or unarmed, in his way to the church, or market, or for a like purpose, without doing any act which either expressly or impliedly amounts to a claim of the lands, he cannot be considered as making an entry

(*w*) Bac. Abr. tit. *Forcible Entry*, &c. (B.).

(*z*) 1 Hawk. P. C. c. 64, s. 26, where it is given as the author's opinion; and contrary opinions are noticed proceeding on the ground that no violence was done to the house, but only to the person of the party.

(*y*) Bac. Abr. tit. *Forcible Entry*, &c. (B.). *Turner v. Meymot*, 1 Bing. 158.

(*z*) 1 Hawk. P. C. c. 64, s. 27.

(*a*) *Milner v. Maclean*, 2 C. & P. 17, Abbott, C. J.

(*b*) *R. v. Smyth*, 5 C. & P. 201, Lord Tenterden, C. J. S. C. 1 M. & Rob. 155.

(*c*) Dalt. 299. Bac. Ab. tit. *Forcible Entry*, &c. (B.).

(*d*) 1 Inst. 257. Bro. tit. *Duress*, 12, 16. 1 Hawk. P. C. c. 64, s. 28.

within the meaning of the statutes; otherwise if he make an actual claim with any circumstances of force or terror. (e) Drawing a latch and entering a house seems not to be a forcible entry according to the better opinion: (f) so if a man open the door with a key, or enter by an open window, or if the entry be without the semblance of force, as by coming in peaceably, enticing the owner out of possession, and afterwards excluding him by shutting the door, without other force, these will not be forcible entries. (g)

A single person may commit a forcible entry as well as a number. (h) But all who accompany a man when he makes a forcible entry will be deemed to enter with him, whether they actually come upon the lands or not. (i) So, if several come in company where their entry is not lawful, and all of them, except one, enter in a peaceable manner, and that one only use force, it is a forcible entry in them all, because they come in company to do an unlawful act; but it is otherwise where one had a right of entry, for there they only come to do a lawful act, and therefore it is the force of him only who used it. (j) And he who barely agrees to a forcible entry made to his use, without his knowledge or privity, is not within the statutes, because he did not concur in or promote the force. (k)

IV. *Forcible detainer* is where a man, who enters peaceably, afterwards detains his possession by force: and the same circumstances of violence or terror which will make an entry forcible, will also make a detainer forcible. From whence it seems to follow that whoever keeps in his house an unusual number of people, or unusual weapons, or threatens to do some bodily hurt to the former possessor, if he dare return, is guilty of a forcible detainer, though no attempt be made to re-enter: and it has been said that he also will come under the like construction who places men at a distance from the house in order to assault anyone who shall attempt to make an entry into it; and that he is in like manner guilty who shuts his doors against a justice of peace coming to view the force, and obstinately refuses to let him come in. (l) This doctrine will apply to a lessee who, after the end of his term, keeps arms in his house to oppose the entry of the lessor, though no one attempt an entry; or to a lessee at will detaining with force after the will is determined: (m) and it will apply in like manner to a detaining with force by a mortgagor after the mortgage is forfeited, or to the feoffee of a disseisor after entry or claim by the disseisee. And a lessee resisting with force a distress for rent, or forestalling or rescuing the distress, will also be guilty of this offence. (n)

But a man will not be guilty of the offence of forcible detainer for merely refusing to go out of a house, and continuing therein in

(e) 1 Hawk. P. C. c. 64, ss. 20, 21.

(f) There have been different opinions upon this point. Noy, 136, 137. Bac. Abr. tit. *Forcible Entry*, &c. (B.). 1 Hawk. P. C. c. 64, s. 26.

(g) Com. Dig. tit. *Forcible Entry*, &c. (A.) 3.

(h) Id. (A.) 2. 1 Hawk. P. C. c. 64, s. 29.

(i) 1 Hawk. P. C. c. 64, s. 22.

(j) Bac. Abr. tit. *Forcible Entry*, &c. (B.).

(k) 1 Hawk. P. C. c. 64, s. 24.

(l) 1 Hawk. P. C. c. 64, s. 30.

(m) See per Parke, J. *R. v. Oakley*, 4 B. & Ad. 307, *ante*, p. 719.

(n) Com. Dig. tit. *Forcible Detainer*, (B.) 1.

despite of another. (o)¹ So that it is not a forcible detainer if a lessee at will, after the determination of the will, denies possession to the lessor when he demands it; or shuts the door against the lessor when he would enter; or if he keeps out, by force, a commoner upon his own land. (p) And it has been seen that the 8 Hen. 6, c. 9, does not apply to a person who has been in possession for three years by himself, or any other under whom he claims. (q) But a person in quiet possession for three years, and then disseised by force, and restored, cannot afterwards detain with force within three years after his restitution; for his possession was interrupted. (r)

The remedies against such as are guilty of forcible entries or detainers are either by action, by complaint to justices of the peace (who may proceed upon view or inquisition), or by indictment at the general sessions. (s) And if a forcible entry or detainer be made by three persons or more, it is also a riot; and may be proceeded against as such, if no inquiry has before been made of the force. (t) Some of the points which have been determined with respect to an indictment for these offences, and also concerning the award of restitution, may be shortly noticed. (u)

The statutes seem to require that the entry should be laid in the indictment *manu forti*, or *cum multitudine gentium*: but some have holden that equivalent words will be sufficient, especially if the indictment concludes *contra formam statuti*; but it is not sufficient to say only that the party entered *vi et armis* since that is the common allegation in every trespass. (v) No particular technical words are necessary in an indictment at common law; all that is required is, that it should appear by the indictment that such force and violence have been used as constitute a public breach of the peace. (w)

The tenement in which the force was committed must be described with convenient certainty; for otherwise the defendant will not know the particular charge to which he is to make his defence, nor

(o) 1 Hawk. P. C. c. 64, s. 30.

(p) Com. Dig. tit. *Forcible Detainer*, (B.) 2.

(q) *Ante*, p. 719. And by the 31 Eliz. c. 11, (*ante*, p. 719) no restitution is to be given on an indictment of forcible entry or detainer, where the party has been three years in quiet possession before the indictment found, and his estate not determined.

(r) Com. Dig. tit. *Forcible Detainer*, (B.) 2.

(s) See the statutes, *ante*, p. 719. Com. Dig. tit. *Forcible Entry* (C.) 4 Black. Com.

148. Burn's Just. tit. *Forcible Entry*, &c. III., IV., V.

(t) Burn's Just. tit. *Forcible Entry and Detainer*, VII. *Ante*, p. 555.

(u) As to the proceedings by justices of peace, see Burn's Just. tit. *Forcible Entry* &c. V. Com. Dig. Tit. *Forcible Entry*, (D.).

(v) Baude's case, Cro. Jac. 41. Rast. Ent. 354. Bac. Abr. tit. *Forcible Entry*, &c. (E.).

(w) By Lawrence, J., in *R. v. Wilson*, 8 T. R. 362.

AMERICAN NOTE.

¹ Mr. Bishop, vol. ii., s. 502, thinks that a person who defends by force a possession peaceably acquired against another who has no just claim, or whom he believes to have no just claim, ought not to be found guilty of forcible detainer. He cites *Farie v. S.*, 3 Ohio St. 159. *Harrington v. P.*, 6 Barb. 607; *S. v. Elliot*, 11 N. H. 540; and the North Carolina Court seems

to have decided that at common law a forcible detainer is not indictable where the entry was peaceable and lawful, — a proposition (as Mr. Bishop says) which seems too narrow. *S. v. Godsey*, 13 Ire. 348. It has been decided in America that there can be no "forcible detainer" of personal chattels. *S. v. Marsh*, 64 N. C. 378.

will the justices or sheriff know how to restore the injured party to his possession. Thus an indictment of forcible entry into a tenement, (x) which may signify anything whatsoever wherein a man may have an estate of freehold, (y) or into a house or tenement, (z) or into two closes of meadow or pasture, (a) or into a rood or half a rood of land, (b) or into certain lands belonging to such a house, (c) or into such a house without showing in what town it lies, (d) or into a tenement, with the appurtenances, called Truepenny in D. (e) is not good. But an indictment for a forcible entry *in domum mansionalem sive messuagium*, &c., is good, for these are words equipollent. (f) And an indictment for an entry into a close called Serjeant Herne's close, without adding the number of acres, is good; for here is as much certainty as is required in ejectment. (g) And an indictment may be void as to such part of it only as is uncertain, and good for so much as is certain: thus an indictment for a forcible entry into a house and certain acres of land may be quashed as to the land, and stand good as to the house. (h) Upon an indictment against a wife for a forcible entry into a house, which she had originally taken in her own name, but into which her husband had afterwards entered for the purpose of giving up possession to the owner, the house is well described as the house of the husband. (i)

An indictment on the 8 Hen. 6, c. 9, (j) must show that the place was the freehold of the party grieved at the time of the force (k); and if founded on 21 Jac. 1, c. 15 (*ante*, p. 720), it should show that he was at such time a tenant for a term of years or otherwise entitled as mentioned in that statute. (l) An inquisition under the 8 Hen. 6, c. 9, will not warrant a justice in restoring possession, unless it set forth the estate possessed by the party in the property. (m) But an indictment which charges that the defendants forcibly entered into a messuage of one W. P., he the said W. P., then and there being seised thereof, sufficiently avers the present seisin of W. P. to warrant the Court in awarding restitution. (n) But in an indictment at common law, where the breach of the public peace is the gist of the offence, and the prosecutor is not entitled to restitution and damages, it appears to be sufficient to state only that the prosecutor was in possession of the premises. (o)

A repugnancy in setting forth the offence in an indictment on these

(x) Dalt. 15. 2 Roll. R. 46. 2 Roll. Abr. 80, pl. 8. 3 Leon. 102.

(y) Co. Lit. 6 a.

(z) 2 Roll. Abr. 80, pl. 4, 5. Roll. R. 334. Cro. Jac. 683. Palm. 277.

(a) 2 Roll. Abr. 81, pl. 4.

(b) Bulst. 201.

(c) 2 Leon. 186. 3 Leon. 101. Bro. tit. *Forcible Entry*, 23.

(d) 2 Leon. 186.

(e) 2 Roll. Abr. 80, pl. 7.

(f) Ellis's case, Cro. Jac. 683. Palm. 277.

(g) Bac. Abr. tit. *Forcible Entry*, &c., (E.). 1 Hawk. P. C. c. 64, s. 37.

(h) Bac. Abr. tit. *Forcible Entry*, &c., (E.). 1 Hawk. P. C. c. 64, s. 37.

(i) R. v. Smyth, 1 M. & Rob. 155. S. C. 5 C. & P. 201.

(j) *Ante*, p. 719.

(k) R. v. Dornay, 1 Lord Raym. 210. 1 Salk. 260. Anon. 1 Vent. 89. 2 Keb. 495. Hetl. 73. Latch. 109.

(l) See R. v. Lloyd, Cald. 415; R. v. Wannop, Say. 142. It is difficult to understand what is meant by some of these cases:

(m) R. v. Bowser, 8 D. P. R. 128, Coleridge. J.; Bac. Abr. tit. *Forcible Entry*, &c. (E.), where, and in 1 Hawk. P. C. c. 64, s. 38, see the cases on this subject collected. And see also R. v. Griffiths, *et al.* 3 Salk. 169.

(n) R. v. Hoare, 6 M. & S. 267. R. v. Dillon, 2 Ch. R. 314.

(o) R. v. Wilson, 8 T. R. 357.

statutes is an incurable fault: as where it is alleged that the party was possessed of a term of years, or of a copyhold estate, and that the defendants disseised him; or that the defendants disseised J. S. of land then and yet being his freehold, for it implies that he always continued in possession; and if so, it is impossible he could be disseised at all. (*p*) It seems that an indictment on 8 Hen. 6, c. 9, setting forth an entry and forcible detainer, is good, without showing whether the entry was forcible or peaceable: but it must set forth an entry; for otherwise it does not appear but that the party has been always in possession, in which case he may lawfully detain it by force. (*q*) It appears to be sufficient to state, that the defendant on such a day entered, &c., and disseised, &c., without adding the words *then and there*; for it is the natural intendment that the entry and disseisin both happened together. (*r*) A disseisin is sufficiently set forth by alleging that the defendant entered, &c., into such a tenement, and disseised the party, without using the words 'unlawfully,' or 'expelled,' for they are implied. (*s*) But no indictment can warrant an award of restitution, unless it find that the wrong-doer ousted the party grieved, and also continues his possession at the time of the finding of the indictment; for it is a repugnancy to award restitution of possession to one who never was in possession, and it is in vain to award it to one who does not appear to have lost it. (*t*)

If a bill, both for a forcible entry and forcible detainer, be preferred to a grand jury, and found 'not a true bill' as to the entry with force, and 'a true bill' as to the detainer, it will not warrant an award of restitution; but is void, because the grand jury cannot find a bill, true for part, and false for part, as a petit jury may. (*u*)

Upon an indictment on the 21 Jac. 1, c. 15, or 8 Hen. 6, c. 9, whereby restitution of the possession of lands entered upon by force, or holden by force, may be awarded to the respective tenants thereof; the tenant whose land has been entered upon, or withheld by force, is now a competent witness for the prosecution by the 6 & 7 Vict. c. 85, and 14 & 15 Vict. c. 99. (*v*)

On an indictment at common law, the prosecutor need only prove a peaceable possession at the time of the ouster. (*w*) On an indictment upon the statute of 8 Hen. 6, c. 9, a seisin in fee must be shown; and on an indictment founded on 21 Jac. 1, c. 15, a tenancy for years or other term within that statute must be shown; (*x*) but it seems that proof that the prosecutor held colourably as a freeholder or leaseholder will suffice; and the Court will not, on the trial, enter into the validity of an adverse claim made by the defendant, which he ought to assert, not by force, but by action. (*y*)

(*p*) 1 Hawk. P. C. c. 64, s. 39. Bac. Abr. *Forcible Entry, &c.* (E.).

(*q*) 1 Hawk. P. C. c. 64, s. 40. Bac. Abr. *ibid.* And see the statute, *ante*, p. 719.

(*r*) Baudé's case, Cro. Jac. 41. 1 Hawk. *ibid.* s. 42.

(*s*) Bac. Abr. *Forcible Entry, &c.* (E.).

(*t*) 1 Hawk. P. C. c. 64, s. 41.

(*u*) 1 Hawk. P. C. c. 64, s. 40. But this it seems does not apply to the case of different counts in the same indictment, but only where the grand jury find 'a true

bill' and not a 'true bill' upon different parts of one and the same charge. See *R. v. Fieldhouse*, Cowp. 323.

(*v*) He was not competent formerly. *R. v. Williams*, 9 B. & C. 549. 4 M. & R. 471. *R. v. Beavan*, R. & M. N. P. C. 242.

(*w*) Talf. Dickenson, 377.

(*x*) *R. v. Child*, 2 Cox C. C. 102. In this case it is stated that the indictment was under the 5 R. 2, c. 8. It is a very loose report.

(*y*) Per Vaughan, B., in *R. v. Williams*, Monm. S. A., 1828, and confirmed

The same justice or justices before whom an indictment of forcible entry or detainer shall be found may award *restitution*: but no other justices, except those before whom the inquest was found, can award restitution, unless the indictment be removed by *certiorari* into the Court of Queen's Bench; and that Court, by the plenitude of its power, can restore, because that is supposed to be implied by the statute; on the ground that whenever an inferior jurisdiction is erected, the superior jurisdiction must have authority to put it in execution. So, if an indictment be found before the justices of the peace at their quarter sessions, they have authority to award a writ of restitution, because the statute having given power to the justices or justice to re-seise, it may as well be done by them in court as out of it. (2) It is laid down in some books that the justices of *oyer and terminer*, or general gaol delivery, though they may inquire of forcible entries, and fine the parties, cannot award a writ of restitution. (a)

Restitution ought only to be awarded for the possession of tenements visible and corporeal; for a man who has a right to such as are invisible and incorporeal, as rents or commons, cannot be put out of possession of them, but only at his own election, by a fiction of law, to enable him to recover damages against the person that disturbs him in the enjoyment of them; and all the remedy that can be desired against a force in respect to such possessions is to have the force removed, and those who are guilty of it punished, which may be done by 15 Rich. 2, c. 2. (b) And restitution is to be awarded only to him who is found by the indictment to have been put out of the *actual possession*, and not to one who was only seised in law. (c) Upon the removal of the proceedings into the Court of Queen's Bench by *certiorari*, that Court may award a restitution discretionally. (d) And the same principle applies to a judge of assize upon the finding of an indictment for forcible entry; namely, that the proceedings being *ex parte*, a discretion may be exercised. Where, therefore, an indictment for a forcible entry and detainer is found at the assizes, it is in the discretion of the judge whether he will grant restitution or not; and if he refuse to grant it, the Court of Queen's Bench will not inquire whether he has exercised his discretion rightly, or grant a mandamus to the judge to grant restitution. (e) But in the case of local

on a motion for a new trial. Talf. Dickenson, 377; and see *Jayne v. Price*, 5 Taunt. 326.

(2) Bac. Abr. tit. *Forcible Entry*, &c. (F.).

(a) Id. *ibid.* and 1 Hawk. P. C. c. 64, s. 51, where it is said that justices of *oyer* and *terminer* have no power either to inquire of a forcible entry or detainer, or to award restitution on an indictment on the statutes; because when a new power is created by statute, and certain justices are assigned to execute it, it cannot regularly be executed by any other; and inasmuch as justices of *oyer* and *terminer* have a commission entirely distinct from that of justices of peace, they shall not from the general words of their commission *ad inquirend' de omnibus*, &c., be construed to have any such powers as are specially limited to justices of peace. But in Com. Dig. tit. *Forc. Entr.* (D. 5), it

is said that justices of gaol delivery may award restitution upon an indictment before them: and Sav. 78, is cited: and afterwards id. (D. 7), it is said that restitution shall not be by justices of assize, gaol delivery, or justices of peace, *if the indictment was not found before them*; and H. P. C. 140, Dalt. c. 44, 131, are cited; assuming here, as it should seem, that if the indictment were found before justices of assize and gaol delivery, they might award restitution: and see *infra*, R. v. Harland, and R. v. Hake, note (a), to R. v. Williams, 4 Mau. & Ry. 483, where a judge at the assizes granted a writ of restitution.

(b) 1 Hawk. P. C. c. 64, s. 45. Lamb. Just. 153. Co. Lit. 323.

(c) Lamb. Just. 153. Dalt. c. 83.

(d) R. v. Marrow, Ca. temp. Hardw. 174.

(e) R. v. Harland, 8 Ad. & E. 826.

magistrates, who are to go to the spot, and make inquiry by the inquisition of the jury, and examination of witnesses; if the jury find the facts, it is imperative on the justices to grant restitution; and the reason is that there has been a fair inquiry. (*f*)

It appears by the proviso in the 8 Hen. 6, c. 9, and also by the 31 Eliz. c. 11, that any one indicted upon these statutes may allege quiet possession for three whole years to stay the award of restitution; in the construction of which it has been holden, that such possession must have continued without interruption during three whole years next before the indictment. (*g*) And it has also been said that the three years' possession must be of a lawful estate; and therefore that a disseisor can in no case justify a forcible entry or detainer against the disseisee having a right of entry, as it seems that he may against a stranger, or even against the disseisee having, by his laches, lost his right of entry. (*h*) Wherever such possession is pleaded in bar of a restitution, either in the Queen's Bench or before justices of the peace, no restitution ought to be awarded till the truth of the plea be tried; and such plea need not show under what title, or of what estate, such possession was; because not the title, but the possession only, is material. (*i*) If the defendant tender a traverse of the force (which must be in writing), no restitution ought to be till such traverse be tried; in order to which the justice, before whom the indictment is found, ought to award a *venire* for a jury: but if such jury find so much of the indictment to be true as will warrant a restitution, it will be sufficient, though they find the other part of it to be false. (*j*) Where the defendant pleads three years' possession in stay of restitution, according to 31 Eliz. c. 11, and it is found against him, he must pay costs. (*k*)

The same justices who have awarded a restitution on an indictment of forcible entry, &c., or any two or one of them, may afterwards *supersede* such restitution upon an insufficiency in the indictment appearing unto them: but no other justices or Court whatsoever have such power, except the Court of Queen's Bench; a *certiorari* from whence wholly closes the hands of the justices of peace, and avoids any restitution which is executed after its *teste*, but does not bring the justices into contempt without notice. (*l*)

The Court of Queen's Bench has such a discretionary power over these matters, from an equitable construction of the statutes, that if a restitution shall appear to have been illegally awarded or executed, that Court may *set it aside*, and grant a re-restitution to the defendant. But a defendant cannot in any case whatsoever, *ex rigore juris*, demand a restitution, either upon the quashing of the indictment, or a verdict found for him on a traverse thereof, &c.; for the power of

S. C. 1 P. & D. 93, 2 M. & R. 141. See *R. v. Hake*, note (*a*) to *R. v. Williams*, 4 M. & R. 483, where a judge, upon such an inquisition, granted a writ of restitution, not as a matter of right, but in the exercise of his discretion.

(*f*) *Ibid.* per Patteson, J.

(*g*) Bac. Abr. tit. *Forcible Entry*, &c.

(*G.*) 1 Hawk. P. C. c. 64, s. 53.

(*h*) Bac. Abr. tit. *Forcible Entry*, &c.

(*G.*) 1 Hawk. c. 64, s. 54.

(*i*) 1 Hawk. c. 64, s. 56.

(*j*) Bac. Abr. tit. *Forcible Entry*, &c. (*G.*) 1 Hawk. c. 64, ss. 58, 59. *R. v. Winter*, 2 Salk. 588.

(*k*) *R. v. Goodenough*, 2 Lord Raym. 1036. And see the words of the statute, *ante*, p. 719.

(*l*) Bac. Abr. *Id.* *ibid.* 1 Hawk. c. 64, ss. 61, 62.

granting a restitution is vested in the Queen's Bench only, by an equitable construction of the general words of the statutes, and is not expressly given by those statutes; and is never made use of by that Court but when, upon consideration of the whole circumstances of the case, the defendant shall appear to have some right to the tenements, the possession whereof he lost by the restitution granted to the prosecutor. (*m*)

But where a conviction for a forcible entry or detainer is quashed by the Queen's Bench they have no discretionary power, but are bound to award re-restitution, although the conviction be quashed for a merely technical error, and the lease of the dispossessed person had expired during the litigation. (*n*)

The Court of King's Bench has been so favourable to one who, upon his traverse of an indictment upon these statutes being found for him, has appeared to have been unjustly put out of his possession, that they have awarded him a restitution, notwithstanding it has been shown to the Court that, since the restitution granted upon the indictment, a stranger has recovered the possession of the same land in the lord's court. (*o*)

The justices or justice may execute the writ of restitution in person, or may make their precept to the sheriff to do it (*p*) The sheriff, if need be, may raise the power of the county to assist him in the execution of the precept; and therefore, if he make a return thereto that he could not make a restitution by reason of resistance, he shall be amerced. (*q*) And it is said, that a justice of peace or sheriff may break open a house to make restitution. (*r*)

If possession under a writ of restitution is avoided immediately after execution by a fresh force, the party shall have a second writ of restitution without a new inquisition; but the second writ must be applied for within a reasonable time. (*s*) And where restitution is not ordered till three years after the inquisition, it is bad. (*t*)

(*m*) Bac. Abr. Id. *ibid.* 1 Hawk. c. 64, ss. 63, 64, 65.

(*n*) R. v. Jones, 1 Stra. 474. R. v. Wilson, 3 A. & E. 817. S. P. 5 H. & M. 164.

(*o*) Bac. Abr. Id. *ibid.* 1 Hawk. c. 64, s. 66.

(*p*) 1 Hawk. c. 64, s. 59.

(*q*) Id. *ibid.* sec. 52.

(*r*) Com. Dig. tit. *Forcible Entry*, &c. (D.) 6.

(*s*) R. v. Harris, 1 Lord Raym. 482.

(*t*) R. v. Harris, 3 Salk. 313.

CHAPTER THE THIRTY-SECOND.

OF NUISANCES. (a)

NUISANCE, *nocumentum*, or annoyance, signifies anything that worketh hurt, inconvenience, or damage. And nuisances are of two kinds: *public* or *common* nuisances, which affect the public, and are an annoyance to *all*¹ the King's subjects; and *private* nuisances, which may be defined as anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another. (b) Private nuisances, as they are remedied only by civil proceedings, do not come within the scope of this Treatise; but public or common nuisances, as they annoy the whole community in general, and not merely some particular person, are properly punishable by indictment, and not the subject of action; for it would be unreasonable to multiply suits by giving every man a separate right for what damnifies him in common only with the rest of his fellow-subjects. (c)

(a) The Public Health Act 1875, 38 & 39 Vict. c. 55, which consolidates the Acts relating to the public health, makes certain provisions respecting nuisances. This Act does not extend to Scotland or Ireland, nor (save as by the Act is expressly provided) to the Metropolis. By s. 111, the provisions of this Act relating to nuisances shall be deemed to be in addition to, and not to abridge or affect any right, remedy, or proceeding under any other provisions of this Act, or under any other Act, or at law, or in equity. Provided that no person shall be punished for the same offence, both under the provisions of this Act relating to nuisances, and under any other law or enactment. See also s. 341.

(b) 3 Black. Com. 216. 2 Inst. 406. As to private nuisances, see *Hole v. Barlow*, 4 C. B. (N. S.) 334. *Stockport Water Works Co. v. Potter*, 7 H. & N. 160. *Bamford v. Turnley*, 3 B. & S. 62, 31 L. J. Q. B. 286. *Cavey v. Ledbitter*, 32 L. J. C. P. 104. 13 C. B. (N. S.) 470. *Walter v. Selfe*, 4 De G. & S. 315. *Beardmore v. Treadwell*, 31 Law J., Chanc. 892. *Roberts v. Yardley*, 3 H. & C. 162.

(c) 4 Black. Com. 166. There are, however, circumstances mentioned in the books upon which a party has been admitted to have a private satisfaction by civil suit for

that which is a public nuisance; namely, where he has sustained some extraordinary damage by it beyond the rest of the King's subjects. As if by means of a ditch dug across a public way, which is a common nuisance, a man or his horse suffer any injury by falling therein; there, for this particular damage, not common to others, it has been held that the party may have his action. Co. Lit. 56. 5 Rep. 73. 3 Black. Com. 219. And see also *Fowler v. Sanders*, Cro. Jac. 446. But the particular damage in this case must be direct, and not consequential, as by being delayed in a journey of importance. Bull. N. P. 26. In *R. v. Dewanap*, 16 East, 196, Lord Ellenborough, C. J., said, 'I did not expect that it would have been disputed at this day that though a nuisance may be public, yet that there may be a special grievance, arising out of the common cause of injury, which presses more upon particular individuals than upon others not so immediately within the influence of it. In the case of stopping a common highway which may affect all the subjects, yet if a particular person sustain a special injury from it, he has an action.' And in *Duncan v. Thwaites*, 3 B. & C. 584, Abbott, C. J., said, 'I take it to be a general rule, that a party who sustains a special and particular injury, by

AMERICAN NOTE.

¹ In America it has been held that a nuisance is a public nuisance if it annoys such part of the public as necessarily come in contact with it. *Hackney v. S.*, 8 Ired.

494; but where a disorderly house only disturbed two families in the country it was held not a public nuisance. *Bishop*, Vol. i., ss. 1077, 1078, see also s. 244.

SEC. I.

Of Public Nuisances in General.

Public nuisances may be considered as offences against the public order and economical regimen of the state, being either the doing of a thing to the annoyance of all the King's subjects, or the neglecting to do a thing which the common good requires. (*d*) But the annoyance or neglect must be of a real and substantial nature. (*e*)

Offensive *trades* and *manufactures* may be public nuisances. A *brewhouse*, (*f*) erected in such an inconvenient place that the business cannot be carried on without greatly incommoding the neighbourhood, may be indicted as a common nuisance; and so in the like case may a *glasshouse* or *swineyard*. (*g*)

An indictment will not lie for that which is a nuisance only to a few inhabitants of a particular place: as where, upon an indictment against a tinman for the noise made by him in carrying on his trade, it appeared in evidence, that the noise only affected the inhabitants of three numbers of the chambers in Clifford's Inn, and that by shutting the windows the noise was in a great measure prevented, Lord Ellenborough, C. J., held that the indictment could not be sustained, as the annoyance was, if anything, a private nuisance. (*h*) But an indictment for a nuisance, by steeping stinking skins in water, laying it to be committed near the highway, and also near several dwelling-houses, has been held sufficient; for if a man erects a nuisance *near* the highway by which the air thereabouts is corrupted, it must, in its nature, be a nuisance to those who are in the highway. (*i*) And an indictment was held good for a nuisance in erecting buildings, and

an act which is unlawful on the ground of public injury, may maintain an action for his own special injury.' And see *Rose v. Miles*, 4 M. & S. 101. *Butterfield v. Forester*, 11 East, 60. *Benjamin v. Storr*, 43 L. J. C. P. 163. *St. Helens Smelting Co. Limited v. Tipping*, 35 L. J. Q. B. 67. *Metropolitan Board of Works v. McCarthy*, 43 L. J. C. P. 385.

(*d*) 4 Black. Comm. 166. 1 Hawk. P. C. c. 75, s. 1. 2 Roll. Abr. 83.

(*e*) By Lord Hardwicke, Anon. 3 Atk. 750.

(*f*) See the Public Health Act, 1875, ss. 112-115.

(*g*) In Bac. Abr. tit. *Nuisance* (A.), it is said, 'It seems the better opinion that a brewhouse, glasshouse, chandler's shop, and sty for swine, set up in such inconvenient parts of a town that they cannot but greatly incommode the neighbourhood, are common nuisances:' and see 2 Roll. Abr. 139.

Cro. Car. 510; *Hut.* 136; *Palm.* 536; *Vent.* 26; *Keb.* 500; 2 *Salk.* 458, 460; 2 *Lord Raym.* 1163, are cited. 1 *Hawk. P. C. c.* 75, s. 10. Public Health Act 1875, (38 & 39 Vict. c. 55) s. 47. It would seem not necessary in order to constitute a nuisance that there should be any injury to health. *Banbury Urban Sanitary Authority v. Page*, 8 Q. B. D. 97.

As to persons coming to a place where a noxious trade is carried on, see *R. v. Cross*, 2 C. & P. 483; and *Hole v. Barlow*, 27 L. J. C. P. 208, where per Byles, J., 'It used to be thought that if a man knew there was a nuisance, and went and lived near it, he could not recover, because it was said it is he that goes to the nuisance and not the nuisance to him. That used to be thought one hundred years ago to be the law. That, however, is not the law now.'¹

(*h*) *R. v. Lloyd*, 4 Esp. 200.

(*i*) *R. v. Pappineau*, 1 Str. 686.

AMERICAN NOTE.

¹ In America it seems the court have sometimes held that there is an indictable nuisance, where the trade has been exercised

in the open country for many years and the houses have come to the nuisance. *Bishop* i. s. 1141.

making fires which sent forth noisome, offensive, and stinking smokes, and making great quantities of noisome, offensive, and stinking liquors, near to the King's common highway, and near to the dwelling-houses of several of the inhabitants, whereby the air was impregnated with noisome and offensive stinks and smells. (*j*) Upon the evidence it appeared that the smell was not only intolerably offensive, but also obnoxious and hurtful, and made many persons sick, and gave them head-aches; and it was held that it was not necessary that the smell should be unwholesome, but that it was enough if it rendered the enjoyment of life and property uncomfortable; and further, that the existence of the nuisance depended upon the number of the houses and concourse of people, and was a matter of fact to be judged of by the jury. (*k*) But the carrying on of an offensive trade is not indictable, unless it be destructive of the health of the neighbourhood, or render the houses untenable or uncomfortable. (*l*) If there be smells offensive to the senses, that is enough, as the neighbourhood has a right to fresh and pure air. (*m*)

The presence of other nuisances will not justify any one of them. (*m*) Upon an indictment for a nuisance in carrying on the trade of a varnish-maker, it was proved that offensive smells proceeded from the defendant's manufactory, to the annoyance of persons travelling along a public road; the defence was, first, that the smells were not injurious to health; and, secondly, that in the immediate neighbourhood there were several houses for slaughtering horses, a brewery, a gas manufactory, a melter of kitchen stuff, and a blood boiler; and that although the accumulation of all the smells was offensive, yet that the defendant's alone would not have been so, and therefore was no nuisance; but Abbot, C. J., said, 'It is not necessary that a public nuisance should be injurious to health; if there be smells offensive to the senses, that is enough, as the neighbourhood has a right to fresh and pure air. (*n*) It has been proved that a number of other offensive trades are carried on near this place, knackers, melters of kitchen stuff, &c.; but the presence of other nuisances will not justify any one of them; or the more nuisances there were the more fixed they would be; however, one is not the less subject to prosecution because others are culpable. The only question, therefore, is this: is the business, as carried on by the defendant, productive of smells offensive to persons passing along the public highway?' (*o*)

A certificate and licence under the 26 Geo. 3, c. 71, s. 1, authorizing a person to keep a house for the slaughtering of horses, is no defence; if the business is a public nuisance to the neighbourhood. (*p*)

It has been said that a person cannot be indicted for continuing a noxious trade which has been carried on at the same place for nearly

(*j*) *R. v. White*, 1 Burr. 333.

(*k*) *R. v. White*, 1 Burr. 337, where see also that the word 'noxious' not only means hurtful and offensive to the smell, but includes the complex idea of insalubrity and offensiveness.

(*l*) *R. v. Davey*, 5 Esp. 217. See the cases cited in note (*c*), *ante*, p. 731.

(*m*) *R. v. Neil*, 2 C. & P. 485. Abbott,

C. J., see *R. v. Watts*, *ibid.* 486. Crossley v. Lightowler, 36 L. J. Ch. 584.

(*n*) As to this see also *Bishop Auckland Local Board v. Bishop Auckland Iron Co.*, 10 Q. B. D. 138.

(*o*) *R. v. Neil*, *supra*. *R. v. Watts*, Moo. & M. 281; *R. v. Neville*, Peake N. P. C. 91.

(*p*) *R. v. Cross*, 2 C. & P. 483. Abbott, C. J.

fifty years. (q) But, as stated *post*, it is now well recognised that no length of time can legalise a public nuisance. (r) It should seem that in judging whether a thing is a public nuisance or not, the public good it does may, in some cases, where the public health is not concerned, be taken into consideration, to see if it outweighs the public annoyance. (s)

Upon an indictment for burning arsenic whereby divers unwholesome smells arose, so that the air was greatly corrupted, evidence is admissible that particles of arsenic were carried off in the vapour, and deposited in the adjoining fields, and thereby the cattle and trees were poisoned, and that several cattle had died. (t)

Where the alleged nuisance was at Liverpool, and certain effects there produced were, by the prosecution, attributed to the fumes from the defendant's manufacture; the defence was that those effects were attributable to other local causes. To meet this, Coleridge, J., admitted evidence that the same effects were found in the neighbourhood of the defendant's similar manufacture carried on in the country, where these local causes did not exist, and that the defendant had paid compensation for them; for this was clearly good evidence of the tendency of the manufacture to produce such effects. (u) But on an indictment in 1857 for a nuisance in carrying on an offensive trade, a conviction in 1855 of the defendant before justices of the peace for carrying on the same trade upon the same premises so as to occasion noxious and offensive effluvia without using the best practicable means for preventing the same, contrary to the 16 & 17 Vict. c. 128, s. 1, but before the period comprised in the indictment, is not admissible, though the manufacture may appear to have been carried on for some years in the same manner. (v)

Erecting *gunpowder* mills, or keeping *gunpowder* magazines near a town, is a nuisance by the common law, for which an indictment or information will lie. (w)

Where a count stated that the defendants unlawfully did deposit in a warehouse belonging to them near to divers streets, highways, and dwelling-houses, divers large and excessive quantities of a dan-

(q) *R. v. Neville, Peake*, 93.

(r) *Weld v. Hornby*, 7 East, 199. *R. v. Cross*, 3 Camp. 227, and see *post*, 758.

(s) See *R. v. Russell*, 6 B. & C. 566, 9 D. & R. 566. *R. v. Ward*, 4 A. & E. 384, shows that it is no defence to an indictment for a nuisance by erecting an embankment in a harbour, that although the work be in some degree a hindrance to navigation, it is advantageous, in a greater degree, to other uses of the port; and see *R. v. Morris*, 1 B. & Ad. 441. *R. v. Tindall*, 6 A. & E. 143. 1 N. & P. 719. See these cases, *post*.¹

(t) *R. v. Garland*, 5 Cox C. C. 165.

(u) Anonymous, cited in *R. v. Fairie*, 8 E. & B. 486.

(v) *R. v. Fairie*, *supra*. It was so held on the ground, 1st, that the offence of which the defendant had been convicted was not

necessarily a nuisance; 2nd, that even if it had been an offence precisely similar, except that it was anterior, it would not have been admissible; but Wightman, J., did not concur in this latter point.

(w) *R. v. Williams*, E. 12, W., an indictment against Roger Williams for keeping 400 barrels of gunpowder near the town of Bradford, and he was convicted. And in *R. v. Taylor*, 15 Geo. 2, the Court granted an information against the defendant for a nuisance, on affidavits of his keeping great quantities of gunpowder near Maldon in Surrey, to the endangering of the church and houses where he lived. 2 Str. 1167. See *R. v. Lister*, *infra*. Burn's Just. tit. *Gunpowder*, where it is said, 'or rather it should have been expressed to the endangering of the lives of His Majesty's subjects.'

AMERICAN NOTE.

¹ It is said in an American case that merely inheriting a public nuisance is not indictable. *Bruce v. S.*, 87 Ind. 450; *Crocker v. S.*, 49 Ark. 60.

gerous, ignitable, and explosive fluid, called wood naphtha, and unlawfully did keep in the said warehouse, and near to the said streets, highways, and houses the said fluid in such large, excessive and dangerous quantities, whereby the Queen's subjects passing along the said streets and highways and residing in the said houses were in great danger of their lives and property, and were kept in great alarm and terror; it was held that the count was good; for though the count did not state that any noxious effluvia issued from the naphtha, or that the air was corrupted by it, or that any bodily harm was done by it to any one; yet to deposit and keep such a substance in such quantities in a warehouse so situate, to the danger of the lives and property of the Queen's subjects, is an indictable offence. The substance must be of such a nature, and kept in such large quantities and under such local circumstances, as to create real danger to life and property. The well founded apprehension of danger, which would alarm men of steady nerves and reasonable courage, passing through the street in which the house stands, or residing in adjoining houses, is enough to show that something has been done which the law ought to prevent by pronouncing it a misdemeanor. (x)

The evidence on the trial of the above count was, that the defendants kept and stored large quantities of wood naphtha and rectified spirits of wine in a warehouse in the City of London; the quantities stored were from 4,000 to 5,000 gallons of naphtha, and from 40,000 to 50,000 gallons of spirits of wine. The two were mixed together upon the premises. For this purpose there were two large vats erected; each of them capable of holding 2,000 gallons of the mixture. The vats were covered over entirely at the top, except an aperture in the centre of the cover, in which was fixed a hopper, with a sliding panel of wood. When it was necessary to mix, the spirits of wine first and the naphtha afterwards were poured through the hopper into the vat below, where, by their chemical action upon each other, they became intermixed, and were drawn off at the bottom by a cock, and carried away for the purposes of commerce. The naphtha was kept in the warehouse in carboys holding twelve gallons each, and carefully stocked till required for the purpose of being thus mixed. It was a product of the distillation of wood, and was very inflammable, more so than spirits, or even gunpowder itself, passing into vapour on the application of a heat of 140° Fahrenheit, and, if inflamed, water could not put out the fire arising from it, and there was no dispute that practically a fire arising and communicating with the quantity kept upon these premises could not be quenched, and would produce very disastrous consequences to the neighbourhood; but it was the practice in the warehouse never to allow any candles or fire or gas-light to enter therein, and so long as that continued, the storing of the naphtha and the spirits could not produce danger; but it was contended on the part of the Crown that to keep articles so liable to accident and so dangerous in the result, if an accident happened, to a populous neighbourhood, was a public nuisance, as fire might incautiously be introduced, or a fire arising in an adjoining house might communicate therewith, and that the existence of such a manufactory, therefore, was a just ground

(x) *R. v. Lister*, D. & B. C. C. 209, 28 L. J. M. C. 196.

for alarm to the surrounding neighbourhood; and upon a case reserved upon the point, whether, when the manufacture, as carried on (which was carefully) produced in the opinion of the scientific men no danger, its liability to danger *ab extra* made it a public nuisance, it was held that it did. The supposed safety from within depended on the care of the defendant's servants in not allowing any candles, fire, or gas-light to enter the warehouse, and it was only so long as this care continued, that the naphtha could not produce danger; but it was said that the law takes notice that occasional carelessness may be reckoned upon, and forbids that to be done which, on the recurrence of carelessness, will in all probability prove destructive to life and property. As to the question whether when such a manufacture is carried on so carefully as in the opinion of scientific men to produce no danger, its liability to danger *ab extra* makes it a public nuisance; there is no doubt that its liability to danger *ab extra* may make it a public nuisance. Upon the trial of such indictments it is a question of fact for the jury whether the keeping and depositing, or the manufacturing of such substances, really does create danger to life and property as alleged; and this must be a question of degree depending upon the circumstances of each particular case. And in this case the jury were properly directed that if the depositing and keeping of the naphtha in the manner described, coupled with its liability to ignition *ab extra*, created danger to life and property to the degree alleged, they might find a verdict of guilty. (y)

Negligently blasting stone in a quarry and thereby projecting large pieces of stone, so as to endanger the safety of persons in houses and on the highways adjoining the quarry, is a misdemeanor indictable at common law. (z)

So also to keep such a large quantity of materials for making fire-works in a building near a street and dwelling-houses as is calculated to endanger the life of the persons passing by and living there, is a common nuisance. (a)

It appears, that persons putting on board a ship an article of a combustible and dangerous nature, without giving due notice of its contents, so as to enable the master to use proper precautions in the stowing of it, will be guilty of a misdemeanor. The case did not come before the Court of King's Bench directly upon its criminal nature: but that Court, in adverting to the conduct imputed to the defendants, declared it to be criminal; and said, 'in order to make the putting on board *wrongful* the defendants must be cognisant of the dangerous quality of the article put on board; and if, being so they yet gave no notice, considering the probable danger thereby occasioned to the lives of those on board, it amounts to a species of delinquency in the persons concerned in so putting such dangerous article on board, for which they are criminally liable, and punishable as for a misdemeanor at least.' (b)

(y) *R. v. Lister*, *supra*. Pollock, C. B., agreed as to the point of law with the other judges; but thought that the defendants were improperly convicted upon evidence of a dangerous use of the article in mixing it with another article to make a very combustible material.

(z) *R. v. Mutters*, 34 L. J. M. C. 22, 10 Cox, C. C. 6. See *Scott v. Frith*, 4 F. & F. 349.

(a) See *R. v. Bennett*, Bell, C. C. 1, Vol. iii. *Manslaughter*.

(b) *Williams v. The East India Company*, 3 East, 192, 201. See *Merchant*

In 38 Vict. c. 17, the Explosives Act, 1875, are contained many provisions with respect to manufacturing, keeping, selling, carrying, and importing gunpowder, nitro-glycerine, and other explosive substances. (c) The following provisions may here be noticed:—

Sec. 78. 'Any person who is found committing any act for which he is liable to a penalty under this Act, and which tends to cause explosion or fire in or about any factory, magazine, store, railway, canal, harbour, or wharf, or any carriage, ship, or boat, may be apprehended without a warrant by a constable, or an officer of the local authority, or by the occupier of or the agent or servant of or other person authorized by the occupier of such factory, magazine, store, or wharf, or by any agent or servant of or other person authorized by the railway or canal company or harbour authority, and be removed from the place at which he is arrested, and conveyed as soon as conveniently may be before a court of summary jurisdiction.' (d)

Sec. 87. 'The occupier or other defendant, when charged in respect of any offence by another person, may, if he think fit, be sworn and examined as an ordinary witness in the case.'

Sec. 89. 'Where any explosive, or ingredient of an explosive, is alleged to be liable under this Act to be forfeited, any indictment, information, or complaint may be laid against the owner of such explosive or ingredient, for the purpose only of enforcing such forfeiture, and where the owner is unknown, or cannot be found, a court may cause a notice to be advertised, stating that unless cause is shown to the contrary at the time and place named in the notice, such explosive will be forfeited, and at such time and place the court after hearing the owner or any person on his behalf (who may be present), may order all or any part of such explosive or ingredient to be forfeited.' (e)

Sec. 90. 'For all the purposes of this Act, (1.) Any harbour, tidal water (f) or inland water (f) which runs between or abuts on or forms the boundary of the jurisdiction of two or more courts shall be deemed to be wholly within the jurisdiction of each of such courts; and (2.) Any tidal water not included in the foregoing descriptions, and within the territorial jurisdiction of Her Majesty, and adjacent to or surrounding any part of the shore of the United Kingdom, and any pier, jetty, mole, or work extending into the same, shall be deemed to form part of the shore to which such water or part of the sea is adjacent, or which it surrounds.'

Sec. 91. 'Every offence under this Act may be prosecuted, and every penalty under this Act may be recovered, and all explosives

Shipping Act 1878, s. 27; 38 Vict. c. 17, s. 42, and 18 & 19 Vict. c. 119, s. 29.

(c) This Act, with certain modifications, applies to Scotland and Ireland. As to petroleum, &c., see 31 & 32 Vict. c. 56.

(d) The expression 'Summary Jurisdiction Acts,' means the 11 & 12 Vict. c. 43, and any Acts amending the same. The expression 'Court of Summary Jurisdiction,' means any justice or justices of the peace, or magistrate, to whom jurisdiction

is given by the Summary Jurisdiction Acts, or any Acts therein referred to, s. 107.

(e) S. 89 is made applicable to offences under the Explosive Substances Act 1883. See 46 Vict. c. 3, s. 8.

(f) By s. 107, the expression 'tidal water' means any part of the sea or of a river within the ebb and flow of the tides at ordinary spring tides. The expression 'inland water' means any canal, river, navigation, lake, or water which is not tidal water.

and ingredients liable to be forfeited under this Act may be forfeited either on indictment or before a court of summary jurisdiction, in manner directed by the Summary Jurisdiction Acts. Provided that the penalty imposed by a court of summary jurisdiction shall not exceed one hundred pounds exclusive of costs, and exclusive of any forfeiture or penalty in lieu of forfeiture, and the term of imprisonment imposed by any such court shall not exceed one month.'

Sec. 92. 'Where a person is accused before a court of summary jurisdiction of any offence under this Act, the penalty for which offence as assigned by this Act, exclusive of forfeiture, exceeds one hundred pounds, the accused may, on appearing before the court of summary jurisdiction, declare that he objects to being tried for such offence by a court of summary jurisdiction, and thereupon the court of summary jurisdiction may deal with the case in all respects as if the accused were charged with an indictable offence and not an offence punishable on summary conviction, and the offence may be prosecuted on indictment accordingly.'

Sec. 96 relates to the application of penalties and the disposal of forfeitures.

Sec. 102. 'This Act shall not, save as is herein expressly provided, exempt any person from any action or suit in respect of any nuisance, tort, or otherwise, which might, but for the provisions of this Act, have been brought against him.

This Act shall not exempt any person from any indictment or other proceeding for a nuisance, or for an offence which is indictable at common law or by any Act of Parliament other than this Act, so that no person be punished twice for the same offence. When proceedings are taken before any Court against any person in respect of any offence under this Act, which is also an offence indictable at common law or by some Act of Parliament other than this Act, the Court may direct that, instead of such proceedings being continued, proceedings shall be taken for indicting such person at common law or under some Act of Parliament other than this Act.

A continuing certificate granted under this Act shall not make lawful any factory, magazine, or store, or any part thereof, which immediately before the passing of this Act was unlawful.'

Sec. 103. 'All powers given by this Act shall be deemed to be in addition to and not in derogation of any other powers conferred on any local authority by Act of Parliament, but the Secretary of State may, on the application of any local authority, or of any council of a borough, or any urban sanitary authority, or on the application of any persons making, keeping, importing, exporting, or selling any explosive within the jurisdiction of any local authority, council, or urban sanitary authority, after notice to such authority, make an order for repealing, altering, or amending all or any of the provisions of any Act of Parliament, charter, or custom, respecting the manufacture, keeping, conveyance, importation, exportation, or sale of an explosive, or the powers of such council or authority for regulating the same, or otherwise in relation to an explosive.' The order is of no force unless confirmed by Parliament. (s. 103.)

An indictment charged the defendant with keeping certain enclosed lands, near to the King's highway and to certain houses,

for the purpose of persons frequenting such grounds, and meeting therein to practise rifle shooting, and to shoot at pigeons with guns, and that he did unlawfully cause divers persons to meet there for that purpose, and did unlawfully suffer and cause a great number of idle and disorderly persons armed with guns to assemble in the streets and highways and other places near the said premises, discharging firearms and making a great noise and disturbance, by means whereof the King's subjects were disturbed and put in peril: the defendant had converted some land, about 100 feet from a public road, into a shooting ground, where persons came to practise with rifles, and to shoot at pigeons; and as the pigeons which were fired at often escaped, it was the custom for idle persons to collect outside the grounds, and in the neighbouring fields to shoot at the birds as they strayed, by which a great noise and disturbance was created; it was objected that the defendant was not responsible, as he neither committed the nuisance in his own person, nor was it his object to induce others to commit it; nor was it a necessary and inevitable consequence of any act of his, being done by persons beyond his control: and those persons being themselves amenable to punishment for it; but it was held that the evidence supported the allegation that the defendant caused such persons to assemble, and that the defendant was liable to be indicted for a nuisance; for if a person collects together a crowd of people to the annoyance of his neighbours, that is a nuisance for which he is answerable; and although it may not be his object to create a nuisance, yet if it be the probable consequence of his act, he is answerable as if it were his actual object: if the experience of mankind must lead any one to expect the result, he will be answerable for it. (g)

All *disorderly inns* or *ale-houses*, *bawdy-houses*, *gaming-houses*, *play-houses*, unlicensed or improperly conducted, and the like, are public nuisances, and therefore may be indicted. (h)¹

The keeper of an *inn* may, by the common law, be indicted and fined as being guilty of a public nuisance, if he usually harbour thieves or persons of scandalous reputation, or suffer frequent disorders in his house. (i) And it seems that if one who keeps a common inn refuse either to receive a traveller as a guest into his house, or to find him victuals or lodging, upon his tendering him a reasonable price for the same, (j) he is not only liable to render damages to the party in an action, but may also be indicted. (k) But a traveller is not entitled to select a particular apartment, or to insist upon occupying a bedroom for the purpose of sitting up all night, if the inn-

(g) *R. v. Moore*, 3 B. & Ad. 184.

(h) See 4 Black. C. 167, *post*, p. 742.

(i) 1 Hawk. P. C. c. 78, s. 1. Bac.
Abr. tit. *Inns*, &c. (A.), (C.) 2. See 34 &
35 Vict. c. 112, s. 10, noticed in Appendix.

(j) 10 Hen. 7, 8; 39 Hen. 6, 18, 19.

See next note.

(k) 1 Hawk. P. C. c. 78, s. 2.

AMERICAN NOTE.

¹ See *Smith v. Comm.*, 6 B. Mon. 22. In America it has been held to be an indictable offence so to conduct a house (whether licensed or not) as to draw disorderly crowds and stimulate them by drink

to make a disturbance. *Bishop*, i. ss. 1113, 1115, 1118, and even if the disturbances are done altogether outside the house if the proprietor ought to have known they were likely to follow from his conduct he is indictable.

keeper offers to furnish him with a proper room for that purpose. (l) Attached to the defendant's hotel and under the same roof was a bar entered by a separate door. The prosecutor who lived near at hand went into the bar with a dog, and was refused refreshment. He had been told by the defendant not to bring his dog as it was an annoyance to his guests. It was held that the defendant could not be convicted; first, because the refreshment bar was not an inn; secondly, because the prosecutor was not a traveller; and thirdly, because the defendant had reasonable grounds for his refusal. (m) It is no defence to an indictment for not receiving a traveller that he did not tender a reasonable sum for his entertainment, if no objection be made on that ground: nor that the guest was travelling on a Sunday; nor that it was at a late hour of the night after the innkeeper and his family were gone to bed; for an innkeeper is bound to admit a traveller at whatever hour of the night he may arrive; nor that the guest refused to tell his name and abode, as the innkeeper has no right to insist upon knowing them; but if the guest be drunk or behave in an indecent or improper manner, the innkeeper is not bound to receive him. (n) If an innkeeper use the trade of an alehouse, as many innkeepers do, the inn will be within the statutes made concerning ale and beer-houses. (o)

The keeping a *bawdy-house* (p),² is a common nuisance, as it endan-

(l) *Fell v. Knight*, 8 M. & W. 269.

(m) *R. v. Rymer*, 2 Q. B. D. 136.

(n) *R. v. Ivens*, 7 C. & P. 213. Coleridge, J. In the preceding case, Lord Abinger, C. B., said, notwithstanding *R. v. Ivens*, 'I am inclined to think that the declaration is bad for want of an allegation of a tender of the amount to which the innkeeper would be reasonably entitled for the entertainment furnished to his guest; it is not sufficient for the plaintiff to allege that he was willing to pay; he should state further that he offered to pay. There may be cases where a tender may be dispensed with; as, for instance, where a man shuts up his doors or windows so that no tender can be made; but I rather think these facts ought to be stated in the indictment or declaration; and I have, therefore, some doubt as to the complete correctness of the judgment in the case cited.' In 39 Hen. 6, 19, Danby said an innkeeper is not bound to give provender to the horse of his guest until he is paid in the hand; for the law does not compel him to put trust in his guest for the payment, — which fully supports Lord Abinger's opinion. See *Hawthorn v. Hammond*, 1 C. & K. 404, where the plaintiff had knocked at an inn door for some minutes in the night without obtaining admission; and Parke, B., left it to the jury whether the defendant heard the noise,

and if so, whether she ought to have concluded that the person knocking required to be admitted as a guest or was a drunken person, who had come there to make a disturbance.¹

(o) Burn's Just. tit. *Alehouses*, where those statutes are collected. Before the 5 & 6 Edw. 6, c. 25 (repealed, 9 Geo. 4, c. 61), it was lawful for any one to keep an *ale-house* without licence, for it was a means of livelihood which any one was free to follow. But if it was so kept as to be disorderly, it was indictable as a nuisance. 1 Salk. 45. 1 Hawk. P. C. c. 78, s. 52, *in marg.* See Dalt. c. 56, Blackerby, 170, Burn's Just. tit. *Alehouses*, 1 Bac. Abr. tit. *Inns*, *dec.* (A.).

(p) By 34 & 35 Vict. c. 112 (The Prevention of Crimes Act 1871), s. 11, 'Every person who occupies or keeps a brothel, and knowingly lodges, or knowingly harbours, thieves, or reputed thieves, or knowingly permits, or knowingly suffers them to meet or assemble therein, or knowingly allows the deposit of goods therein, having reasonable cause for believing them to be stolen, shall be guilty of an offence against this Act, and be liable to a penalty not exceeding ten pounds, and, in default of payment, to be imprisoned for a period not exceeding four months, with or without hard labour, and the Court before which he

AMERICAN NOTES.

¹ The guest's right to remain or to be received depends upon his good behaviour. *S. v. Steel*, 106 N. C. 766; 19 Am. St. Rep. 573; *C. v. Power*, 7 Met. 596; 41 Am. D. 465.

² See *S. v. Wright*, 6 Jones (Law), 25 *S. v. Powers*, 36 Conn. 77; *Brockway v. P.*, 2 Hill, 558.

gers the public peace by drawing together dissolute and debauched persons; and also has an apparent tendency to corrupt the manners of both sexes, by such an open profession of lewdness. (g) And it has been adjudged that this is an offence of which a feme covert may be guilty as well as if she were sole, and that she, together with her husband, may be convicted of it; for the keeping the house does not necessarily import property, but may signify that share of government which the wife has in a family as well as the husband; and in this she is presumed to have a considerable part, as those matters are usually managed by the intrigues of her sex. (r) If a person be only a lodger, and have but a single room, yet if she make use of it to accommodate people in the way of a bawdy-house, it will be a keeping of a bawdy-house as much as if she had a whole house. (s) But an indictment cannot be maintained against a person for being a common bawd, and procuring men and women to meet together to commit fornication: the indictment should be for keeping a bawdy-house. (t) For the bare solicitation of chastity is not indictable, but cognizable only in the Ecclesiastical Courts. (u)

All common *gaming-houses*¹ are nuisances in the eye of the law, being detrimental to the public, as they promote cheating and other corrupt practices; and incite to idleness and avaricious ways of gaining property, great numbers whose time might otherwise be employed for the good of the community. (v) And the keeping a common gaming-house, and for lucre and gain² unlawfully causing and procuring divers idle and evil-disposed persons to frequent and come to play together at a game called '*rouge et noir*,' and permitting the said idle and evil-disposed persons to remain playing at the same game for divers large and excessive sums of money, is an indictable offence at common law. (w) It has also been adjudged, that it is an offence for which a feme covert may be indicted: for, as she may be concerned in acts of bawdry, as has been observed above, so she may be active in promoting gaming, and furnishing the guests with conveniences for that purpose. (x) As an indictment for keeping a gaming-house is an indictment for a public nuisance, and not for any matter in the

is brought, may, if it think fit, in addition to, or in lieu of any penalty, require him to enter into recognizances, with or without sureties, as in this act described.'

(g) 3 Inst. c. 98, p. 204. 1 Hawk. P. C. c. 74, and c. 75, s. 6. Bac. Abr. tit. *Nuisances* (A.). Burn's Just. tit. *Lewdness and Nuisance*.

(r) R. v. Williams, 1 Salk. 383, *ante*, 152.

(s) R. v. Pierson, 2 Lord Raym. 1197; 1 Salk. 382.

(t) Id. *ibid*.

(u) 1 Hawk. P. C. c. 74. Burn's Just. tit. *Lewdness*.

(v) Bac. Abr. tit. *Nuisances* (A.). 1 Hawk. P. C. c. 76, s. 6. R. v. Dixon, 10 Mod. 336. See 2 & 3 Vict. c. 47, s. 48.

(w) R. v. Rogier, 1 B. & C. 272. 2 D. & R. 431. And Holroyd, J., said, that in his opinion it would have been sufficient merely to have alleged, that the defendants kept a common gaming-house. And see R. v. Taylor, 3 B. & C. 502.

(x) R. v. Dixon, Trin. 2 Geo. 1. Bac. Abr. tit. *Nuisances* (A.). 10 Mod. 335. 1 Hawk. P. C. c. 92, s. 30, and see *ante*, p. 152.

AMERICAN NOTES.

¹ As to bowling alleys in America, see C. v. Goding, 3 Metc. 130; Bloomhuff v. S., 8 Blackf. 205; S. v. Hale, 3 Vroom, 158. As to gaming houses see S. v. Door, Charl.

1; P. v. Jackson, 3 Denio, 101. Bishop i. s. 1136.

² In America it would seem that lucre need not be the motive of the keeping. See Bishop i. ss. 1086, 1112, 1137.

nature of a private injury, if the prosecutor forbears bringing the case to trial, another person may proceed with the indictment. (y) There are certain penalties imposed by statutes upon the offence of keeping a common gaming-house; (z) and by 3 Geo. 4, c. 114, hard labour may be added to any imprisonment which the Court may award. (a)

An indictment against a defendant for that he did keep a common, ill-governed, and disorderly house, and in the said house for his lucre, &c., certain persons of ill-name, &c., to frequent and come together, did cause and procure, and the said persons in the said house to remain *fighting of cocks, boxing, playing at cudgels, and misbehaving themselves*, did permit, has been held to be good. (b) And it seems that the keeping of a *cockpit* is not only an indictable offence at common law, but that a cockpit is considered as a gaming-house within the 33 Hen. 8, c. 9, s. 11 (c) which imposes a penalty of forty shillings per day upon such houses; and therefore, on a conviction on an indictment at common law, the Court will measure the fine by inflicting forty shillings for each day, according to the number of days such cockpit was kept open. (d)

It seems to be the better opinion that *playhouses*, having been originally instituted with a laudable design of recommending virtue to the imitation of the people, and exposing vice and folly, are not nuisances in their own nature, but may only become such by accident; as where they draw together such numbers of coaches or people, &c., as prove generally inconvenient to the places adjacent; or, when they pervert their original institution by recommending vicious and loose characters, under beautiful colours, to the imitation of the people, and make a jest of things commendable, serious, and useful. (e)

(y) *R. v. Wood*, 3 B. & Ad. 657. See *R. v. Oldfield*, *ibid.* note (a). *R. v. Fielden*, *ibid.*; *R. v. Constable*, *ibid.*

(z) 1 Hawk. P. C. c. 92, s. 14, *et seq.* And see 25 Geo. 2, c. 36, s. 5; 42 Geo. 3, c. 119. And see *post*, p. 754, as to Lotteries and Little-goes.

(a) See the section, *ante*, p. 81.

(b) *R. v. Higginson*, 2 Burr. 1233.

(c) This statute is partly repealed by the 8 & 9 Vict. c. 109, but it is not easy to say how much. See 26 & 27 Vict. c. 125.

(d) *R. v. Howell*, 3 Keb. 510. 1 Hawk. P. C. c. 92, s. 29. See 2 & 3 Vict. c. 47, s. 47.

(e) Bac. Abr. tit. *Nuisances* (A.). 1 Hawk. P. C. c. 75, s. 7. And as to the performance of an obscene play, see *ante*, p. 618.

See also the 2 & 3 Vict. c. 47, s. 46, which gives power to enter unlicensed theatres, and subjects persons letting houses, &c., for the purpose of being used as unlicensed theatres to a penalty of not more than £20, or two months' imprisonment; and subjects persons performing or being therein without lawful excuse, to a penalty of 40s.: and a conviction under the Act is not to exempt the owner, keeper, or manager of any such house from any penalty for keeping a disorderly house, or for the nuisance thereby occasioned. The Act extends

to the Metropolitan police districts. By sec. 3 of 25 Geo. 2, c. 36, the Act is not to extend to the theatres in Drury Lane and Covent Garden, or the King's theatre in the Haymarket; nor to performances and public entertainments carried on under letters patent, or licence of the Crown, or licence of the Lord Chamberlain. Theatres are now put under salutary regulations by the 6 & 7 Vict. c. 68. And places of public entertainment in the neighbourhood of London, if not properly licensed, are to be deemed *disorderly houses* by the 25 Geo. 2, c. 36, made perpetual by the 28 Geo. 2, c. 19, which, reciting the multitude of places of entertainment for the lower sort of people as a great cause of thefts and robberies, enacts, 'that any house, room, garden, or other place, kept for public dancing, music, or other public entertainment of the like kind in the cities of London and Westminster, or within twenty miles thereof,' without a licence from the last preceding Michaelmas quarter sessions, under the hands and seals of four of the justices, 'shall be deemed a disorderly house or place.' The Act then particularizes the mode of granting the licence, makes it lawful for a constable or other person, authorized by warrant of a justice, to enter such house or place, and to seize every person found therein; and makes every person

It seems also to be the better opinion, that all *common stages for rope-dancers, &c.*, are nuisances, not only because they are great temptations to idleness, but also because they are apt to draw together numbers of disorderly persons, which cannot but be very inconvenient to the neighbourhood. (f)

By the 42 & 43 Vict., ch. 18, s. 6, 'Any person who shall be the owner or lessee in possession of any open or enclosed land or place for which a licence for horse-racing is required under this Act' [i. e. within a radius of ten miles from Charing Cross], and upon which, any horse race shall be held after Mar. 25, 1880, without such licence having been obtained, shall be guilty of a misdemeanor, and on conviction thereof shall be punishable for every such offence with fine or imprisonment at the discretion of the court, such fine not to be less than £5 or more than £25, and such imprisonment not to be less than one month or more than three months.'

The proceedings in respect of prosecutions against persons keeping bawdy-houses,¹ gaming-houses, or other disorderly houses, are facilitated

keeping such house, &c., without a licence, liable to a penalty of £100, and otherwise punishable as the law directs in cases of disorderly houses. In the first place, the house or room must be kept with the defendant's knowledge; secondly, it must be kept for the purposes prohibited by the statute; there must be something like an *habitual* keeping of it, which however need not be at stated intervals; thirdly, it must be public, to which all persons have a right to go, whether gratuitously or on payment of money, no matter whether paid to the defendant or not, if he knows of the payment. Per Parke, B., *Marks v. Benjamin*, 5 M. & W. 564. Where, therefore, the defendant was a publican, and music, dancing, and masquerades had occasionally been held at his house, where, from its vicinity to the Great Synagogue, Jewish marriages were frequently celebrated, but no money was taken at the door or elsewhere by the defendant for admission, and the rooms were let to a dancing-master, and to other persons, who sold tickets and received money for admission at the door; but there was no direct evidence that the defendant knew of this practice; it was held, that there was evidence for the jury of keeping the house for the purposes mentioned in the Act. *Marks v. Benjamin*, *supra*. A mere temporary or occasional use of a room for music and dancing is not a keeping it within this Act, but the room need not be kept exclusively for those purposes, nor need money be taken at the door. Where, therefore, the defendant kept a public house, and on repeated occasions, during a space of three or four months, the tap-room was frequented at night by numbers of sailors, soldiers, boys, and prostitutes, who danced there to a

violin played by a person on an elevated platform, but no money was taken for admission, it was held that the case was within the Act. *Gregory v. Tuffs*, 6 C. & P. 271; 4 Tyrw. 820; *Gregory v. Tavernor*, 6 C. & P. 280. On an indictment for unlawfully keeping a room for public music and dancing within twenty miles of London and Westminster without a licence, it was proved that nightly entertainments were there given when music and dancing took place, the public being admitted on paying money at the door. There were often from 200 to 300 visitors, who conducted themselves in an orderly manner, and no impropriety of conduct was permitted or practised: the Recorder held, that this room required a licence under the Act, and that, after this proof, it lay on the defendant to prove that it was licensed. *R. v. Wolf*, 3 Cox, C. C. 578. The defendant kept a skating rink in which in the evening dance music was played during the skating. It was held that he might be convicted under the Act of keeping a place for public entertainment of a like kind to music and dancing without a licence. *R. v. Tucker*, 2 Q. B. D. 417. And so where the owner of a building allowed it gratuitously to be used for the performance of stage plays, to which the public were admitted on payment, for the benefit of a charity, he was held to be rightly convicted of keeping a house for the public performance of stage plays without a licence. *Shelley v. Bethell*, 12 Q. B. D. 11.

(f) Bac. Abr. tit. *Nuisances* (A.). 1 Hawk. P. C. c. 75, s. 6. And see *ante*, p. 555 n.), as to stage players being indicted for a riot and unlawful assembly.

AMERICAN NOTE.

¹ Although a bawdy-house may be the wife's separate property, yet if the husband lives with her, knowing what takes place, he

may be convicted of keeping the house. See Bishop, vol. i. s. 1084.

by the 25 Geo. 2, c. 36, by which it is enacted, that if two inhabitants of any parish or place, paying scot and lot, give notice in writing to the constable, of any person keeping a bawdy-house, gaming-house, or any other disorderly house, in such parish or place, the constable shall go with such inhabitants to a justice, and shall, upon such inhabitants making oath before the justice that they believe the contents of the notice to be true, and entering into a recognizance in twenty pounds each to give material evidence against the person for such offence, enter into a recognizance in the sum of thirty pounds to prosecute with effect at the next sessions or assizes as to the justice shall seem meet. And provision is also made for the payment by the overseers of the charges of prosecution to the constable, and ten pounds on conviction to each of the two inhabitants. (*g*) The person keeping such bawdy-house, &c., is also to be bound over to appear at the sessions or assizes. (*h*)

Sec. 8, reciting that by reason of the many subtile and crafty contrivances of persons keeping bawdy-houses, &c., it is difficult to prove who is the real owner or keeper, enacts, 'that any person who shall appear, act, or behave as master or mistress, or as the person having the care, government, or management, of any bawdy-house, gaming-house, or other disorderly house, shall be deemed and taken to be the keeper thereof, and shall be liable to be prosecuted and punished as such, notwithstanding he or she shall not, in fact, be the real owner or keeper thereof.' By sec. 9, any person may give evidence upon such prosecution, though an inhabitant of the parish or place, and though he may have entered into the before-mentioned recognizance. By sec. 10, no indictment shall be removed by *certiorari*, but shall be tried at the same sessions or assizes where it shall have been preferred (unless the Court shall think proper, upon cause shown, to adjourn the same), notwithstanding any such writ or allowance. This clause does not restrain the Crown from removing the indictment by *certiorari*; there being nothing in the Act to show that the legislature intended that the Crown should be bound by it. (*i*) And where an indictment for keeping a disorderly house has been removed from the sessions into the Central Criminal Court under the 4 & 5 Will. 4, c. 36, s. 16, either by the prosecutor or defendant, the opposite party may remove it into the Court of Queen's Bench. (*j*) But the power of that Court to grant a *certiorari* at the defendant's instance to remove an indictment for keeping such a house found at the Middlesex Sessions, is taken away by the 25 Geo. 2, c. 36, s. 10, whether the prosecution be under that Act or in the ordinary course. (*k*)

It is said that any number of persons may be included in the same indictment for keeping different disorderly houses, (*l*) stating that they 'severally' kept, &c., such houses; (*m*) but it is usual in practice to

(*g*) Sec. 4. See *Burgess v. Boetefeur*, 7 M. & G. 481, an action on this section.

(*h*) See the 58 Geo. 3, c. 70, s. 7, by which a copy of the notice served on the constable is also to be served on one of the overseers, and the overseers may enter into a recognizance, and prosecute instead of the constable.

(*i*) *R. v. Davies*, 5 T. & R. 626.

(*j*) *R. v. Brier*, 14 Q. B. 568.

(*k*) *R. v. Sanders*, 9 Q. B. 235.

(*l*) As to an indictment for keeping a disorderly house, or gambling-house, not being preferred without previous authorization, see *ante*, p. 2.

(*m*) 2 Hale, 174, where it is said, 'It is common experience at this day that twenty persons may be indicted for keeping disorderly houses or bawdy-houses; and they are daily convicted upon such indictments,

indict the keeper of each house separately. It seems that in the indictment it is necessary to make a particular statement of the offence, which is the *keeping* of the house. (*n*) But particular facts need not be stated; and though the charge is thus general, yet at the trial evidence may be given of particular facts, and of the particular time of doing them. (*o*) It is not necessary to prove who frequents the house, for that may be impossible: but if any unknown persons are proved to be there behaving disorderly, it is sufficient to support the indictment. (*p*)

A conviction on an indictment for keeping a disorderly house will be supported, although there is no evidence of any indecency or disorderly conduct being perceptible from the exterior of the house. (*q*)

The 8 & 9 Vict. c. 109, s. 2, declares and enacts that, 'in default of other evidence proving any house or place to be a common gaming-house, it shall be sufficient, in support of the allegation in any indictment or information that any house or place is a common gaming-house, to prove that such house or place is kept or used for playing therein at any unlawful game, and that a bank is kept there by one or more of the players exclusively of the others, or that the chances of any game played therein are not alike favourable to all the players, including among the players the banker or other person by whom the game is managed, or against whom the other players stake, play, or bet; and every such house or place shall be deemed a common gaming-house such as is contrary to law, and forbidden to be kept by the said Act of King Henry the Eighth, and by all other Acts containing any provision against unlawful games or gaming-houses.' (*r*)

By the 16 & 17 Vict. c. 119, s. 1, 'No house, office, room, or other place (*s*)

for the word *separaliter* makes them several indictments.' And in *R. v. Kingston* and others, 8 East, 41, it was held that it is no objection on *demurrer* that several different defendants are charged in different counts of an indictment for offences of the same nature; though it may be a ground for application to the discretion of the Court to quash the indictment.

(*n*) By Buller, J., in *J'Anson v. Stuart*, 1 T. R. 754.

(*o*) By Lord Hardwicke, in *Clarke v. Periam*, 2 Atk. 339.

(*p*) *J'Anson v. Stuart*, 1 T. R. 754, by Buller, J.

(*q*) *R. v. Rice*, 35 L. J. M. C. 93.

(*r*) The Act also contains provisions for searching houses where gaming is suspected to be carried on, and for the summary conviction of owners, keepers, and managers of gaming-houses, &c., &c.

(*s*) As to the meaning of the words 'house, office, room, or other place' in this enactment, see *Doggett v. Catterns*, 17 C. B. N. S. 669; *Shaw v. Morley*, L. R. 3 Ex. 137; 37 L. J. M. C. 105; *Bows v. Fenwick*, 43 L. J. M. C. 107. Police constables entered, at about half-past two in the afternoon, an enclosed place called Borough Park Ground, occupied by the appellant.

People were admitted to this ground after paying money and receiving tickets. Among those present inside the grounds were two betting-book makers, with books in their hand. These two men were shouting out, 'Twenty to two on the match.' The match about to take place was a pigeon-shooting match for £10 a side. Two men came up to one of the book-makers, and one of them gave to one of the men with the book a sovereign. As this man was getting some change back the other man said, 'Hold on, that will do for both of us.' The book-maker took a ticket out of his book, gave it to one of the men, and said, 'That's on Wooler' (one of the parties to the match). Soon after this Wooler was going to shoot at a pigeon, when another man shouted out, 'Four to one he kills!' This bet was taken, and the man said, 'Three to one he kills.' The appellant could hear what the book-makers and other persons said. Held, that there was evidence; first, that the ground in question was a 'place' within the meaning of the Act; secondly, that although used for pigeon-shooting, it was also used for the purposes of betting, and that the magistrates were therefore justified in convicting the appellant under section 3 of the Act. *Eastwood v. Millar*, L. R. 9 Q. B.

shall be opened, kept, or used (*t*) for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management or in any manner conducting the business thereof, betting with persons resorting thereto (*tt*); or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race, (*u*) or other race, fight, game, sport, or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid; and every house, office, room, or other place, opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance (*v*) and contrary to law.'

Sec. 2. 'Every house, room, office, or place opened, kept, or used, for the purposes aforesaid, or any of them, shall be taken and deemed to be a common gaming-house within the meaning of 8 & 9 Vict. c. 109.' (*w*)

440; *et per* Lush, J. 'First, was it a place within the meaning of the Act? I can see no reason why it should not be a "place," although it is not a structure of any kind, and is exposed to the open air, and why it should not come within the meaning of the Act as much as an ordinary tenement. It is an enclosed place occupied exclusively by the appellant, and is, therefore, quite within the meaning of the Act, and the mischief which it was intended to cure. The extent of the premises cannot at all affect the question, the public being only admitted to them by the permission of the occupier, the appellant. The cases which have been cited in no way limit the construction which I have thought right to put on the Act. In *Doggett v. Catterns*, where a person was convicted for having kept a betting-table under one of the trees in Hyde Park, it could not be said that this was a place kept or used for the purpose of betting. The same may be said as to the case of *Morley v. Greenhalgh*, where the persons proceeded against resorted to a quarry for the purpose of betting, and it was held, on the authority of the previous case of *Clarke v. Hague*, that the quarry was not a place used for the purpose in question. The same remark applies to *Clarke v. Hague*, where two persons went to a bowling alley belonging to the appellant for the purpose of cock-fighting, and it was not shown that the owner or occupier had anything to do with the cock-fighting, or even knew of its existence. Here, what was done was with the knowledge and consent of the appellant, who was the sole occupier of the ground.' A movable box within the ring at a race meeting has been held to be 'a place' within s. 3 of the

Act, *Gallaway v. Maries*, 8 Q. B. D. 275; but the reserved portion of an enclosed field is not a place within either of the sections. *Snow v. Hill*, 14 Q. B. D. 588. And where the owner of a house allowed a person who made bets near it but outside the house to deposit in the house the stakes received by him, it was held that he could not be convicted for suffering the house to be used under s. 3, *Davis v. Stephenson*, 24 Q. B. D. 529; but where a book-maker and his clerk were on several days using the bar and taproom of a public house for the purpose of betting, and the keeper of the house was present and permitted such uses, he was held rightly convicted although the book-maker and clerk did not occupy any specific place in the bar or taproom. *Hornsby v. Raggett*, 1892, 1 Q. B. 20. *R. v. Preedy*, 17 Cox, 433. (*t*) As to using, see *Whitehurst v. Fisher*, 17 Cox, C. C. 70.

(*tt*) This means personally resorting and not merely sending telegrams or letters. *R. v. Brown*, 39 Sol. J. 64.

(*u*) See *R. v. Crawshaw, Bell*, C. C. 303, 30 L. J. M. C. 58.

(*v*) And is indictable as such, see *R. v. Crawshaw, supra*. As to sentence of hard labour, see 3 Geo. 4, c. 114, *ante*, p. 81.

(*w*) Sec. 3. makes the owner, occupier, &c., of a house, &c., used for the purposes mentioned in the previous sections liable to be summarily convicted. See *R. v. Cook*, 13 Q. B. D. 377. Sec. 4 makes the owner, occupier, &c., of any such house, &c., who receives any money as a deposit on any bet on condition of paying any money on the happening of any event liable to be summarily convicted. Sec. 7 imposes a penalty on persons exhibiting placards or advertising betting

The 17 & 18 Vict. c. 38, contains additional provisions for the suppression of gaming-houses, and sec. 1 imposes penalties on persons obstructing the entry of constables into suspected houses.

Sec. 2. 'Where any constable or officer authorized as aforesaid to enter any house, room, or place is wilfully prevented from or obstructed or delayed in entering the same or any part thereof, or where any external or internal door or means of access to any such house, room, or place so authorized to be entered shall be found to be fitted or provided with any bolt, bar, chain, or any means or contrivance for the purpose of preventing, delaying, or obstructing the entry into the same or any part thereof of any constable or officer authorized as aforesaid, or for giving an alarm in case of such entry, or if any such house, room, or place is found fitted or provided with any means or contrivance for unlawful gaming, or with any means or contrivance for concealing, removing, or destroying any instruments of gaming, it shall be evidence, until the contrary be made to appear, that such house, room, or place, is used as a common gaming-house within the meaning of this Act and of the former Acts relating to gaming, and that the persons found therein were unlawfully playing therein.' (x)

The proprietor and four members of the committee of a club were held to be rightly convicted under s. 4, for keeping and using the club for the purpose of unlawful gaming, but four members of the club who were playing at baccarat, though possibly liable to be indicted for unlawful gaming in a common gaming-house, (y) were not liable to conviction under this statute since they did not assist in conducting the establishment. If the club were kept for a double purpose, namely, as a social club as well as a gaming-house, it nevertheless would be a house kept for the purpose of gaming, (z) and it makes no difference that the use of the club is limited to the members, for it is not a public but a common gaming-house that is prohibited. (a)

A recorder of a borough has jurisdiction to try an indictment under the 25 Geo. 2, c. 36, s. 5, for keeping a disorderly house within the borough. (b)

The punishment for keeping a common bawdy-house, a common gambling-house, or a common ill-governed and disorderly house, is fine, or imprisonment, or both, and by the 3 Geo. 4, c. 114, hard labour in addition to such imprisonment. (c)

In general, all open lewdness¹ grossly scandalous is punishable

houses. The Acts do not apply to advertisements offering information for the purpose of bets not to be made in any house, &c. *Cox v. Andrews*, 12 Q. B. D. 126. Sec. 11 empowers justices to authorize houses to be searched; and Sec. 12 empowers commissioners of police to do the same. See 37 Vict. c. 15. As to persons playing or betting in a street, 36 & 37 Vict. c. 38, *post*, p. 754.

(x) Sec. 3 imposes a penalty on any person apprehended for giving a false name or address. Sec. 4 imposes penalties on persons keeping gaming-houses. Sec. 5 enables jus-

tices to examine on oath any persons who have been apprehended. And Sec. 6 exonerates persons so examined, who make a full discovery, from all penalties.

(y) See *post*, Gaming.

(z) See however *R. v. Cook*, 13 Q. B. D. 377.

(a) *Jenks v. Turpin*, 13 Q. B. D. 505. See *post*, Gaming.

(b) *R. v. Charles*, 1 L. & C. 90, 81 L. J. M. C. 60.

(c) See the section, *ante*, p. 81.

AMERICAN NOTE.

¹ *S. v. Avery*, 7 Conn. Rep. 267; *S. v. Rose*, 32 Mo. 560. In South Carolina openly living in adultery was held not in-

dictable at common law, *S. v. Branson & Bailey*, 149; but generally in America it would appear to be so, see *Bishop i. s. 501*.

by indictment at the common law: and it appears to be an established principle that whatever openly outrages decency, and is injurious to public morals, is a misdemeanor. (*d*) Exposing the naked dead body of a newly-born infant has been held to be indictable. (*e*)

The prisoners were convicted on an indictment which charged in the first count the keeping and exhibiting of an indecent exhibition in a certain booth for lucre or gain, the second count charged the exhibiting of the same, the third count charged the exhibition as being in a public place, and the fourth count charged the prisoners with uttering indecent language in the presence and hearing of divers persons. Objection was taken that the first and second counts were bad since they did not allege any indecency in a public place, and that the third count was not proved because the public had no right to enter the booth except on payment. To the fourth count it was objected that the mere utterance of indecent language was not an indictable offence.

The judgment of the Court (Lord Coleridge, C. J., Bramwell and Pollock, BB., Mellor and Grove, JJ.), was delivered by Lord Coleridge, C. J. 'It appears to have been proved that the two prisoners kept on Epsom Downs a booth for the purpose of showing an indecent exhibition, that they invited all persons who came within reach of their solicitations to come in and see it, and that those who paid went in and did see what was grossly indecent; we think that those facts are abundant to prove a common-law offence, and that it is well stated in the indictment.' (*f*)

Any unlawful exposure of the private parts of an individual in a public place and in the sight of divers persons is indictable.

A urinal situate in Hyde Park, was open to the public; it was near to a lodge, the window of which in a first floor commanded a view of it; the distance between the lodge and the urinal was 14 ft. 6 in.; the urinal was approached by a gate opening from the public footpath, and there was also access to it by another gate communicating with a small garden belonging to the lodge; it was held that the urinal was a public place. (*g*) Where a man indecently exposed his person upon the roof of a house, where his act could not be seen by persons passing along the highway, but where it was seen by seven persons from the back windows of another house, it was held that he was rightly convicted of exposing his person in a public place. (*h*) A passenger in a public omnibus for hire exposed his person whilst the omnibus was passing along a street, in the presence of three or four females who were passengers in the omnibus, and saw such exposure; it was held that this was an exposure in a public place. (*i*)

(*d*) 1 Hawk. P. C. c. 5, s. 4. Burn's Just. tit. *Lewdness*. 4 Black. Com. 65 (*n*). 1 East, P. C. c. 1, s. 1. See 5 Geo. 4, c. 85, s. 4, and 1 & 2 Vict. c. 38, which make persons guilty of the indecent exposure of obscene prints, pictures, wounds, deformities, &c., punishable as rogues and vagabonds.

(*e*) R. v. Clark, 15 Cox, C. C. 171.

(*f*) R. v. Saunders, 1 Q. B. D. 15, 13 Cox,

C. C. 116. The point as to indecent language does not seem to have been noticed by the Court.

(*g*) R. v. Harris, 1 L. R. C. C. 282; 40 L. J. M. C. 67.

(*h*) R. v. Thallman, L. & C. 336, 33 L. J. M. C. 58.

(*i*) R. v. Holmes, Dears. C. C. 207. On an indictment for indecent exposure in a

A French master was tried on an indictment for indecently exposing his person, and it appeared that he was seen from an opposite window by a maid-servant, but there was no evidence that any one in the street saw him, but only that persons going along the street might have seen him; Parke, B., directed the jury to consider whether the prisoner was in such a situation that the passers-by in the street could have seen him had they happened to look, and if they were of that opinion to find him guilty. (*j*)

Where an indictment for indecent exposure alleged the offence to have been committed on a certain public and common highway, it was held, on a case reserved in Ireland, that evidence that it was committed on a piece of land near the highway did not support the indictment. And a count having been amended so as to state the offence to have been committed 'on a place in view of a public highway,' and there being no evidence that any one could have seen the prisoner except one female, it was held that no offence was proved; for an exposure seen by one person only, and being capable of being seen by one person only, is not an offence at common law; but if the prisoner had been seen by one person only, and there had been evidence that others might have seen him, the case would have been different. No opinion was expressed as to the propriety of the amendment. (*k*)

Where the place in question was out of sight of the public foot-path but was a place to which persons were in the habit of going without any strict legal right so to do and without being in any way hindered, but the prisoner exposed his person to several little girls, it was held that he was rightly convicted, and a suggestion was thrown out that the offence might be indictable if committed before divers subjects of the realm even if the place be not public. (*l*)

An indictment charged that the prisoner in a certain public and open place, called Paddington churchyard, in the sight and to the view of Lydia C., did wilfully expose his private parts; the Court of Queen's Bench arrested the judgment, on the ground that the nuisance must be public. (*m*) So where an indictment charged that the prisoner in a certain public place within a certain alehouse indecently did expose his private parts in the presence of Mary A., and of divers other the liege subjects of the Queen, and the prisoner had conducted himself in an offensive manner in the public passage from the entrance door of the public-house to the bar, but not amounting to an indecent exposure, and whilst so doing several persons passed to and fro, and he then took out and exposed his private parts to Mary A., but there was no one in sight but herself at that time; it was held that, assuming the indictment to be sufficient, the averment respecting 'divers

certain room in a dwelling-house, it appeared that the prisoners had gone into a parlour in a public-house, and committed the acts alleged, and that a maid-servant had witnessed what was done through the window of another room, and had gone for assistance, and in consequence of her representations a policeman and another witness went, and they also saw sufficient to constitute the crime. The servant was not called as a witness; and the Recorder left it to the jury

whether this was a place in which such practices occurring they were likely to be witnessed by others, and there was a conviction. *R. v. Bunyan*, 1 Cox, C. C. 74. As to a railway carriage being a public place, see *Langrish v. Archer*, 10 Q. B. D. 44.

(*j*) *R. v. Rouverard*, cited in *R. v. Webb*, *infra*.

(*k*) *R. v. Farrell*, 9 Cox, C. C. 446.

(*l*) *R. v. Wellard*, 14 Q. B. D. 63.

(*m*) *R. v. Watson*, 2 Cox, C. C. 376.

others' was material, and was not proved, as the exposure was only proved to have been made in the presence of one person. (*n*)

Where an exposure was charged on a certain public common in the presence and sight of divers persons, the prisoners had committed fornication in open day on the said common; there was no evidence that it was committed within the sight of any one except the witness; it could have been seen by persons on the common, but the case did not state that there were any other persons on the common; the judges, after argument, differed in opinion, and no judgment was delivered. (*o*)

Where an indictment alleged that the two defendants in a certain open and public place called Kew Gardens, frequented by divers of the liege subjects, unlawfully did meet together for the purpose and with the intent of committing with each other openly, lewdly, and indecently, in the said public place, divers nasty, wicked, filthy, lewd, beastly, unnatural and sodomitical practices, and then unlawfully, wickedly, openly, lewdly, and indecently did commit with each other, in the sight and view of divers of the liege subjects, in the said public place passing and being, divers such practices as aforesaid, the Court of Queen's Bench arrested the judgment on the ground that the indictment did not state so distinct and specific a charge as on legal principles was sufficient. (*p*) So where a count alleged that A. in a certain public place did lay his hands on the private parts of B., with intent to stir up in his own mind and B.'s mind unnatural and sodomitical desires and inclinations, and to incite B. to the committing with A. divers unnatural and sodomitical acts, and that B. in the said public place did permit A. so to lay his hands, and was then aiding and assisting A. in the said acts, with the like intent; the count was held bad for not describing an incitement to commit a felony in proper terms. (*q*)

Bathing so near a public footway frequented by females that public exposure must occur, is a nuisance, and it is no defence that there has been an usage to bathe at that place time out of mind. (*r*)

In one case it was held to be an indictable offence for a man to undress himself on the beach and to bathe in the sea near inhabited houses, from which he might be distinctly seen; although the houses

(*n*) *R. v. Webb*, 1 Den., C. C. 338, 18 L. J. M. C. 39, 2 C. & K. 933. No notice was taken of the question whether the place was a public place. The indictment alleged the exposure 'in the presence of M. A. and of divers others,' &c., and the judges doubted whether it was not bad for not adding 'in their view,' and also whether 'divers others' was sufficient.

(*o*) *R. v. Elliot*, 1 L. & C. 103.¹

(*p*) *R. v. Rowed*, 3 Q. B. 180. The indictment was too general. It did not properly charge any distinct act.

(*q*) *R. v. Orchard*, 3 Cox, C. C. 248, Cresswell and Erle, JJ.

(*r*) *R. v. Reed*, 12 Cox, C. C. 1, per Cockburn, C. J.

AMERICAN NOTE.

¹ In America it was held sufficient to allege that the defendant 'exposed his person in public view in a public place,' the Court holding that it was unnecessary that the exposure should be actually seen by the public. It was enough if the circumstances rendered it probable that such exposure would be seen by the public. *S. v. Roper*, 1 Dev. & Bat. 208. *S. v. Millard*, 18 Vt. 574, 26 Am. D. 170. And it would appear

from several decisions that the American Courts give a wide interpretation of the words 'public place.' See Bishop, Vol. i., s. 1129, citing among other cases *P. v. Bixby*, 4 Hun, 636, where some women exposed themselves to some men in a bawdy-house, doors and shutters being closed. It would seem however that there must be an evil intention, otherwise no offence is committed. *Miller v. P.*, 5 Barb. 203; Bishop i. s. 1133.

had been recently erected, and, until their erection, it had been usual for men to bathe in great numbers at the place in question. M'Donald, C. B., ruled, that whatever place becomes the habitation of civilized men, there the laws of decency must be enforced. (s)

To show a being of unnatural and monstrous shape for money is a misdemeanor. (t)

By the 20 & 21 Vict. c. 83, justices are empowered to issue a warrant to search for any obscene books, papers, writings, prints, pictures, drawings, or other representations kept in any house, &c., for the purpose of sale or distribution, exhibition for the purpose of gain, lending upon hire, or being otherwise published for the purpose of gain, if any such articles are of such a description that the publication of them would be a misdemeanor; and if any such articles are found, the justices may order them, except such as may be necessary as evidence in some further proceeding, to be destroyed.

By this Act it is enacted that upon complaint before two justices of the peace, that any obscene books, papers, prints, &c., are kept in any place within their jurisdiction 'for the purpose of sale or distribution, exhibition for purposes of gain, lending upon hire, or being otherwise published for purposes of gain,' and upon the justices being satisfied that any of the articles so kept are of such a character that the publication of them would be a misdemeanor and proper to be prosecuted as such, they may cause such books, &c. to be seized and destroyed, in the manner provided by the Act. A society of persons called 'The Protestant Electoral Union' (whose objects were stated to be, amongst others, 'to protest against those teachings and practices of the Romanist and Puseyite systems which are un-English, immoral, and blasphemous,' to 'maintain the Protestantism of the Bible and the liberty of England,' and 'to promote the return to Parliament of men who will assist them in these objects; and particularly will expose and defeat the deep-laid machinations of the Jesuits, and resist grants of public money for Romish purposes') exposed for sale at their office a pamphlet entitled, 'The Confessional Unmasked, showing the depravity of the Romish priesthood, the iniquity of the confessional, and the questions put to females in confession.' This pamphlet consisted of extracts from the works of theologians on the doctrines and discipline of the Church of Rome, and particularly on the practice of auricular confession. On the side of the page were printed passages in the original Latin, correctly extracted from the works of these writers, and opposite each extract was placed a free translation of it into English. The pamphlet also contained a preface and notes, and comments condemnatory of the tenets and principles of the authors

(s) *R. v. Crunden*, 2 Campb. 89. And the Court of King's Bench, when the defendant was brought up for judgment, expressed a clear opinion that the offence imputed to him was a misdemeanor, and that he had been properly convicted. In *R. v. Sir Charles Sedley*, Sid. 168, 1 Keb. 620, S. C., the defendant, being indicted for showing himself naked from a balcony in Covent Garden to a great multitude of people, confessed the indictment; and was sentenced to pay a fine

of 2,000 marks, to be imprisoned a week, and to give security for his good behaviour for three years.

(t) *Harring v. Walrond*, 2 Cha. Ca. 110, the case of a monstrous child that died, and was embalmed to be kept for show, but was ordered by the Lord Chancellor to be buried — (cited in Burn's Just. tit. *Nuisances*). See per Pollock, C. B., *contra*, in *R. v. Webb*, 2 C. & K. 938.

of the works from which the extracts were made. About one half of the pamphlet related to casuistical and controversial questions which were not obscene, but the remainder of the pamphlet was obscene, relating to impure and filthy acts, words, and ideas. A member of the society kept and sold these pamphlets with the purpose of promoting the objects of the society, and exposing what he deemed to be the errors of the Church of Rome. Two magistrates, purporting to act under the above-mentioned statute, ordered a number of these pamphlets while in his possession to be seized and destroyed: Held that, notwithstanding the object of the defendant was not to injure public morals, but to attack the religion and practice of the Roman Catholic Church, this did not justify his act nor prevent it from being a misdemeanor proper to be prosecuted, as the inevitable effect of the publication must be to injure public morality; and although he might have had another object in view, he must be taken to have intended what was the natural consequence of his act, and had therefore been guilty of an offence within the meaning of this statute. (*u*)

A herbalist, who had publicly exposed and exhibited in his shop on a highway a picture of a man naked to his waist and covered with eruptive sores, so as to constitute an offensive and disgusting exhibition, was held guilty of a nuisance, although there was nothing immoral or indecent in the picture, and his motive was innocent. (*v*)

A count which charges the keeping obscene prints with intent to utter them is bad, as it alleges no act done; but a count which charges the procuring obscene prints with the like intent is good, as procuring is an act done. (*w*)

By the 14 & 15 Vict. c. 100, s. 29, whenever any person shall be convicted of any public and indecent exposure of the person, or any public selling or exposing for public sale or to public view of any obscene book, print, picture, or other indecent exhibition, the Court may sentence the offender to be imprisoned for any term now warranted by law, and also to be kept to hard labour during the whole or any part of such term of imprisonment.

Eaves-droppers,¹ or such as listen under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance, and presentable at the Court Leet; or are indictable at the sessions, and punishable by fine and finding sureties for their good behaviour. (*x*)

A *common scold*, *communis rixatrix* (for our law confines it to the feminine gender),² is a public nuisance to her neighbourhood, and may be indicted for the offence; and, upon conviction, punished by being placed in a certain engine of correction called the trebucket, or cuck-

(*u*) R. v. Hicklin, 37 L. J. M. C. 89.

(*v*) R. v. Grey, 4 F. & F. 73.

(*w*) R. v. Dugdale, Dears. C. C. R. 64 ante, p. 188.

(*x*) 4 Black. Com. 167, 168. Burn's Just. tit. *Eaves Droppers*.

AMERICAN NOTES.

¹ In America it has been held that a person who hangs about the Grand Jury Room in order to overhear the remarks of the Grand Jury is indictable for eaves-dropping. S. v. Pennington, 3 Head, 299; 75 Am. D. 771.

² See James v. C., 12 Serg. & R. 220. A common drunkard is an indictable nuisance in America (C. v. Conley, 1 Allen, 6), and so is a common brawler. C. v. Foley, 99 Mass. 497; Bishop i. s. 505.

ing stool. (y) And she may be convicted without setting forth the particulars in the indictment; (z) though the offence must be set forth in technical words, and with convenient certainty. (a) It is not necessary to give in evidence the particular expressions used; it is sufficient to prove generally that the defendant is always scolding. (b)

A defendant was convicted on an indictment for making great noises in the night with a speaking trumpet, to the disturbance of the neighbourhood; which the court held to be a nuisance. (c)

The exposing in public places persons infected with *contagious disorders*, so that the infection may be communicated, is a nuisance, and has been already treated of in a preceding chapter. (d)

It is said that a *mastiff* going in the street unmuzzled, from the ferocity of his nature being dangerous and cause of terror to his Majesty's subjects, seems to be a common nuisance; and that, consequently, the owner may be indicted for suffering him to go at large. (e)

There are also some offences which are declared to be nuisances by the enactments of particular statutes. Where a statute declares a particular thing to be a common nuisance, it is indictable as such. An Act of Parliament prohibited the erection of any building within ten feet of a road, and declared that if any such building should be erected, it should be deemed a common nuisance. By another clause, justices were empowered to convict the proprietor and occupier of such building; it was held that the party who erected a building contrary to the Act might be indicted for a nuisance. (f)

A canal company were empowered by an Act of Parliament to take the water of certain brooks and use it for the purposes of their canal; the water in one of the brooks at the time the Act passed was pure, but it afterwards became polluted by drains, &c. before it reached the canal, and it was then penned back in the canal, and became a public nuisance: Held, that the company were liable to be indicted for the nuisance, as there was nothing in the Act compelling them to take the water, or authorizing them to use it so as to create a nuisance. (g)

(y) 1 Hawk. P. C. c. 75, s. 14. 4 Black. Com. 168. Burn's Just. tit. *Nuisances*, III. *Cuck* or *guck*, in the Saxon language (according to Lord Coke) signifies to scold or brawl; taken from the bird *cuckoo*, or *guckhaw*: and *ing* in that language signifies water, because a scolding woman, when placed in this stool, was for her punishment soused in the water. 3 Inst. 219.

(z) 2 Hawk. P. C. c. 25, s. 59.

(a) R. v. Cooper, 2 Str. 1246.

(b) By Buller, J., in *J'Anson v. Stuart*, 1 T. R. 754.

(c) R. v. Smith, 1 Str. 704. And see a precedent of an indictment for keeping dogs which made noises in the night, 2 Chit. Crim. Law, 647.

(d) *Ante*, p. 272.

(e) Burn's Just. tit. *Nuisance*, 1. And

see a precedent of an indictment for this offence, 3 Chit. Crim. Law, 643. It should be observed, however, that the offence seems to be stated too generally in the authority from which the text is taken. To permit a *furiosus* mastiff or bull-dog to go at large and unmuzzled may be a nuisance; but those dogs are frequently quiet and gentle in their habits, except when incited by their owners; and it can hardly be said to be a nuisance to permit them to go at large and unmuzzled, because some of their breed are ferocious. See 34 & 35 Vict. c. 56, which gives a summary jurisdiction in certain cases where dogs are dangerous, &c.¹

(f) R. v. Gregory, 5 B. & Ad. 555. See this case as to the meaning of the term 'building' in such an Act.

(g) R. v. Bradford Navigation, 34 L. J.

AMERICAN NOTE.

¹ In America it seems that a dog well known to be a ferocious dog is a common nuisance and may be killed. See Bishop,

Vol. i., s. 1080, note 2. A public beating of an animal or a slave is indictable as a nuisance. Bishop, i. s. 597.

By the 10 & 11 Will. 3, c. 17, all *lotteries* are declared to be public nuisances; and all grants, patents, and licences for such lotteries to be against law. But for many years it was found convenient to the Government to raise money by the means of them; and accordingly different state Lottery Acts were passed to license and regulate offices for lotteries. (*h*) But the 42 Geo. 3, c. 119, declares all games or lotteries, (*i*) called *little-goes*, to be public nuisances, and provides for their suppression; and also imposes heavy penalties upon persons keeping offices, &c., for lotteries not authorised by Parliament. (*j*) An indictment lies on Sec. 1 of each of these Acts for keeping a lottery. (*k*)

A lottery in which tickets were drawn by subscribers of a shilling, which entitled them at all events to what was professed to be a shilling's worth of goods, and also to the chance of certain bonuses of goods of greater value than the shilling, is an illegal lottery within the statute. (*l*)

By the 36 & 37 Vic. c. 38, s. 3, every person playing or betting by way of wagering or gaming in any street, road, highway or other open and public place, or in any open place to which the public have or are permitted to have access, (*m*) at or with any table or instrument of gaming, (*n*) or any coin, card, token or other article used as an instrument or means of such wagering or gaming, at any game or pretended game of chance, shall be deemed a rogue and a vagabond within the true intent and meaning of 5 Geo. 4, c. 83, and as such may be convicted and punished under the provisions of that Act. By 42 & 43 Vic. c. 18, s. 7, Every horse race held or taking place in contravention of the provisions of this Act shall be deemed to be a nuisance, and any person injured or inconvenienced thereby shall have all such rights and remedies against all persons taking part in the same, and against owners, lessees and occupiers of the land or place, as he would have in case of a nuisance at common law.

And where a man sold packets of tea which were advertised to, and actually did, each contain a coupon entitling the buyer to a prize, but the prizes varied in character and value, it was held that this constituted a lottery within 42 Geo. 3, c. 119. (*o*) The proprietor of a newspaper published a paragraph in which the last word was omitted. The readers of the paper were invited to fill in the missing word and send it to the office of the paper with a shilling for each guess, and it was promised that the whole of the money received should be divided among the successful competitors. It was held that this competition was an illegal lottery within the Act. (*p*) But where a newspaper

Q. B. 191. As to a body in whom the guardianship of the highway is vested having the right of removing obstructions in the highway, see *Bagshaw v. The Boston Local Board of Health*, 45 L. J. Chanc. 260.

(*h*) See the Acts collected, Burn's Just. tit. *Gaming*, III. By the 9 & 10 Vict. c. 48, certain associations for the distribution of works of art are legalised. See also 21 & 22 Vict. c. 102.

(*i*) *Morris v. Blackman*, 2 H. & C. 912.

(*j*) See 6 & 7 Will. 4, c. 66, 8 & 9 Vict. c. 74, 37 & 38 Vict. c. 35.

(*k*) *R. v. Crawshaw*, Bell, C. C. 303.

(*l*) *R. v. Harris*, 10 Cox, C. C. 352.

(*m*) A railway carriage on its journey is within the section. *Langrish v. Archer*, 10 Q. B. D. 44. It seems doubtful whether enclosed grounds for admission to which the public have to pay is within the section. *Hirst v. Molesbury*, L. R. 6 Q. B. 130.

(*n*) Betting on a race with a half sovereign is not within the section. *Hirst v. Molesbury*, L. R. 6 Q. B. 130, but an automatic machine for registering the odds is. *Tollett v. Thomas*, L. R. 6 Q. B. 514.

(*o*) *Taylor v. Smetten*, 11 Q. B. D. 207.

(*p*) *Barclay v. Pearson* (1893), 2 Ch. 154.

proprietor published a weekly racing record at the end of which there was a coupon to be cut off by the purchaser, and filled up with the names of horses which the purchaser thought would win the races therein named, and then sent to the newspaper office where prizes were given to the persons who selected the greatest number of winners, it was held that this was not a lottery nor did it amount to illegal betting. (g) A society making certain of its members entitled to particular benefits by the process of periodical drawings, does not come within the Lottery Acts. (r)

It is laid down in some books that any one may pull down, or otherwise destroy, a common nuisance; ¹ and it is said that if any one, whose estate is, or may be, prejudiced by a private nuisance, may justify the entering into another's ground and pulling down and destroying such nuisance, surely it cannot but follow *à fortiori* that any one may lawfully destroy a common nuisance. (s)

It has since been held, that if there be a nuisance in a highway, a private individual cannot of his own authority abate it, unless it does him special injury, and he can only interfere with it as far as is necessary to exercise his right of passing along the highway, and he cannot justify doing any damage to the property of the person who has improperly placed the nuisance in the highway, if, avoiding it, he might have passed on with reasonable convenience. (t)

It is also stated as the better opinion, that the Court of Queen's Bench may, by a mandatory writ, *prohibit* a nuisance, and order that it shall be abated; and that the party disobeying such writ will be subject to an attachment. (u) Such writs appear to have been granted in some cases; and the proceeding in one case was that the judges, upon view, ordered a record to be made of the nuisance, and sending for the offender, ordered him to enter into a recognizance not to proceed; but he refusing to comply, the Court committed him for the contempt, issuing a writ to the sheriff on the record made, to abate the building, and ordered the offender to be indicted for the nuisance. (v)

But the more usual course of proceeding in cases of nuisance is by *indictment*, in which the nuisance should be described according to the circumstances; and it should be stated to be continuing, if that be the fact. (w) An indictment for carrying on offensive works may state them to be carried on at such a parish. It is not necessary to state that they were carried on in a town or village; (x) stating them

(g) *Caminada v. Hulton*, 17 Cox, C. C. 307. The case seems explicable on the ground that no deposit was paid by the purchaser, and also that skill was necessary to select the right horses.

(r) *Wallingford v. Mutual Society*, 5 App. Cas. 685.

(s) 1 Hawk. P. C. c. 75, s. 12. Bac. Abr. tit. *Nuisance* (C.). See *Roberts v. Rose*, 4 H. & C. 103.

(t) *Dimes v. Petley*, 15 Q. B. 276. *Mayor of Colchester v. Brooke*, 7 Q. B. 339. *Bateman v. Bluck*, 18 Q. B. 870. And see

Ellis v. The London and S. W. R. Co., 2 H. & N. 424. *Arnold v. Holbrook*, 42 L. J. Q. B. 80.

(u) Bac. Abr. tit. *Nuisance* (C.).

(v) *R. v. Hall*, 1 Mod. 76. 1 Vent. 169, S. C. And Hale, C. J., mentioned another case in 8 Car. 1, of a writ to prohibit a bowling-alley erected near St. Dunstan's church.

(w) *R. v. Stead*, 8 T. R. 142; otherwise there will not be judgment to abate it.

(x) *Burr*. 333.

AMERICAN NOTE.

¹ As to abating nuisances in America, see 1 *Casey*, 508; *Hart v. Mayor of Albany*, 9 S. v. *Noyes*, 10 *Foster*, 279; *Barclay v. C.*, Wend. 571.

to be carried on *near* a common King's highway, and *near* the dwelling-houses of several persons, to the common nuisance of passengers and of the inhabitants, is sufficient: it need not be stated how near the highway or houses they were carried on. (y) The offence is charged to be done *ad commune nocumentum*, 'to the common nuisance of all the liege subjects,' &c. (z) When the want of a proper conclusion is cured see the 14 & 15 Vict. c. 100, s. 24. (a)

In some cases it is no defence to show that the premises, out of which the nuisance arises, are in the occupation of a tenant.

If the owner of land erect a building which is a nuisance, or of which the occupation is likely to produce a nuisance, and let the land, he is liable to an indictment for such nuisance being continued or created during the term. (b) Where the defendant was in receipt of the rents of some dwelling-houses, let for short periods to tenants, and two privies and a sink belonging to them were used in common by the occupiers of the houses; it did not appear whether any of the present tenants commenced occupying the houses before the defendant began to receive the rents; but the privies and sink were used by the tenants of those premises before his time; there was no distinct proof of any actual demise of the privies and sink, but they had regularly been cleansed by the persons occupying the houses, until the time of the nuisance, when the cleansing had been neglected; the nuisance had arisen since the defendant began to receive the rents; it was held that the defendant was liable to be indicted for the nuisance. (c) This case underwent great consideration in a later case where the Court said, 'If *R. v. Pedley* is to be considered as a case in which the defendant was held liable because he had demised the buildings when the nuisance existed; or because he had relet them after the user of the buildings had created a nuisance; or because he had undertaken the cleansing and had not performed it; we think the judgment right. But if it is to be taken as a decision that a landlord is responsible for the act of his tenant in creating a nuisance, by the manner in which he uses the premises demised; we think it goes beyond the principle to be found in any previously decided case, and cannot assent to it;' for 'if a landlord lets premises, not in themselves a nuisance, but which may or may not be used by the tenant so as to become a nuisance, and it is entirely at the option of the tenant so to use them or not, and the landlord receives the same benefit whether they are so used or not, the landlord cannot be made responsible for the acts of the tenant; and *à fortiori* he would not be liable if he had taken an obligation from the tenant not to use them so as to create a nuisance, even without reserving a right to enter and abate a nuisance if created.' (d)

(y) *Id. ibid.*

(z) *Vin. Abr. tit. Indictment (Q.), Nuisance*, 13. *Pratt v. Stearn*, Cro. Jac. 382. *R. v. Hayward*, Cro. Eliz. 148. *Anon.* 1 Vent. 26. 2 Roll. Abr. 83. 1 Hawk. P. C. c. 75, ss. 3, 4, 5. And see *Bac. Abr. tit. Nuisance (B.)*. *R. v. Reynell*, 6 East, 315.

(a) *R. v. Holmes, Dears. C. C.* 207, *ante* p. 37.

(b) *R. v. Pedley*, 1 A. & E. 822. 3 N. & M. 627. See *Russell v. Shenton*, 3 Q. B.

449. The duty of cleansing and repairing drains and sewers is *prima facie* that of the occupier and does not devolve on the owner merely as such.

(c) *R. v. Pedley, supra*. See *Gandy v. Jubber*, 5 B. & S. 78.

(d) Per Curiam, *Rich v. Basterfield*, 4 C. B. 783, where it was held that a landlord, who let a shop with a chimney in it to a tenant who made fires, the smoke from which issued from the chimney, and caused a

Upon an indictment for keeping two bawdy-houses, the evidence, in addition to the proof of the nature of the houses, was that the defendant owned the houses, which he let to weekly tenants, and that he had been repeatedly remonstrated with as to the manner in which the houses were conducted, and called upon to interfere so as to abate the nuisance; of these warnings he took no notice, and some months before the prosecution, he was served with a notice to the like effect; he, however, took no steps to stop the nuisance, but continued to go to the houses, and receive the rent every week; but it was not proved that the defendant obtained any additional rent by reason of the nature of the occupation; and it was held that the defendant was not really the keeper of the bawdy-houses in point of law; but was simply the owner of the houses, letting them to other persons who used them for an immoral purpose. (c)

The prisoner, being the owner of a house, let out the different apartments in it separately to young women, who, to his knowledge and with his consent, used them for the purposes of prostitution. They were merely weekly tenants. The prisoner, when he let the rooms, knew of the purposes to which they would apply them, and fully assented thereto, but he received no share of the earnings of the women. He did not live in the house, and he only went there to collect his weekly rents. He had no other control over the tenants

nuisance, was not responsible for it. It has since been held that an action lies against a person who lets premises with a ruinous chimney upon them, which afterwards falls and injures an adjoining building, on the ground that if the wrong causing the injury arises from the nonfeasance or misfeasance of the lessor, the party suffering the injury may sue him. *Todd v. Flight*, 7 C. B. (N. S.) 377. A. let to B. a field for the purpose of its being worked as a lime quarry. The ordinary way of getting the limestone was by means of blasting, and A. authorised the quarrying of the stone and the erection of lime kilns in the field. A nuisance was caused to the adjoining occupier by the blasting and by the smoke from the kilns, and he brought an action against both A. and B. On demurrer by A.:—Held, that he, the landlord, was liable although the nuisance was actually created by the act of his tenant, because the terms of the demise were an authority from him to B. to create the nuisance, which was, therefore, the necessary consequence of the mode of occupation contemplated in the demise. *Harris v. James*, 45 L. J. Q. B. 545; *et per Blackburn, J.*:—“In the present case, as I understand the averments, the field was let for the very purpose and object of being worked as a lime quarry, and for erecting lime kilns and burning lime. When, then, it is stated as a fact that the injury complained of arose from the natural and necessary consequence of carrying out this object, and as the result of lime getting and lime burning, then I think we must say that the landlord authorised the lime burning and the nuisance arising from it as being the necessary consequence of let-

ting the field in the manner and with the objects described. In *Rich v. Basterfield*, 4 C. B. 483, the Court of Common Pleas came to a conclusion of fact which authorised their conclusion upon the case. There, a former occupier of the premises where the chimney was used to burn coke in the fire, and caused no smoke which could be at all injurious to the plaintiff; and the judgment proceeded on that ground, as is evident from the following passage:—“It being therefore quite possible for the tenant to occupy the shop without making fires, and quite optional on his part to make them or not, or to make them with certain times excepted, so as not to annoy the plaintiff, or in such a manner as not to create any quantity of smoke that could be deemed a nuisance, it seems impossible to say that the tenant was in any sense the servant or agent of the defendant, in doing the acts complained of. The utmost that can be imputed to the defendant is, that he enabled the tenant to make fires if he pleased.” Assuming that the evidence really did establish the facts which the Common Pleas thought it did, and if it was not the necessary consequence of burning fires in the chimney that there should be smoke, I have no fault to find with the decision; but then, this case is not the same, because the fifth paragraph finds that the injury arising from the smoke and vapour is the natural and necessary consequence of the use of the land, and the plaintiff must therefore have judgment upon the demurrer to that paragraph.

(c) *R. v. Barrett*, 9 Cox, C. C. 255, 32 L. J. M. C. 36.

than arose from his power as landlord to determine the tenancies:—Held, that he could not be indicted for keeping a disorderly house. (*f*)

It is no defence for a master or employer that a nuisance is caused by the acts of his servants, if such acts are done in the course of their employment. (*g*) But the general rule of law is that a master is not criminally responsible for the negligence of his servant, and where the occupier of premises was summoned under 16 & 17 Vict. c. 128, for not consuming the smoke of his furnaces and it was proved that the smoke was caused by the carelessness of the stoker whom he employed, it was held that he could not be convicted. (*h*)

It will be no excuse for the defendant that the nuisance, for which he is indicted, has been in existence for a great length of time. (*i*)³ Lord Ellenborough, C. J., said, in one case, 'It is immaterial how long the practice may have prevailed, for no length of time will legitimate a nuisance. The stell fishery across the river at Carlisle had been established for a vast number of years, but Buller, J., held that it continued unlawful, and gave judgment that it should be abated.' (*j*) But in some cases length of time may concur with other circumstances in preventing an obstruction from having the character of a nuisance. (*k*)

If the indictment be so general that it does not convey sufficient information to the defendant to enable him to prepare his defence, the Court will order the prosecutor to give the defendant particulars of the several acts of nuisances he intends to prove. (*l*) And where the indictment is for the obstruction or non-repair of highways which are described generally, particulars of the several highways obstructed or out of repair may be obtained. (*m*)

All common nuisances are regularly punishable by fine and imprisonment: but, as the removal of the nuisance is usually the chief end of the indictment, the Court will adapt the judgment to the nature of the case. Where the nuisance, therefore, is stated in the indictment to be *continuing*, and does in fact exist at the time of the judgment, the defendant may be commanded by the judgment to remove it at his own costs: (*n*) but only so much of the thing as

(*f*) *R. v. Stannard*, 38 L. J. M. C. 61, L. & C. 349.¹

(*g*) *R. v. Medley*, 6 C. & P. 292, Lord Denman, C. J. *R. v. Stephens*, 1 L. R. Q. B. 702; 35 L. J. Q. B. 251. These cases seem either to turn on statutory enactments or the proceeding was a civil and not a criminal one.² See *ante*, p. 274.

(*h*) *Chisholm v. Doulton*, 22 Q. B. D. 736.¹

(*i*) *Weld v. Hornby*, 7 East, 199; and see sec. 3 of this chapter. *Fowler v. Sanders*, Cro. Jac. 446. In *Dewell v. Sanders*, Cro. Jac. 490, the Court referred to this case as deciding that 'none can prescribe to make a common nuisance, for it cannot have a lawful beginning by licence or otherwise, being an

offence at common law;' and per Montague, C. J., 'Neither the King nor the lord of a manor can give any liberty to erect a common nuisance.' See *Simpson v. Wells*, 41 L. J. M. C. 105.

(*j*) *R. v. Cross*, 3 Camp. 227.

(*k*) *R. v. Smith and others*, 4 Esp. 111. See *Bliss v. Hall*, 4 B. N. C. 183. *R. v. Montague*, 4 B. & C. 598, *post*.

(*l*) *R. v. Curwood*, 3 A. & E. 815.

(*m*) *R. v. Marquis of Downshire*, 4 A. & E. 698. *R. v. Inhabitants of Pembroke*, June 26, 1841, Patteson, J., at chambers. *R. v. Probert, Dears. C. C.* 32 (*a*). *R. v. Flower*, 7 D. P. C. 665.

(*n*) 2 Roll. Abr. 84. 1 Hawk. P. C. c. 75, s. 14. *R. v. Pappineau*, 1 Str. 686.

AMERICAN NOTES.

¹ As to the two cases above cited of *R. v. Barrett* and *R. v. Stannard* it appears to be Mr. Bishop's opinion that they would not be followed in America; see Bishop, Vol. i., ss. 1094-1096.

² The case of *R. v. Stephens* is cited with approval by Mr. Bishop, Vol. i., s. 1076.

³ *P. v. Cunningham*, 1 Denio, 624. *Elkins v. S.*, 3 Humph. 543.

causes the nuisance ought to be removed; as if a house be built too high, only so much of it as is too high should be pulled down; and if the indictment were for keeping a dye-house, or carrying on any other stinking trade, the judgment would not be to pull down the building where the trade was carried on. (o) So in the case of a glass-house, the judgment was to abate the nuisance, not by pulling the house down, but only by preventing the defendant from using it again as a glass-house. (p) But where the indictment does not state the nuisance to be continuing, a judgment to abate it would not be proper. In a case where this point arose, Lord Kenyon, C. J., said, 'When a defendant is indicted for an existing nuisance, it is usual to state the nuisance and its continuance down to the time of taking the inquisition; it was so stated in *R. v. Pappineau, et adhuc existit*; and in such cases the judgment should be that the nuisance be abated. But in this case it does not appear in the indictment that the nuisance was then in existence; and it would be absurd to give judgment to abate a supposed nuisance which does not exist. If, however, the nuisance still continue, the defendant may be again indicted for continuing it.' (q)

The 18th section of the 12 & 13 Vict. c. 45, by which any order of Quarter Sessions may be removed into the Court of Queen's Bench, and enforced as a rule of Court, does not apply to an order of Quarter Sessions to abate a nuisance, made after the trial of an indictment for the nuisance. (r)

The 5 Will. & M. c. 11, s. 3, enacts, that if a defendant prosecuting a writ of *certiorari* (as mentioned in the Act) be convicted of the offence for which he is indicted, the Court of King's Bench shall give reasonable costs to the prosecutor if he be the *party grieved*, or be a justice, &c., or other civil officer, who shall prosecute for any fact that concerned them as officers to prosecute or present. Upon this clause it was decided, that persons dwelling near to a steam-engine, which emitted volumes of smoke affecting their breath, eyes, clothes, furniture, and dwelling-houses, and prosecuting an indictment for such nuisance, were *parties grieved* entitled to their costs: the defendants had removed the indictment from the sessions by *certiorari*, and been convicted. (s)

The 1 & 2 Geo. 4, c. 41, reciting the great inconvenience and injury sustained from the improper construction and negligent use of furnaces employed in the working of engines by steam, and that though such nuisance being of a public nature, is abateable as such by indictment, the expense had deterred parties suffering thereby from seeking the remedy given by law, enacts that 'it shall and may be lawful for the Court by which judgment ought to be pronounced in case of conviction on any such indictment, to award such costs as shall be deemed proper and reasonable to the prosecutor or prosecutors, to be paid by the party or parties so convicted as aforesaid: such award to be made either before or at the time of pronouncing final judgment, as to the Court may seem fit.'

(o) *R. v. Pappineau, supra.* 9 Co. 53. Godb. 221.

(p) Co. Ent. 92 b.

(q) *R. v. Stead*, 8 T. R. 142. *R. v. The Justices of Yorkshire*, 7 T. R. 468.

(r) *R. v. Bateman*, 27 L. J. M. C. 95.

(s) *R. v. Dewsnap*, 16 East, 191.

Sec. 2, 'if it shall appear to the Court by which judgment ought to be pronounced that the grievance may be remedied by altering the construction of the furnace, it shall be lawful for the Court, without the consent of the prosecutor, to make such orders as shall be by the Court thought expedient for preventing the nuisance in future, before passing final sentence on the defendant.'

Sec. 3, 'the provisions relating to the payment of costs and the alteration of furnaces, shall not extend to the owners or occupiers of any furnaces of steam-engines, erected solely for the purpose of working mines of different descriptions, or employed solely in the smelting of ores and minerals, or in the manufacturing the produce of ores or minerals, on or immediately adjoining the premises where they are raised.'

The Public Health Act, 1875, contains numerous excellent provisions for the removal of nuisances and the prevention of diseases, but they do not fall within the scope of this work.

SEC. II.

Of Nuisances to Public Highways.

We may consider this subject in the following order:—

What is a public highway.

Of nuisances to a highway by obstruction.

Of nuisances to a highway by the neglect to repair.

The Highways Acts, and the Public Health Act, 1875, as to highways.

What is a Public Highway.

The word highway originally denoted a public way, which was raised above the level of the lands through which it ran.¹ Such ways are of extreme antiquity. When the Israelites asked leave to pass through Edom, they said, (t) 'We will go by מסלה,' the raised road or highway. (u) And it is very remarkable that the same way is called just before, (v) דרך המלך, the king's track (w) or way. So that here we have the well-known expression, 'the king's highway,' which in our old records is *alta regia via*, (x) and in our Year Books *haut chemin le Roy*. (y) Long ago, however, highway has been applied not only to every public way on land but also on water.

(t) Numb. xx. 19.

(u) Isai. lxii. 11, shows this to be the correct meaning of the word.

(v) Numb. xx. 17.

(w) The English word 'track' is either

from the Hebrew word, d being changed into t, or from the Arabic, which is from the Hebrew with a similar change.

(x) 2 Inst. 701.

(y) 33 Hen. 6, 26.

AMERICAN NOTE.

¹ The definition of a highway in America is found to differ in the different States. Some of the cases are collected in Mr. Bishop's New Criminal Law, Vol. ii., s. 1267

and notes. The question of liability to repair is not regulated by common law, but entirely by statute, see Bishop ii. s. 1281.

Highway is said to be the *genus* of all public ways; (z) of which there are three kinds: a footway; (a) a foot and horseway, which is also a pack and prime-way; and a foot, horse and cartway. (b) Whatever distinctions may exist between these ways, it seems to be clear that any of them, when common to all the King's subjects, whether directly leading to a market town, or beyond a town as a thoroughfare to other towns, or from town to town, may properly be called a highway; and that the last, or more considerable of them, has been usually called the *King's* highway. (c) But a way to a private house or for the benefit of particular persons only, is not a highway, because it belongs not to all the King's subjects. (d)

It has been expressly held, that there may be a public way over a place which is commonly called a *cul de sac*, and that it is a question for the jury whether it does exist or not. Where therefore a court opening into a public street had no thoroughfare through it, but contained fourteen or fifteen houses, and had been paved by commissioners under the 12 Geo. 3, c. 68, and always lighted by the parish, and the jury found that it was a public highway; it was held that there might be a highway under these circumstances. (e) So a large square with only one entrance, or a promenade, the owner of which has, for many years, permitted all persons to go into and round it, may become a public highway. (f)

A question here presents itself whether there may not exist a public right of walking over a close in every direction though there be but one entrance to the close. There certainly may be such a private right. A plaintiff alleged a right of private way over and along a terrace walk, and a user of that way for many years was proved, and also a grant of the free liberty, use, benefit and privilege of the terrace walk with other inhabitants; it was objected that the right proved was not a right of way, but a right to use the walk for pleasure only; and that the right was altogether different from the right of way claimed, but was like the privilege which the builder of a square, who reserves the centre for a garden common to all the houses, grants to the tenants of the houses of walking about the garden; but the objection was overruled. Patteson, J., 'I do not understand the distinction that has been contended for between a right to walk, pass and repass, forwards and backwards over every part of a close, and a right of way from one part of a close to another. What is a

(z) *R. v. Saintiff*, 6 Mod. 255.

(a) Where a perambulator, eighteen inches wide and fourteen pounds weight, was pushed along a public footway leading from a road into a square, Byles, J., left it to the jury to say whether this was a usual accompaniment of a large class of foot passengers, and so small and light as neither to be a nuisance to other passengers or injurious to the soil. *R. v. Mathias*, 2 F. & F. 570. The jury were discharged.

(b) Co. Lit. 56 a.

(c) *Id. ibid.* 1 Hawk. P. C. c. 76, s. 1. Bac. Abr. tit. *Highways* (A.). And in a case where the *terminus ad quem* was laid to be a public highway, and it appeared in evidence that it was a public footway, it was held that

the description was sufficient. *Allen v. Ormond*, 8 East, 4.

(d) 1 Hawk. P. C. c. 76, s. 1. So by Hale, C. J., in *Austin's case*, 1 Vent. 189.

(e) *Bateman v. Buck*, 18 Q. B. 870. *R. v. Marchioness of Downshire*, 4 A. & E. 232. 5 N. & M. 662. See also *Williams's case*, 5 Co. 72 b, 2 Roll. 84, pl. 15. *R. v. Reynell*, 6 East, 315. Where, however, access to a highway has been legally stopped at both ends it ceases to be a public highway, *Bailey v. Jamieson*, 1 C. P. D. 329.

(f) Per Lord Campbell, C. J., *ibid.* *Campbell v. Lang*, 1 Macq. Sco. Ap. C. 451. *Young v. Cuthbertson*, 1 Macq. Sco. Ap. C. 455. See *R. v. Hawkhurst*, *post*, p. 766.

right of way but a right of way to go forwards and backwards from one place to another?' Wightman, J., 'The right proved is a right of passage backwards and forwards over every part of the close; the right claimed is less than this; but it is included in it, being a right of way from one part of the close to another.' (g) In an old case a defendant prescribed that all the inhabitants of a vill from time immemorial had been used to dance in a close at all times of the year at their free will for their recreation, and it was held that this was a good custom. (h) Now coupling these decisions with those as to public highways where there are no thoroughfares, it may fairly be inferred that the public may in point of law have a right of passing and repassing over every part of a close, whatever its shape or size may be; but the shape, size, and circumstances must be taken into consideration by the jury when determining whether the right of way exists. Where a place had been an open place in Epping Forest, and people had always been used to go over it, as over the rest of the forest, wherever they liked and wherever they could, but there was no distinct evidence of any definite way in any particular direction, and though there were tracks from time to time, which might last for a few weeks or months, there was no beaten or enduring track which had lasted for years; Wightman, J., directed the jury that if they thought that there was no regular way, but that people merely went where they liked, they should find against the right of way. (i)

It is not to be understood by the term *cart-way*, that the way is to be used only with the particular vehicle called a *cart*; for if it is a common highway for carriages, it is a highway for all manner of things. (j) Many public highways however, as a footway, are to be used only in a particular mode. Thus, though a towing-path is to be used only by horses employed in towing vessels, yet it is a common highway for that purpose. (k) And where a railway or tram-road was made under the authority of an Act of Parliament, by which the proprietors were incorporated, and by which it was provided that the public should have the beneficial enjoyment of it, such railway or tram-road was taken to be a public highway. (l)

The number of persons who may be entitled to use the way, or may be obliged to repair it, will not make it a public way, if it be not common to *all* the King's subjects. Thus, where the commissioners under an inclosure Act set out a private road for the use of the inhabitants of nine parishes, directing the inhabitants of six of those parishes to keep it in repair, it was held that no indictment could be supported against those six parishes for not repairing it, because it did not concern the public. (m)

(g) *Duncan v. Louch*, 6 Q. B. 904.

(h) *Abbot v. Weekly*, 1 Lev. 177, cited by Lord Cranworth, C., in *Young v. Cuthbertson*, *supra*. See *Mounsey v. Ismay*, 1 H. & C. 729.

(i) *Schwinge v. Dowell*, 2 F. & F. 845. There was a similar case at Gloucester where a way was claimed over a common; and Littledale, J., very strongly directed the jury that they could not find that there was a right of way unless some one particular line

had been regularly used by the public. See also *Chapman v. Cripps*, 2 F. & F. 864. — S. P. per Erle, C. J.

(j) *R. v. Hatfield*, Cas. temp. Hardw. 315. S. C. 8. East, R. 6 (a).

(k) Per Bayley, J., in *R. v. Severn and Wye R. Co.*, 2 B. & A. 648.

(l) *R. v. Severn and Wye R. Co.*, 2 B. & A. 646.

(m) *R. v. Richards*, 8 T. R. 634.

Though a highway is said to be the King's, yet this must be understood as meaning that in every highway the King and his subjects may pass and repass at their pleasure; for the freehold and all the profits, as trees, mines, &c., belong to the lord of the soil. *(n)* The rights, however, of the owner of the soil will be subject to those of the public as to their exercise of their right of way in its full extent. *(o)* Where a way is dedicated to the public the owner of the soil does not transfer his property in it. *(p)*

A way may become a public highway by a *dedication* of it, by the *owner* of the soil, to the public use. Thus where the owners of the soil suffered the public to have the free passage of a street in London, though not a thoroughfare, for eight years, without any impediment (such as a bar set across the street, and shut at pleasure, which would show the limited right of the public), it was held a sufficient time for presuming a dedication of the way to the public. *(q)* So where a street, communicating with a public road at each end, had been used as a public road for four or five years, it was held the jury might presume a dedication. *(r)* And though if the land had been under lease during that time, or even for a much longer period, the acquiescence of the tenant would not have bound the landlord, without evidence of his knowledge; *(s)* yet it was held that where a way had been used by the public for a great number of years over a close in the hands of a succession of tenants, the privity of the landlord, and a dedication by him to the public might be presumed, although he was never in the actual possession of the close himself, and was not proved to have been near the spot. *(t)* And it was also held in this case that where a way had been so used, notice of the fact to the steward is notice to the landlord. *(u)* In a case where it appeared that a passage, leading from one part to another of a public street, (though by a very circuitous route) made originally for private convenience, had been open to the public for a great number of years, without any bar or chain across it, and without any interruption having been given to persons passing through it, it was ruled, that this must be considered as a way dedicated to the public. *(v)* But the erection of a bar, to prevent the passing of carriages, rebuts the presumption of a dedication to the public; although the bar may have been long broken down. *(w)* Where

(n) Bac. Abr. tit. *Highways* (B.). Com. Dig. *Chemin* (A.) 2. The Marquis of Salisbury v. G. N. R. Co., 5 C. B. (N. S.) 174. The presumption that the soil of a road *usque ad medium flumen viæ* belong to the owners of the adjoining lands applies to both public and private roads. Holmes v. Bellingham, 7 C. B. (N. S.) 329. Berridge v. Ward, 10 C. B. (N. S.) 400. Smith v. Howden, 14 C. B. (N. S.) 398. R. v. Strand Board of Works, 4 B. & S. 526.

(o) As to the right of the public to go on the adjoining land when the way is so foundrous and out of repair as to become impassable or dangerous, see *post*.

(p) Sir John Lade v. Shepherd, 2 Str. 1004.

(q) Trustees of the Rugby Charity v. Merryweather, 11 East, 375. Woodyer v. Hadden, 5 Taunt. 125, *post*, p. 764.

(r) Jarvis v. Dean, 3 Bing. 447; the street was neither paved nor lighted, but highway and paving rates had been paid.

(s) Trustees of the Rugby Charity v. Merryweather, 11 East, 375. Wood v. Veal, *post*, p. 448.

(t) R. v. Barr, 4 Camp. 16.

(u) Id. *ibid*.

(v) R. v. Lloyd, 1 Camp. 260.

(w) Roberts v. Karr, *cor.* Heath, J., Kingston Lent Ass. 1808. 1 Campb. 261, note *(b)*. Lethbridge v. Winter, Somerset Spr. Assiz. 1808, *cor.* Marshal, Serjt. 1 Campb. 263, in the note.

land is vested in fee in trustees for certain public purposes, they may dedicate the surface to the use of the public as a highway, provided such use be not inconsistent with the purposes for which the land is vested in them. Commissioners for drainage, being authorized by an Act to make drains and dispose of the earth in forming banks on the sides thereof, made a drain, and with the earth taken from it made a bank on one side of it, which had been used for twenty-five years, as a public highway: it not appearing that the cleansing of the drains or any other purpose of the Act had been or was likely to be interfered with by such user of the soil, it was held that a dedication might be made by the commissioners. (x) So when land was acquired and used by a canal company for the purposes of a towing-path and it appeared that the use of it as a public foot-path was not inconsistent therewith, it was held that the company could dedicate the land as a foot-path subject to its use as a towing-path. (y) A canal company therefore may dedicate a way to the public, as other persons or corporate bodies may do. They are the masters of their own property; and though they may be answerable to the rest of the proprietors for failure of duty, there is no reason why the public may not by user gain a right of way against them as well as against any other individuals. (z) But it seems that there must be some owner who can dedicate the way to the public, otherwise the road will not become a public way. (a) In every case the facts must be such as are sufficient to show that the owner meant to give the public a right of way over his soil, before a dedication by him will be presumed. (b) And nothing done by a lessee without the consent of the owner of the fee will give a right of way to the public. Thus in a case of an action of trespass, and a justification under a public right of way, the facts were, that the place in question, which was not a thoroughfare, had been under lease from 1719 to 1818; but had been used by the public, as far back as living memory could go; and had been lighted, paved and watched, under an Act of Parliament, in which it was mentioned as one of the streets of Westminster; and that the plaintiff, who inclosed it after 1818, had previously lived for twenty-four years in its neighbourhood. But it was held, that even under these circumstances the jury were well justified in finding that there was no public right of way, inasmuch as there could be no dedication to the public by the tenants for ninety-nine years, nor by any one, except the owner of the fee. (c) There cannot be a public way by dedication, unless there be some evidence to show that the owner has consented to the use of the way; the consent of the lessee is not sufficient, because it cannot bind the owner of the inheritance. A public footway over crown-land was extinguished by an inclosure Act, but for twenty years after the inclosure took place the public continued to use the way; it was held that this use was not evidence

(x) *R. v. Leake*, 5 B. & Ad. 469. 2 N. & M. 583. *The Board of Works for Greenwich District v. Maudsley*, 39 L. J. Q. B. 205.

(y) *Grand Junction Canal Co. v. Petty*, 21 Q. B. D. 273.

(z) *The Surrey Canal Co. v. Hall*, 1 M. & G. 392. See this case, *post*, p. 768.

(a) *R. v. Edmonton*, 1 M. & Rob. 24. See the case, *post*.

(b) *Woodyer v. Hadden*, 5 Taunt. 125. *R. v. Hudson*, 2 Str. 909.

(c) *Wood v. Veal*, 5 B. & A. 454.

of a dedication to the public, as it did not appear to have been with the knowledge of the Crown. (*d*) If there be an old way running along the side of my land, and, by my fences decaying, the public come on my land, that is no dedication. (*e*)

In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an intention to dedicate—there must be an *animus dedicandi*—of which the user by the public is evidence and no more; and a single act of interruption by the owner is of much more weight upon a question of intention to dedicate than many acts of enjoyment; (*f*) but it is sufficient to show that there has been such a user by the public as satisfies the jury that a dedication to the public was intended by the owner, whoever he might be. Thus where a road had originally been set out under a private inclosure Act over part of the waste of a manor, and had been used by the public generally ever since it had been so set out, being a period of fifty years, and a portion of the waste had been allotted to the lord in respect of his interest in the soil, it was contended that the soil of the road had been taken out of the lord, and transferred to no other person, and that therefore there was no owner or none against whom a dedication could be presumed; for that there must have been an owner who knew that he was so, or his consent to the public user could not be presumed; and that if the crown were the owner, stronger evidence would be necessary to raise a presumption of a dedication than if the owner had been a private person. But the Court of Queen's Bench held that a dedication might be presumed even against the crown from long acquiescence in public user, and that the jury were rightly directed to consider whether the owner, whoever he might be, had consented to the public user in such a manner as to satisfy the jury that he intended to dedicate a highway to the public. (*g*)

On an indictment for obstructing a highway it appeared that the way had been laid out as a projected street in 1827, and used as a highway till 1836, when the defendants began to obstruct it, and soon after enclosed a part of the road. The owners of the soil of the greater part of the road brought ejectment; and, after negotiations between them and the defendants, the latter agreed to open the road, but finally in 1853 broke off the negotiations, assigning as a reason that they had, since the negotiations commenced, acquired the fee of another part of the road, on which was the obstruction in question. It was shown that that spot had been part of an estate settled in strict settlement in 1823, on a tenant for life, with power to grant building leases, and for the trustees of the settlement to sell with the consent of the tenant for life. The first tenant in tail was an infant at the time of the trial. The tenant for life proved that in 1828 the whole of the property had been sold by his trustees, and that he had

(*d*) *Harper v. Charlesworth*, 4 B. & C. 574; 6 D. & R. 572. *Baxter v. Taylor*, 4 B. & Ad. 72; 1 N. & M. 13.

(*e*) *The Trustees of the British Museum v. Finnis*, 5 C. & P. 460. *Patteson, J.*

(*f*) Per Parke, B. *Poole v. Huskinson*, 11 M. & W. 827.

(*g*) *R. v. East Mark*, 11 Q. B. 877. Per Lord Denman, C. J. 'Enjoyment for a great length of time ought to be sufficient evidence of dedication, unless the state of the property has been such as to make dedication impossible.'

had nothing to do with it since. The jury were told that there was evidence that the way had been for several years actually used by the public, from which user a dedication might be inferred, and were asked whether they inferred that there was a dedication, and at what time and by whom; and they found that there was a dedication in 1829 by whoever was then owner of the fee. And it was held that this direction was right; for when there is satisfactory evidence of such a user of a road, as to time, manner and circumstances, as would lead to the inference that there was a dedication by the owner of the fee, if it was shown who he was, it is not necessary to inquire who the individual was from whom the dedication, necessarily inferred from such user, first proceeded; and when such user is proved the onus lies on the person who seeks to deny the inference from it, to show negatively that the state of the title was such that that dedication was impossible, and that no one capable of dedicating existed: that here the statement of the defendants that they acquired the fee in 1853, and of the tenant for life that he had had nothing to do with the property since 1828, was evidence that the fee was not subject in 1829 to the settlement: and therefore that there was nothing to rebut the inference from the public user at that time. (*h*)

From evidence of acts of user of a footway by the public extending over the whole time of living memory, during which time, however, the land over which the way passed had been under lease, a jury may presume against the reversioner a dedication of the way by his ancestors to the public at a period anterior to the land having first been leased. (*i*)

It is not enough, however, to establish the right of the public, that the persons using the way *reasonably believed*, from the conduct of the owner, that they had acquired a right to it; an *actual intention* on the part of the owner to dedicate must be shown. (*j*)

Where it appeared that a road ran from a highway to the lodge of a park as a carriage-way, but there was no road through the park but a bridleway leading to another highway; the park gates were sometimes locked, but persons on foot and on horseback were allowed to pass through the park; but after rain, when the road was liable to be cut up, carriages were refused admission: there was no actual thoroughfare beyond the park gates, but there were private roads leading from the road to two farms; the surveyor of highways had been in the habit of taking stone from the park to repair the road, and had, after supplying other stone, used the whole for the purpose of repair; the parish, in conjunction with the adjoining parish, had done the repairs from time immemorial; and the road was used by every one who thought fit to use it, but there had not been any user of the road by the public except for the purpose of going to the park to seek admission there; and it was held that this was not such a dedication as would make the road a public highway. (*k*)

(*h*) *R. v. Petrie*, 4 E. & B. 737.

(*i*) *Winterbottom v. The Earl of Derby*, 36 L. J. Ex. 194.

(*j*) *Hall v. Crawford*, Q. B. E. T. 1860. *Bateman's Highw. Acts*, 23. See *R. v. Broke*, 1 F. & F. 514.

(*k*) *R. v. Hawkhurst*, 7 Law T. 268. *Cockburn, C. J.*, thought the facts explained the user; and *Wightman, J.*, thought the repairs might be referred to the bridleway. See *Mildred v. Weaver*, 3 F. & F. 30.

Where there was a piece of garden ground in front of a house, with a fence on the side of a footpath and a road respectively, and there was a gate, which was kept bolted, at the footpath side, leading to the door of the house, and also gate-posts, but no gate near to the house at the road side, and people had frequently passed across the garden, but the defendant swore that they had no right to go that way, and that he had repeatedly sent persons back; it was held that there was no evidence to go to the jury of a public way. (l)

In determining whether or not a way has been dedicated to the public, the *intention* of the proprietor must be considered. If it appear only that he had suffered a continual user, that may prove a dedication; but such proof may be rebutted by evidence of acts showing that he contemplated a licence only, resumable in a particular event. Thus where the owner of land agreed with the Thorncliffe Iron Company, and with the inhabitants of a hamlet repairing its own roads, that a way over his land should be open to carriages, that the company should pay him £5 a year, and supply cinders for the repair of the road, and that the hamlet should lead and spread them, and from that time the road was used as a carriage-road without obstruction for nineteen years, when disputes arose, and the passage along the road with carriages was interrupted, and the interruption acquiesced in for five years; it was held that the evidence showed no dedication, but only a licence to use the road, resumable on breach of the agreement. (m) So where in order to show that a road is a public highway evidence is given that repairs have been done to it by the surveyor of highways, it is competent to prove an agreement between the surveyor and an agent of a landowner, which tends to explain such repairs, and to show that the road had not been repaired as a parish road, but under a private bargain. (n)

Where the owner of the soil has been under a compulsory obligation to permit a qualified passage over his soil, the circumstance of a general passage having been used by the public for many years will not lead to the conclusion of a dedication to the public. Thus where a road was set out by commissioners under a local Act, and certain persons only were by the Act to use it, but in fact it had been used by the public for nearly seventeen years, it was held, that this was not sufficient evidence of a dedication to the public. (o) But a private road, set out under an enclosure award, may, upon proof of sufficient user by the public before the passing of the Highway Act, 5 & 6 W. 4, c. 50, be deemed to be a highway which the parish or township is compellable to repair, though the award provides that such road is for ever thereafter to be kept in repair by the owners or occupiers of adjoining lands. (p)

Where a canal company were required to make and maintain bridges over a canal for the use of the owners and occupiers of adjoining lands, and also where the canal was carried across any highway, bridleway or footpath; and in 1804 the company erected a

(l) *Stone v. Jackson*, 16 C. B. 199.(m) *Barraclough v. Johnson*, 8 Ad. & E.

99; 3 N. & P. 233.

(n) *Ferrand v. Milligan*, 7 Q. B. 730.(o) *R. v. St. Benedict*, 4 B. & A. 447.*R. v. Bradfield*, 43 L. J. M. C. 155.(p) *R. v. Bradfield*, *supra*.

swivel bridge at a spot where there was a public bridleway and footway, which bridge, as a carriage-way, was intended to be for the exclusive accommodation of the tenants of an adjoining estate. From 1810 to 1822 the public occasionally used the bridge with carriages. In 1822 a church was built near to the canal, streets were formed, and the neighbourhood became very populous. From 1822 to 1832 the bridge was used by the public as a carriage-way, without interruption. In 1832 the company began to exact a toll from persons not tenants of the adjoining estate crossing the bridge with carriages, and in 1834 they removed the swivel bridge, and built a stone bridge in its stead. It was held that the evidence warranted the jury in finding that there had been a dedication. The fact of the public having the uninterrupted use of the way from 1822 to 1832 was a strong ground for inferring an intention on the part of the company to dedicate the way to the public. But if the matter rested on what took place since 1834, it could not be said that there had been a dedication to the public; but the previous period must be looked at, and if the public had acquired a right of way along the swivel bridge, the circumstance of the company erecting the stone bridge in its place could not have the effect of destroying that right. (q) Upon an indictment for encroaching upon a public highway, it appeared that in 1771, commissioners under an inclosure Act had been empowered to set out public and private roads, the former to be repaired by the township, the latter by such persons as the commissioners should direct. The public roads were to 'be and remain sixty feet in breadth between the fences.' The road in question was described in the award as a private road, and of the width of eight yards; but in fact a space of sixty feet was left between the fences till the time of the alleged encroachment. The centre of this space was commonly used by the public as a carriage-road, and had been repaired by the township for eighteen years before the encroachment. The space said to be encroached upon was at the side of this road, and there was a diversity of evidence as to the use made of this space by the public, and its condition since the time of the award. The commissioners, in their award, directed that the township should repair as well the public as the private ways. Parke, J., in summing up, observed that the commissioners had exceeded their authority in awarding that a private road should be repaired by the township; (r) but he left it to the jury to decide, whether the road, though originally meant to be a private one, had not subsequently been dedicated to the public, and they found a verdict of guilty, and it was held, that the case was for the jury, and that they had found a proper verdict. (s)

It seems that there may be a partial dedication of a way, although doubts have been entertained upon the subject. Where the owner of an estate permitted the public to use a road for several years for all purposes except that of carrying coals, Bayley and Holroyd, JJ., thought there might be such a partial dedication. (t) So where an

(q) *Surrey Canal Company v. Hall*, 1 M. & G. 392.

(r) *R. v. Cottingham*, 6 T. R. 20.

(s) *R. v. Wright*, 3 B. & Ad. 681. See this case, *post*.

(t) *Marquis of Stafford v. Coyney*, 7 B. & C. 257. Little Dale, J., doubted. And see *Cowling v. Higginson*, 4 M. & W. 245.

indictment for non-repair of a bridge used 'at all such times as and when it has been or is dangerous to pass through the river by the side of the bridge,' was objected to because it did not show the bridge to be a public bridge, but only a bridge to be used on particular occasions. Lord Ellenborough, C. J., said that, though it must be an absolute dedication to the public, still it might be definite as to time, and the Court overruled the objection. (*u*)

The correct distinction in cases of this kind appears to be that there may be a dedication of a way to the public for a limited purpose, as for a footway, horseway, or driftway; but there cannot be a dedication to a limited part of the public, as to the inhabitants of a parish and persons resorting to their houses. (*v*) Thus there may be a dedication of a highway, subject to a partial interruption during the continuance of a fair or market for a certain limited and not unreasonable time. (*w*) So where in front of a line of houses there was a footway; then a space thirty-three feet wide between the footway and a carriage-way, and the occupiers of the houses had always made use of so much of the intermediate space as was opposite to their respective houses, in such manner as suited their trades or occupations; but the public had at all times passed over the intermediate space as of right subject to such use of it by the occupiers; the Court of Queen's Bench seem to have been of opinion that this was a dedication to the public, subject to such use by the occupiers. (*x*) So where there had been a public highway over a quay in front of certain houses, and as far as living memory went there had been a user by the occupiers thereof to deposit anchors and other incumbrances thereon, the Court of Exchequer thought that in point of law a dedication might have been made subject to such use. (*y*)

A highway may be dedicated with obstructions or impediments which, if made in an existing highway, would be a nuisance. Thus where a cellar had an opening into a footway, which was open during the day, but shut at night with a flap which slightly projected above the footway, and this state of things had existed as far as living memory went; it was held that the jury ought to draw the conclusion that it had existed as long as the footway, and that the dedication of the way to the public was with the reservation of the flap being continued there, and accepted by them subject to the inconvenience arising from it; and that such a dedication might lawfully be made, and consequently that the flap was no nuisance, though it would have been otherwise if it had been placed in an existing footway. (*z*)

In front of the house of the appellant, situate in a London square, was an area and cellar. The cellar was formed of brick walls, one forming the outer walls of the area, and another running parallel to such outer wall. The covering to the cellar was formed of large flag-

(*u*) *R. v. Northampton*, 2 M. & S. 262. See *R. v. Marquis of Buckingham*, 4 Camp. N. P. 189; *Roberts v. Karr*, 1 Camp. N. P. 3, 262, n.

(*v*) *Poole v. Huskinson*, 11 M. & W. 827.

(*w*) *Elwood v. Bullock*, 6 Q. B. 383.

(*x*) *Le Neve v. Vestry of Mile End Old Town*, 8 E. & B. 1054.

(*y*) *Morant v. Chamberlin*, 6 H. & N. 541.

(*z*) *Fisher v. Prowse*, 2 B. & S. 770. See *Robbins v. Jones*, 15 C. B. N. P. 221. S. P. as to projecting steps, *Cooper v. Walker*, *ibid*.

stones, the ends of which rested on the walls. From the year 1830, when the houses were built and the flagstones were laid down, the flagstones were used by the public as a footway, and became, by reason of the traffic, worn down, cracked, and dangerous. The vestry called upon the appellant to repair the cellar and its covering. He refused to do so, whereupon the vestry did the work, and proceeded against him to recover the expenses. Held, that the vestry were bound to keep the flagstones in repair, and could not recover from the appellant any part of the expenses of doing so. (a) The respondent was owner and occupier of premises consisting of a yard, building, and railway arches, in a Metropolitan parish. These premises abutted upon a highway consisting of a foot-pavement and roadway, and had a gateway opening on to the pavement. For sixty years and upwards, whenever the occupier of premises abutting on the footway wished to have access to them across the footway for carts, &c., it was the practice for him to apply to the highway board or vestry for permission to construct the necessary way, which was usually granted. The respondent, after taking possession of his premises, began to use them for the deposit of heavy machinery, the only use, owing to the character of the neighbourhood, to which they could be put. He at first conveyed the machinery across the causeway by means of rollers and levers, but this being objected to as an obstruction of the thoroughfare, he applied to the vestry for leave to take up the pavement and make a carriage way. This leave was refused, and he then conveyed it to and from his premises in waggons across the flagged footway. The weight of the machinery in the waggons crushed the paving stones and obstructed the way, and the appellants took out a summons against him under 5 & 6 Will. 4, c. 50, s. 72, for a nuisance. The magistrate dismissed the summons, finding, as a fact, that 'the premises could not be reasonably enjoyed without access over the existing footway, and that the rights of ownership and those of the public might be jointly exercised consistently with the general welfare.' Held, upon a case raising the question whether the magistrate was bound to convict, that the respondent was entitled to judgment, since the owner of land, who dedicates part of it as a public way, may enjoy all rights not inconsistent with the dedication, and that the respondent did not appear to have exceeded these rights. (b) A footway across an arable field had from time immemorial at all times of the year been used by all persons, as of right, but the occupier of the field and his predecessors had also from time immemorial, in ploughing the field, ploughed up the footway in such parts as they thought fit, and in other parts lifted the plough across it. Held by the Court of Exchequer Chamber, upholding the decision in *Mercer v. Woodgate*, 39 Law J. Rep. M. C. 21, that the surveyors of the parish highways were not justified in repairing the way with hard materials, so as to prevent it from being ploughed, or the plough from being lifted over it, so easily as before, as it must be presumed to have been dedicated to the public, subject to the inconvenience of being occasionally ploughed up. (c) In a high street in the town and

(a) *Hamilton v. The Vestry of St. George's, Hanover Square*, 43 L. J. M. C. 41.

(b) *The Vestry of St. Mary Newington v. Jacobs*, 41 L. J. M. C. 72.

(c) *Arnold v. Blaker*, 40 L. J. Q. B. 185.

manor of C. there was a market house belonging to the lord. This manor, together with the market, belonged to the Crown in the reign of Henry III. As far back as living memory extended, various tolls had been paid for the use of the market, for articles hawked about the town, and for stalls and standings for the sale of articles erected in the street. One of these tolls was a shilling for every cart-load of fish, fruit, and vegetables hawked about the town, and for which no toll had before been paid in the market. Held, that there was evidence that the toll had been paid from time immemorial, so that a legal origin of the claim would, if possible, be presumed; that, if any objection were made to the antiquity of the toll on the score of rankness, it might still be supported as a reasonable toll, the amount varying from time to time according to the varying value of money; that, if such an objection were unanswerable, the claim might be sustained as to a toll granted or reserved within time of memory, by presuming a dedication by the Crown of the street to the public since the time of Henry III., which would be a good consideration for a grant or reservation of the toll claimed, as it was not toll thorough, or a toll for the mere use of the way, but imported a licence to rest and stay upon the land for the purpose of selling marketable commodities. (*d*)

Where a private right of way already exists, the owner of the land over which it runs can only dedicate that land to the public subject to such private right; for he can give nothing but what he himself has, *i. e.*, a right of user not inconsistent with the private easement; (*e*) and the acquiring a right of way by the public does not destroy a previously existing private right of way over the same line. (*f*)

But there can be no dedication of a way by an individual to the public for a limited time, whether certain or uncertain, and if dedicated at all by an individual, it must be dedicated in perpetuity. (*g*)

Public roads are frequently created by Acts of Parliament, but in these cases the road will only continue to be a public road so long as the Act continues in force, and the performance of statute duty upon the road during the continuance of the Act is no adoption of the road so as to render the parish liable to repair it after the Act has expired. A road was made by the trustees appointed under the 45 Geo. 3, c. 7, which was to continue in force for twenty-one years, and from thence to the end of the then next session of Parliament, and which required the inhabitants to do statute duty upon the road: it was held that when the Act ceased to be in operation, the road made pursuant to its provisions was no longer a public road, and as,

(*d*) *Lawrence v. Hitch*, 37 L. J. Q. B. 209.

(*e*) *R. v. Chorley*, 12 Q. B. 515.

(*f*) *Duncan v. Louch*, 6 Q. B. 904.

(*g*) *R. v. Lordsmere*, *post*, p. 772. *Dawes v. Hawkins*, 8 C. B. (N. S.) 848; in this case an ancient way over a common was, without authority or interference from the owner of the soil, diverted by an adjoining proprietor, who substituted a new road for it, which was used for more than twenty

years by the public, and then the original road was reopened to the public and used by them; and *Erle, C. J.*, and *Byles, J.*, held that these facts afforded no reasonable evidence of a dedication of the substituted road to the public, the public user thereof being referable to the right of the public to deviate on the adjoining land in consequence of the old road being stopped up. *Williams, J.*, *dissentiente*.

during the time the Act continued in force, the several parishes through which the road passed were compelled by the Act to do statute duty, there was no adoption of the road by those parishes during that period. As soon as the Act expired or was repealed, the several parishes, through which the road passed, could only be liable to repair by reason of the common-law obligation. Now a road becomes public by reason of a dedication of the right of passage to the public by the owner of the soil, and of an acceptance of the right by the public or the parish; and in this case the facts did not furnish any ground for presuming an adoption by the public. (*h*)

Upon an indictment for non-repair of a common Queen's highway, it appeared that the road was made under a turnpike Act, which was to continue in force for twenty-one years, and had been kept in force by subsequent Acts till the finding of the indictment. It was opened in 1850 for general traffic, a stage-coach had run along it, and it had been used by carts and carriages. It was proposed to prove in defence that the trustees had never put the road in good repair, and that it had never been properly fenced or finished so as to fulfil the requisitions of the Act; but as it had been so far completed as to have been used along the whole line for several years, Patteson, J., rejected the evidence as tending to prove what was immaterial. It was contended, after a verdict of guilty, that the township was not liable to repair a temporary turnpike road; that the way was improperly described, as it was not described as a way for a limited time; and that the evidence was improperly rejected, as unless the road had been completed by the trustees, the township had not become liable to repair. But it was held that this was a common Queen's highway at the time the bill was found, and that the township was liable to repair it, at least as long as the Act continued in force, and that there was no misdescription, and that after the road had been opened and used for so many years, it was much too late to raise any objection to its not having been fully completed. (*i*) Where a road was made by turnpike trustees under a temporary Act which expired in 1848, but the whole line authorized by the Act had never been completed: for twenty-eight years it had been used by the public, and rates had been made, during that time, at the parish meetings, for the repair of the road, and the road had on many occasions been repaired, and the surveyor had been paid for such repairs, but during such time portions of the road were frequently not kept in sufficient repair, and in one part there was a hole a yard deep made by persons employed to repair the road in order to obtain materials, but vehicles could pass between that and the hedge, and the parish had not attempted to fill it up. Two or three bars or chains were put up shortly after the making of the road, and toll demanded and sometimes refused; but the chain and bars had been removed for more than twelve years. On an appeal against a conviction in 1857 for obstructing this road, the sessions confirmed the conviction, subject to the opinion of the Court of Queen's Bench, whether there was evidence that the said road ever became a highway compulsorily repairable

(*h*) *R. v. Mellor*, 1 B. & Ad. 32. See the *infra*. *R. v. Winter*, 8 B. & C. 785; 3 M. & R. 433.

(*i*) *R. v. Lordsmere*, 15 Q. B. 689.

by the parish; and that Court held that there was such evidence, and that, though the fact that the road was originally made under the turnpike Act, might explain away such evidence in fact, it did not conclusively rebut it in law. (*j*)

Where an ancient highway is turned into a turnpike road the imposition of tolls does not prevent its continuing to be repairable by the parish. (*k*)

Where by an Act of Parliament trustees are authorized to make a road from one point to another, the making of the entire road is not a condition precedent to any part becoming a highway repairable by the public. (*l*)

Where a highway was proved to have existed for forty years before 1827, and then to have been interrupted for more than twenty years, it was contended that such an interruption acquiesced in by the public was sufficient in law to exclude such right of way on behalf of the public; but it was held that the fact that a person had for more than twenty years prevented the public from doing what they had done before for forty years, did not destroy the right. An interruption for such a period was evidence that no right ever existed, but it might be met by counter evidence. (*m*)

By the common law an ancient highway cannot be changed without the King's licence first obtained upon a writ of *ad quod damnum*, and an inquisition thereon found that such a change will not be prejudicial to the public. (*n*)

It is certain that a highway may be changed by the act of God; and therefore it has been holden that if a water, which has been an ancient highway, by degrees change its course, and go over different ground from that whereon it used to run, yet the highway continues in the new channel as it previously was in the old. (*o*) But it may well be doubted whether this position can be applied to roads, and it seems clearly inapplicable to a case where a public road is washed away by the sea. An indictment alleged that a certain part of a public highway, which had existed from time immemorial, was out of repair, and that the defendant was liable to repair it by reason of the tenure of his lands; and it was found by a special verdict that the sea had from time to time made encroachments upon the said lands, and carried away the soil and earth of the same, so that part of the space occupied by the said lands was occupied by the sea; and that there was an ancient highway as stated in the indictment, part whereof passed over the said lands; and that the encroachments of the sea had from time to time extended unto and over the said ancient highway, so that a portion of the said highway was covered by the sea and impassable; wherefore those, whose estate the defendant had, had, from time to time, gradually removed the same highway, and appropriated other parts of the said land for the site thereof, so that the public had had the uninterrupted use of a road for the purposes of the said highway;

(*j*) *R. v. Thomas*, 7 E. & B. 399.

(*k*) *R. v. Lordsmere*, *supra*.

(*l*) *R. v. French*, 4 Q. B. D. 507.

(*m*) *Young v. Cunthbertson*, 1 Macq. Sco. Ap. C. 455. Perhaps in case of non-user by the public for a great length of time, it might be presumed that a highway has been legally

stopped by order of justices, or in some other legal way.

(*n*) 1 Hawk. P. C. c. 76, s. 3. Burn's Just. tit. *Highways*, s. 11. The writ of *ad quod damnum* seems virtually abolished. See Woolrych's Highway Act, 112.

(*o*) 1 Hawk. P. C. c. 76, s. 4.

and that the same road had always been repaired by the defendant and those whose estate he had in lieu of so much of the ancient highway; and that the sea had made an encroachment in the month of March last, upon the part of the highway mentioned in the indictment, and carried away large quantities of the soil thereof, and that the highway was thereby rendered impassable. And it was held by the Court of Queen's Bench, that the defendant was entitled to be acquitted. (*p*) So where an indictment described a road as leading from a street to the German Ocean, and alleged that part of it was in great decay for want of due reparation, and it appeared that the road had formerly sloped gradually down towards the sea, but had been washed away from time to time by the encroachments of the sea, and at the time when the indictment was preferred the termination of the road had become a perpendicular cliff twenty feet high, which rendered it impossible for any cart or carriage to get down to the beach, but the surface of the existing road was in good repair up to where the same had been swept away by the destruction of the cliff; it was held that there did not exist any legal obligation upon the parish to provide an available carriage-road down to the beach. The indictment alleged that there was a highway, and that it was out of repair; but it was found that that part of the road alleged to be out of repair had been washed away by the sea, so that the subject of repair was not in existence; and in order to create an obligation to repair, there must be something in existence capable of being repaired. (*q*)

So where upon an indictment for non-repair of a highway it appeared that the highway alleged to be out of repair had passed along the top of a quay, which was a thick wall of solid masonry of considerable height, and the surface of it was composed of large pieces of granite mortared together, and had been used by persons going on foot and on horseback and with small carts used by fishermen, and two or three years before the sea had washed away a considerable portion of the quay leaving a gap, which completely broke off the communication. Maule, J., held that the defendants were entitled to be acquitted. Whatever might be the duty of the parish as to the road whilst the quay existed, they were not defaulters on this evidence. The interruption of the passage was not from the want of repair, but from the sea having washed away the wall, and there was no longer anything for them to repair. (*r*)

A public highway ran along the slope of a hill, beneath which was a valley, the slope being at right angles to the valley, and very precipitous. A landslip of considerable magnitude occurred on the slope, and about 252 yards of the highway were carried off into the valley below, and, its place being filled up with stones and other debris, no trace of the old metalled road remained, but the line of it was known and admitted. An engineer, who had inspected the *locus in quo*, reported that it was practicable to form a permanent and passable road along the whole track, and of a similar character, at a moderate outlay. The Court had power to draw inferences of fact, — Held, that

(*p*) R. v. Bamber, 5 Q. B. 279.

(*q*) R. v. Hornsen, Dears. C. C. 291. See R. v. Leigh, 10 A. & E. 398, as to sea walls washed away by an extraordinary tempest,

and R. v. Commrs. of Fobbing, 11 Ap. Cas. 449.

(*r*) R. v. Paul, 2 M. & Rob. 307.

there was no such total destruction of the road as would relieve the parish from liability to repair. ^(s)

By the 5 & 6 Will. 4, c. 50, s. 80, the surveyor shall make every public cartway, leading to any market town, twenty feet wide at the least, and every public horseway eight feet wide at the least, and every public footway by the side of any carriage-way three feet at the least, if the ground between the fences inclosing the same will admit thereof. ^(t) And by sec. 82, where it shall appear, upon the view of two justices, that any highway is not of sufficient breadth, and may be widened and enlarged, the said justices shall order such highway to be widened and enlarged in such manner as they shall think fit, so that the said highway, when enlarged and diverted, shall not exceed thirty feet in breadth; and that neither of the said powers do extend to pull down any house or building, or to take away the ground of any garden, lawn, yard, court, park, paddock, planted walk, plantation, or avenue to any house or any enclosed ground set apart for building-ground, or as a nursery for trees. The statute then proceeds to empower the surveyor to agree with the owners of the ground wanted for such purposes for their recompense; and provides, that if they cannot agree, the same may be assessed by a jury at the quarter sessions; and, after directing the proceedings in such event, it enacts that, 'upon payment or tender of the money so to be awarded and assessed, to the person, body politic or corporate, entitled to receive the same, or leaving it in the hands of the clerk of the peace of such limit, in case such person, &c., cannot be found, or shall refuse to accept the same, for the use of the owner of or others interested in the said ground, the interest of the said person, &c., in the said ground shall be forever divested out of them; and the said ground, after such agreement or verdict as aforesaid, shall be esteemed and taken to be a public highway, to all intents and purposes whatsoever.' ^(u)

Sec. 84. 'When the inhabitants in ^(v) vestry assembled ^(w) shall deem it expedient that any highway should be stopped up, diverted or turned, either entirely or reserving a bridleway or footway along the whole or any part or parts thereof, ^(x) the chairman of such meeting shall, by an order in writing, direct the surveyor to apply to two justices to view the same, ^(y) and shall authorize him to pay all the ex-

^(s) *R. v. Hornsea*, Dears. C. C. 291, distinguished. *R. v. Greenhow*, Inhab. of, 1 Q. B. D. 703, 45 L. J. M. C. 141.

^(t) 1 Hawk. P. C. c. 76, s. 16. The surveyor has no authority to pare away the bank of a fence by the side of a road under this clause. *Alston v. Scales*, 9 Bing. 3. See *Lowen v. Kaye*, 4 B. & C. 3; 6 D. & R. 20. As to widening highways under the Highway Acts, 1862, 1864, see 25 & 26 Vict. c. 61, s. 44; 27 & 28 Vict. c. 101, ss. 21, 47, 48, noticed *post*.

^(u) Sec. 82. It was decided that a similar power thus given to two justices by the 13 Geo. 3, c. 78, to order any highway to be widened extended to roads repairable *ratione tenuræ*; and that upon disobedience to such order the party might either be proceeded against summarily under the statute, or by an indictment as for an offence at common law. 1 Hawk. P. C. c. 76, s. 57;

R. v. Balme, Cowp. 648. Sec. 83 provides for the costs of the proceedings at the sessions.

^(v) *Wright v. Frant* (Overseers of), 32 L. J. M. C. 204.

^(w) *R. v. Powell*, 42 L. J. M. C. 129, where it was held that the notice convening the meeting was sufficient.

^(x) This provision seems to have been introduced to get rid of the doubts entertained in *R. v. Winter*, 8 B. & C. 785, as to whether justices could divert a road for carriages and continue it for foot passengers. An order for stopping up half the breadth of a highway under the 55 Geo. 3, c. 68, was bad, although the other half was not within the division of the justices who made the order. *R. v. Milverton*, 5 A. & E. 841; 1 N. & P. 179.

^(y) See *post*. As to stopping up foot-paths across lands required for rifle vol-

penses attending such view, and the stopping up, diverting or turning such highway, either entirely or subject to such reservation as aforesaid, out of the money received by him for the purposes of this Act; provided nevertheless, that if any other party shall be desirous of stopping up, diverting, or turning any highway as aforesaid, he shall, (z) by a notice in writing, require the surveyor to give notice to the churchwardens to assemble the inhabitants in vestry, and to submit to them the wish of such person; and if such inhabitants shall agree to the proposal, the said surveyor shall apply to the justices as last aforesaid for the purposes aforesaid; and in such case the expenses aforesaid shall be paid to such surveyor by the said party, or be recoverable in the same manner as any forfeiture is recoverable under this Act; and the said surveyor is hereby required to make such application as aforesaid.'

Sec. 85. (a) 'When it shall appear upon such view (b) of such two justices of the peace, made at the request of the said surveyor as aforesaid, that any public highway may be diverted and turned, either entirely or subject as aforesaid, so as to make the same nearer or more commodious to the public, and the owner of the lands or grounds through which such new highway so proposed to be made shall consent thereto by writing under his hand, (c) or if it shall appear upon such view that any public highway is unnecessary, the said justices shall direct the surveyor to affix a notice in the form or to the effect of Schedule (No. 19) to this Act annexed in legible characters, at the place and by the side of each end (d) of the said highway from whence the same is proposed to be turned, diverted, or stopped up, either entirely or subject as aforesaid, and also to insert the same notice in one newspaper published or generally circulated in the county where the highway so proposed to be diverted and turned, or stopped up,

unter and artillery volunteer practice, see 23 & 24 Vict. c. 140, s. 17; 25 & 26 Vict. c. 41, s. 4.

(z) This seems virtually to do away with the writ of *ad quod damnum*, as the clause is imperative on the party desiring to stop up a highway to proceed under this section. C. S. G.

(a) See 27 & 28 Vict. c. 101, s. 21, *post*.

(b) Actual inspection being the foundation of the jurisdiction of the justices, the order must distinctly state that the justices acted upon view. See *R. v. Justices of Cambridgeshire*, 4 A. & E. 111, 5 N. & M. 440; *R. v. Milverton*, 5 A. & E. 841, 1 N. & P. 179; *R. v. Marquis of Downshire*, 4 A. & E. 698, 6 N. & M. 92. An order, 'we having upon view found, or it appearing unto us,' would be bad. *R. v. Wallace*, 4 Q. B. D. 641; *R. v. Justices of Worcestershire*, 8 B. & C. 244; and see *R. v. Justices of Kent*, 10 B. & C. 477; *R. v. Jones*, 12 A. & E. 684; *R. v. Newmarket R. Co.*, 15 Q. B. 702, that the order must have shown, on the face of it, that the justices had viewed the new line of road. The view by justices under the 55 Geo. 3, c. 68, s. 2, was not sufficient, unless it was a joint view, and unless the finding that the way was unnecessary was the result of that view: but it was held to

be no objection that previously to their view the road had been stopped up *de facto* by the owner of the adjoining land without authority, as they might properly state in their order that they had viewed the old road if they had viewed the ground over which the right of way was. *R. v. Justices of Cambridgeshire*, 4 A. & E. 111; 5 N. & M. 440. Where a person, over whose land a highway led, opened another road over his own land, between the same points, which the public used, and they ceased using the former road, it was held that nine years afterwards an order for stopping up the old road as unnecessary might be made under the 55 Geo. 3, c. 68, and that it was not necessary to proceed as in case of diverting a highway under the 13 Geo. 3, c. 78, s. 16, *ibid*.

(c) There must be the consent of the person who is the owner of the estate at the time when the order is made. *R. v. Kirk*, 1 B. & C. 21. And an assent to the turning of a road, given under the hand and seal of the solicitor and agent of the party through whose ground the new road is to pass, is not sufficient. *R. v. Justices of Kent*, 1 B. & C. 722.

(d) See *R. v. Surrey (Justices of)*, 39 L. J. M. C. 145, where there were three roads forming one system.

either entirely or subject as aforesaid (as the case may be) shall lie, for four successive weeks next after the said justices have viewed such public highway, and to affix a like notice on the door of the church of every parish in which such highway so proposed to be diverted, turned, or stopped up, either entirely or subject as aforesaid, or any part thereof, shall lie, on four successive Sundays next after the making such view; and the said several notices having been so published, and proof thereof having been given to the satisfaction of the said justices, and a plan having been delivered to them at the same time particularly describing the old and the proposed new highway, by metes, bounds, and admeasurement thereof, which plan shall be verified by some competent surveyor, the said justices shall proceed to certify (e) under their hands the fact of their having viewed the said highway as aforesaid, and that the proposed new (f) highway is nearer or (g) more commodious to the public; and if nearer, the said certificate shall state the number of yards or feet it is nearer, or if more commodious, the reasons why it is so; and if the highway is proposed to be stopped up as unnecessary, either entirely or subject as aforesaid, then the certificate shall state the reason why it is unnecessary; and the said certificate of the said justices, together with the proof and plan so laid before them as aforesaid, shall, as soon as conveniently may be after the making of the said certificate, be lodged with the clerk of the peace for the county in which the said highway is situated, and shall (at the quarter sessions which shall be holden for the limit within which the highway so diverted and turned, or stopped up, either entirely or subject as aforesaid, shall lie, next after the expiration of four weeks from the day of the said certificate of the said justices having been lodged with the clerk of the peace as aforesaid), (h) be read by the said clerk of the peace in open court; and the said certificate, together with the proof and plan as aforesaid, as well as the consent in writing of the owner of the land through which the new highway is proposed to be made, shall be enrolled by the clerk of the peace amongst the records of the said court of quarter sessions; provided always, that any person whatever shall be at liberty, at any time previous to the said quarter sessions, to inspect the said certificate and plan so as aforesaid lodged with the said clerk of the peace, and to have a copy thereof, on payment to the clerk of the peace, at the rate of sixpence per folio, and a reasonable compensation for the copy of the plan.'

Sec. 86. 'In any case where it is proposed to stop up or divert more than one highway, which highways shall be deemed to be so connected together as that they cannot be separately stopped or diverted without interfering one with the other, it shall be lawful to include such different highways in one order or certificate.' (i)

(e) As to the requisites of the certificate, see *R. v. Hervey*, 44 L. J. M. C. 1; *R. v. Maule*, 41 L. J. M. C. 47.

(f) See *R. v. Phillips*, 35 L. J. M. C. 217, *post*, p. 779.

(g) A certificate is not bad by reason of its not stating that the new highway would be nearer as well as more commodious. *R. v. Phillips*, 35 L. J. M. C. 217.

(h) See *R. v. Justices of Kent*, 1 B. & C. 622, as to the mode of computing the time from the giving the notices under the 55 Geo. 3, c. 68, s. 2.

(i) Before this Act there must have been a separate order for each road. *R. v. Milverton*, 5 A. & E. 841; 1 N. & P. 179. So a road could not be diverted and stopped up by the same order. *R. v. Justices of Middle-*

Sec. 87. 'In the event of any appeal being brought against the whole or any part or parts of any order or certificate for diverting more highways than one, it shall be lawful for the Court to decide upon the propriety of confirming the whole or any part or parts of such order or certificate, without prejudice to the remaining part or parts thereof.'

Sec. 88. 'When any such certificate shall have been so given as aforesaid, it shall and may be lawful for any person who may think that he would be injured or aggrieved (j) if any such highway should be ordered to be diverted and turned or stopped up, either entirely or subject as aforesaid, and such new highway set out and appropriated in lieu thereof as aforesaid, or if any unnecessary highway should be ordered to be stopped up as aforesaid, to make his complaint thereof by appeal to the justices of the peace at the said quarter sessions, upon giving to the surveyor ten days' (k) notice in writing of such appeal, together with a statement in writing of the grounds of such appeal, who is hereby required, within forty-eight hours after the receipt of such notice, to deliver a copy of the same to the party by whom he was required to apply to the justices to view the said highway; provided that in all cases where the said surveyor shall have been directed by the inhabitants in vestry assembled to apply to such justices as aforesaid, then the said surveyor shall not be required to deliver a copy of such notice to any party; provided also, that it shall not be lawful for the appellant to be heard in support of such appeal unless such notice and statement shall have been so given as aforesaid, nor on the hearing of such appeal to go into or give evidence of any other grounds of appeal than those set forth in such statement as aforesaid.'

Sec. 89. 'In case of such appeal the justices at the said quarter sessions shall, for the purpose of determining whether the proposed new highway is nearer or more commodious to the public, or whether the public highway so intended to be stopped up, either entirely or subject as aforesaid, is unnecessary, or whether the said party appealing would be injured or aggrieved, impanel a jury of twelve disinterested men out of the persons returned to serve as jurymen at such quarter sessions: and if, after hearing the evidence produced before them, the said jury shall return a verdict that the proposed new highway is nearer or more commodious to the public, or that the public highway so intended to be stopped up, either entirely or subject as aforesaid, is unnecessary, or that the party appealing would not be injured or aggrieved, then the said court of quarter sessions shall dismiss such appeal, and make the order herein mentioned for diverting and turning and stopping up such highway either entirely or subject as aforesaid, or for diverting, turning, and stopping up of such old highway, and purchasing the ground and soil for such new highway, or for stopping up such unnecessary highway either entirely or

sex, 5 A. & E. 626; 1 N. & P. 92. R. v. Justices of Kent, 10 B. & C. 477.

(j) R. v. Justices of Essex, 5 B. & C. 431. R. v. Justices of West Riding of Yorkshire, 7 B. & C. 678. R. v. Blackawton, 10 B. & C. 792. R. v. Bond, 6 A. & E. 905. R. v.

Justices of the West Riding of Yorkshire, 4 B. & Ad. 685; 1 N. & M. 426. R. v. Adey, 4 N. & M. 365.

(k) As to fourteen days' notice being now necessary, see R. v. Maule, 41 L. J. M. C. 47; see R. v. Lancashire, 8 E. & B. 563.

subject as aforesaid; but if the said jury shall return a verdict that the proposed new highway is not nearer or not more commodious to the public (*l*) or that the highway so intended to be stopped up, either entirely or subject as aforesaid, is not unnecessary, or that the party appealing would be injured or aggrieved, then the said court of quarter sessions shall allow such appeal, and shall not make such order as aforesaid.' (*m*)

Sec. 91. 'If no such appeal be made, (*n*) or being made shall be dismissed as aforesaid, then the justices at the said quarter sessions shall make an order (*o*) to divert and turn and to stop up such highway, either entirely or subject as aforesaid, or to divert, turn, and stop up such old highway, and to purchase the ground and soil for such new highway, or to stop up such unnecessary highway, either entirely or subject as aforesaid, by such ways and means, and subject to such exceptions and conditions in all respects as in this Act is mentioned in regard to highways to be widened, and the proceedings thereupon shall be binding and conclusive on all persons whomsoever, and the new highway so to be appropriated and set out shall be and for ever after continue a public highway to all intents and purposes whatsoever, but no old highway (except in the case of stopping up such useless highway as herein is mentioned) shall be stopped until such new highway shall be completed and put into good condition and

(*l*) By a certificate of two justices, obtained for the purpose of diverting and stopping up a highway, &c., and made under the 85th sect. of the 5 & 6 Will. 4, c. 50, it was stated that the proposed new highway 'will be more commodious to the public, by reason,' &c., and that the old highway called, &c., 'will if and so soon as such diversion or substitution be effected, become and be wholly unnecessary and useless, by reason,' &c. The certificate also showed that the way to be substituted for the old one was not an entirely new way, but would consist of two existing ways, which were to be widened and enlarged, so as to make them more commodious and convenient. Held, overruling *R. v. Shiles*, 1 Q. B. 919, that the certificate was not bad by reason of its not stating that the new highway would be nearer as well as more commodious. Held, also, that it was not bad by reason of its not stating that the new highway was more commodious, and that it was sufficient to state that it would be, &c. Held, also, overruling *Welch v. Nash*, 8 East, 394, that it was not necessary that the highway to be substituted should be entirely new. *R. v. Phillips*, 35 L. J. M. C. 217.

(*m*) Sec. 90. 'The Court of Quarter Sessions has power to award costs of the appeal.' See *R. v. W. R. of Yorkshire*, 2 B. & S. 811.

(*n*) In *R. v. Justices of Worcestershire*, 2 B. & A. 223, it was held that the sessions had a right to inquire whether the order, though there was no appeal, was made by proper authority before they confirmed it. *R. v. Worcestershire*, 3 E. & B. 477. *R. v. Hervey*, 44 L. J. M. C. 1.

(*o*) An order for stopping up a footway under the 55 Geo. 3, c. 68, s. 2, must have distinctly stated in what parish or place the footway was situate. *R. v. Kenyon*, 6 B. & C. 640. Where a road was diverted, the order must have shown on the face of it that the public had the same permanent right over the new line as they had along the old line: where, therefore, the new line passed partly over a road described in the order as a new turnpike road, it was held that as it might have been made a turnpike road only for a limited period, and if so, would subsist as a public road for that period only (see *ante*, p. 771), the order was bad; and if a permanent right was given to the public under the Turnpike Act, that ought to have been shown by the order. *R. v. Winter*, 8 B. & C. 785. An order referring to a plan annexed to the order for the description of the road to be diverted was good; but a notice published pursuant to the 55 Geo. 3, c. 68, s. 2, merely describing the road by *termini*, and the part to be stopped up as so many yards of such road, was held bad. *R. v. Horner*, 2 B. & Ad. 150. If an order for stopping a highway were properly made and enrolled, under 55 Geo. 3, c. 68, it was unnecessary to render it effectual that an actual stoppage of the road should have taken place. *R. v. Milverton*, 5 A. & E. 841; 1 N. & P. 179. A footway might be ordered to be stopped without being ordered to be sold. *R. v. Glover*, 1 B. & Ad. 482. It seems to have been thought that the justices had only jurisdiction over the roads within the division of the county for which they acted, under the 55 Geo. 3, c. 68. *R. v. Milverton*, 5 A. & E. 841; 1 N. & P. 179.

repair, and so certified by two justices of the peace upon view thereof, which certificate shall be returned to the clerk of the peace, and by him enrolled amongst the records of the court of quarter sessions next after such order as aforesaid shall have been made pursuant to the directions hereinbefore contained.' (oo)

Sec. 92. 'In every case in which a highway shall have been turned or diverted under the provisions of this Act, the parish or other party which was liable to the repair of the old highway shall be liable to the repair of the new highway, without any reference whatever to its parochial locality.'

Sec. 93. 'The powers and provisions in this Act contained with respect to the widening and enlarging, diverting, turning, or stopping up any highway shall be applicable to all highways which any person, bodies politic or corporate, is or are bound to repair by reason of any grant, tenure, limitation, or appointment of any charitable gift, or otherwise howsoever; and that when such last-mentioned highways are so widened or enlarged, turned or diverted, the same shall and may, by an order of the justices at a special sessions for the highways, be placed under the control and care of the surveyor of the parish in which such highways may be situate, and shall be from time to time thereafter repaired and kept in repair by the said parish: provided also, that the said highways so widened, enlarged, diverted, or turned, shall be viewed by two justices of the peace, who shall make a report thereof to the justices at a special sessions for the highways, and such last-mentioned justices shall, by an order under their hands, fix the proportionate sum which shall be annually paid, or shall fix a certain sum to be paid, by such person, bodies politic or corporate, his or their heirs, successors, or assigns, to the said surveyors of the parish, in lieu of thereafter repairing the said part of the said old highway, and the order of the said last-mentioned justices shall be and continue binding on all such persons, bodies politic or corporate, their heirs, successors, or assigns, and in default of payment thereof the said surveyor shall proceed for the recovery of the same in the manner as any penalties and forfeitures are recoverable under this Act.'

It frequently happened that the boundaries of parishes passed through the middle of a highway, one side of the highway being situated in one parish, and the other side of the way being situated in another parish, whereby great inconveniences arose to the parishes in settling the time and manner of repairing such highways; and it was therefore provided by the 5 & 6 Will. 4, c. 50, s. 58, that the justices, at a special sessions for the highways, upon application by the surveyor, may divide the whole of any such common highway, by a transverse line crossing it, into two equal parts, or into two such unequal parts and proportions as in consideration of the soil, waters, floods, the inequality of such highway, or any other circumstances, they think just. (p)

Besides the methods which have been already mentioned, roads are sometimes changed or stopped, or new ones created by turnpike Acts,

(oo) The consent of the Parish Council is also now necessary, 56 & 57 Vict. c. 73, s. 13.

(p) The Act sets forth particularly the proceedings to be had for the purpose of such

division; and afterwards enacts as to the liabilities of the parishes respectively to repair their portions after such division; see *post*, p. 797.

inclosure Acts, or other Acts of Parliament, containing specific enactments for such purposes; but such new roads may or may not be public, according to the provisions of the particular Acts. (*q*)

The commissioners appointed under local inclosure Acts have power to stop up and divert public ways over lands to be inclosed by the 41 Geo. 3, c. 109, s. 8; but that section contains a proviso, that where such commissioners have power, under any inclosure Act, to stop up any old road leading through old inclosures, they shall not exercise that power without the concurrence of two justices; it follows as a necessary consequence from the proviso, taken with the rest of the clause, that if no such power is given to commissioners by the particular inclosure Act, it cannot exist at all. (*r*)

Under the 41 Geo. 3, c. 109, s. 8, the commissioners are authorised to stop up or divert footways as well as carriage-roads; and the proviso at the end of the section is not confined to carriage roads, but extends to every species of way, and, therefore, where the commissioners were empowered by a local inclosure Act to stop up all ways passing over the lands to be inclosed, as well as ways passing through old inclosures in the parish, it was held that in order effectually to stop up a public footway passing partly over the lands to be inclosed and partly over an old inclosure, it was necessary for them to have the concurrence and order of two justices, and no such order or concurrence having been obtained, it was held that a footway which the commissioners had ordered to be stopped up had not been effectually stopped, but continued a public footway. (*s*)

Where an inclosure Act provided that all ways not set out by the commissioners should be extinguished, and also authorised the stopping up of roads through old inclosures, provided that no roads should be stopped up without the order of two justices, and a road through old inclosures opened upon the waste, and at such opening joined another road, which formed a continuation of the first road, and ran entirely over waste land; and no valid order was obtained for stopping up the road, which ran through the old inclosures, and the road over the waste land was not set out or continued by the commissioners; it was held that this omission to set out or continue the road, did not extinguish the road through the old inclosures, and create a consequent stoppage of the road over the waste, but that, on the contrary, the road through the old inclosures remaining open for want of an order of justices, as a consequence the road over the waste remained open also. (*t*)

Upon an indictment against the township of Hatfield for non-repair of a highway, it appeared that the road was an ancient highway which passed over part of a common then within Hatfield, and that by an inclosure Act (51 Geo. 3, c. 30) for inclosing Hatfield and other townships, it was directed that the allotments in respect of certain messuages should be part of the townships within which the messuages were situate, and the commissioners were to make such orders as they should think proper concerning all public roads, 'in what township

(*q*) *Ante*, p. 771.

(*r*) *Thackrah v. Seymour*, 3 Tyrw. 87.

(*s*) *Logan v. Burton*, 5 B. & C. 513. See *Harber v. Rand*, 9 Price, 58.

(*t*) *R. v. Marquis of Downshire*, 4 A. & E. 698; 6 N. & M. 92.

and place the same are respectively situate,' and by whom they ought to be repaired. The commissioners by their award directed there should be the road in question, and new allotments on each side of it were declared to be in other townships than Hatfield, but it was not declared in what township the road was situate, or by whom it was to be repaired. The prescriptive liability set forth in the indictment was proved, but no certificate of justices was produced. It was held that the road continued in Hatfield, but that Hatfield could not be indicted for not repairing it, for want of a certificate of justices under the 41 Geo. 3, c. 109, s. 9, declaring it to be fully completed. (*u*)

Upon an indictment for the non-repair of an ancient bridleway, it appeared that there had been such an ancient way leading through old inclosures into and across a common, which in parts was so narrow that the bridleway might be described as passing along a broad lane; in other parts the common opened into a broad field, across which persons using the way rode much as they pleased, so that in those parts there was no definite track. Certain commissioners under an Act, 54 Geo. 3, c. 160, which incorporated the 41 Geo. 3, c. 109, were authorised 'to stop up, divert, turn, or in any other way alter' any public ways over the common or old inclosures with the concurrence of two justices, and to set out new ways, which, when certified by two justices to be complete, were to be repaired by the parish, and they directed the common to be inclosed, and made no alteration in the bridleway between the old inclosures; but ordered that across the common there should be set out a road thirty feet wide as a 'public bridle-road' and as a 'private carriage-road' for certain persons, and directed that the road should be repaired by those persons. The road was accordingly set out, and its *termini* were the same as those of the old bridleway, but it did not precisely follow the track over which the public were anciently accustomed to ride. No certificate or order of justices was proved: and it was held that the cases cited (*v*) related to roads stopped or diverted by the commissioners or left unnoticed in their award, and so impliedly stopped or diverted; but in this case there had been no stopping or diverting of the old road; that the road set out was in effect the same road, and that the parish was bound to do such repairs as were requisite to maintain the road as a public bridle-road. (*w*)

Upon an indictment against a parish for the non-repair of a highway, it appeared that the road indicted was an ancient highway within the parish. In 1840 the parish was inclosed under an Act which incorporated the General Inclosure Act, 41 Geo. 3, c. 109. The award was made in June, 1840, and under the heading of 'public carriage-roads and highways' described the road indicted as 'one public carriage-road and highway of the width of thirty feet.' The commissioners had, before the award, made some alteration in the original road by straightening and widening it; but the whole of the original road was comprehended in the road set out in the award. It was admitted by the defendants that the road indicted was a public road, and that

(*u*) *R. v. Hatfield*, 4 A. & E. 156, A. D. 1835.

(*v*) *Logan v. Burton*, *supra*.

(*w*) *R. v. Cricklade*, 14 Q. B. 735, A. D.

1850. The Court pronounced no opinion on the effect of the order to repair the public bridleway further than that it did not relieve the parish from this indictment.

the parish had repaired it both before and after the award; but no steps had been taken by the commissioners for putting it into complete repair, and there never was any declaration by any justices at special sessions that the road had been fully formed, completed, and repaired; and no proceedings had been taken under the 5 & 6 Will. 4, c. 50, s. 23. The road passed through allottable land on both sides, except that a small portion on one side was an old inclosure. It was objected that the proviso in sec. 9 of the 41 Geo. 3, c. 109, applied to roads continued by an award as well as to roads made under it; and that as the road had not been declared by any justices at special sessions to be formed, completed, and repaired, the parish were not chargeable with the non-repair; and, upon a case reserved, after a verdict of guilty, the conviction was held wrong. (x)

Where an inclosure Act authorised commissioners to stop up any old road leading between or over certain old inclosures, provided there was an order of two justices, and the award in 1814 in pursuance of the powers of the Act and 'by the concurrence and order of' two justices stopped up a public footpath; but no order of justices could be found; the footpath had been stopped up in pursuance of the award, and the site of it obliterated, and a private carriage-way had been made on the site of it, and persons prevented passing along it, and one person taken before a magistrate for so doing; and it was held that there was sufficient *prima facie* evidence of the footway having been properly stopped; for the award must be taken to have been rightly made, unless there were some inference to the contrary from subsequent enjoyment inconsistent with it. (y)

Where an inclosure Act incorporated the 41 Geo. 3, c. 109, and authorised commissioners to stop up old roads, subject to the concurrence of two justices, and the commons were allotted in 1819, when a gate which had since been kept locked was put up across an old highway, but the road had since been used by foot passengers occasionally, and the award in 1830 set out new roads and directed the old roads to be stopped up, and a certificate of two justices that the new roads had been completed, under the 41 Geo. 3, c. 109, s. 9, was proved; but no order of justices for stopping the old road was proved; it was held that as there had been an inclosure of the road for about twenty-eight years, it was sufficient to warrant the Court, standing in the place of a jury, in presuming that everything was rightly done, and that an order of justices had been obtained, and that the user by foot passengers was not sufficient to rebut that presumption. (z)

Upon an indictment against the township of Gate Fulford for the non-repair of a highway, which it was alleged to be liable to repair by virtue of an inclosure Act and award, it appeared that Gate Fulford and Water Fulford were townships in the parish of Fulford, and the inclosure Act directed commissioners to allot certain lands in the manor of Fulford which (it was contended) were shown

(x) *R. v. East Hagbourne*, Bell, C. C. 135, A. D. 1859. No reasons for the decision were given. *R. v. Hatfield* was relied on for the defence, and *R. v. Cricklade* for the prosecution.

(y) *Manning v. E. Counties R. Co.*, 12 M. & W. 237, A. D. 1843.

(z) *Williams v. Eyton*, 4 H. & N. 357, affirming the decision of the Court of Exchequer in 2 H. & N. 771, A. D. 1858.

by the context to be all in the township of Gate Fulford and to set out public and private roads in such lands, and the public roads so set out were to be repaired by the township of Gate Fulford. The award set out some roads, which it termed public highways and roads; some which it termed public carriage-roads, and others which it termed private carriage-roads: it then set out the road in question, which it termed simply a 'carriage-road,' and directed that it should be repaired by 'the township of Fulford aforesaid,' without specifying which township was meant. Another road also termed simply a 'carriage-road' appeared to be set out as a private road. It was held that it sufficiently appeared that the road in question was made a public road. The road in question ran through what was now understood to be the township of Water Fulford; the township of Gate Fulford had, however, on many occasions repaired the road, but had also repaired roads in the township which were not public roads: it was held that, assuming the commissioners had power only to award as to lands in Gate Fulford, the Court would presume that the lands, on which the road was made, lay at the time of the award in Gate Fulford. (a)

A statute authorising the making a new course for a navigable river, and turning the old part into a floating harbour, will not, without words for the purpose, put an end to a public towing-path upon that part; but such towing-path will be liable to be used as such for the purposes of the harbour; and it will make no difference though the river was a tide-river, and at low water admitted of no navigation. By the 43 Geo. 3, power was given to carry part of the Bristol river along a new course, and to convert the old part into a floating harbour. There had immemorially been a towing-path on the north side, and whether that continued a public towing-path along the side of the floating harbour was the question. It was urged that it did not, because this was a tide-river, not navigable at low water; and the floating harbour would make it usable at all times, and therefore increase the burthen on the land. But, after taking time to consider, the Court held, that as there were no words in the Act to annihilate the right of the public, that right would continue notwithstanding the improved state of the water within the bank; that such water being still applied to navigation purposes, for the use of the public, was still in a state to derive the benefit from the path for which the path had first been given to the public; and judgment was given for the King. (b)

In some instances a highway may, it seems, be in some measure confined to a particular course by a private individual; as, 'where it lies over an open field, and the owner of the field incloses the field for his own benefit, leaving a sufficient way.' (c) But in such case, where the public had a right before such alteration to go upon the adjacent ground when the way was out of repair, the owner of the field can

(a) *R. v. Gate Fulford*, D. & B. C. C. 74. It was conceded that if any part of the road set out had been on lands over which the commissioners had no jurisdiction, the award would have been bad as to the whole road.

(b) *R. v. Tippet*, Mich. T. 1819, 3 B. & A. 192, and *MS. Bayley, J.* The indictment was for an obstruction of the public path.

(c) 3 Salk. 182. *R. v. Warde*, Cro. Car. 266. *R. v. Flecknow*, 1 Burr. 465.

only make the alteration subject to the onus of making a good and perfect way. (*d*)

Having thus inquired concerning the different sorts of highways, and the methods by which they may be changed, widened, or stopped up, we may now consider of nuisances to highways, by *obstructions*.

Of Nuisances to a Highway by Obstructions.

There is no doubt but that all injuries whatsoever to a highway, as by digging a ditch, or making a hedge across it, or laying logs of timber in it, or ploughing it up, (*e*) or by doing any other act which will render it less commodious to the King's subjects, are public nuisances at common law. (*f*) And if the tenant of the land plough the soil, over which another has a way, this is a nuisance to the way, for it is not so easy to him as it was before. (*g*) If a man with a cart use a common pack and prime way, so as to plough it up and render it less convenient for riders, that is indictable. (*h*) If there be a stile across a public footway of a certain height, and a man raises this stile to a greater height, it is a nuisance. (*i*) And it is clearly a nuisance at common law to erect a new gate in a highway, though it be not locked, and open and shut freely, because it interrupts the people in that free and open passage which they before enjoyed and were lawfully entitled to; but where such a gate has continued time out of mind, it shall be intended that it was set up at first by consent, on a composition with the owner of the land, on the laying out the road, in which case the people had never any right to a freer passage than what they continue to enjoy. (*j*)

It is a nuisance to suffer the highway to be incommoded by reason of the foulness of the adjoining ditches, or by boughs of trees hanging over it, &c.; and it is said that the owner of land next adjoining to the highway, ought of common right to scour his ditches; but that the owner of land, next adjoining to such land, is not bound by the common law so to do, without a special prescription: (*k*) and it is also said that the owner of trees hanging over a highway, to the annoyance of travellers, is bound by the common law to lop them. (*l*)

(*d*) 3 Salk. 182. And see the cases collected in *R. v. Stoughton*, 2 Saund. 160 *a*, note (12).

(*e*) *R. v. Griesly*, 1 Vent. 4.

(*f*) 1 Hawk. P. C. c. 76, s. 144. 2 Roll. Abr. *Nuisance* (B.). *Overton v. Freeman*, 11 C. B. 867.

(*g*) 2 H. 4. 11 Vin. Abr. tit. *Nuisance* (G.). See *ante*, p. 770, *Arnold v. Blaker*.¹

(*h*) *Per curiam*, *R. v. Leach*, 6 Mod. 145.

(*i*) *Bateman v. Burge*, 6 C. & P. 391. *J. A. Park, J.*

(*j*) 1 Hawk. P. C. c. 75, s. 9, and c. 76, s. 146. Com. Dig. tit. *Chemin* (A.) 3. *James*

v. Hayward, Cro. Car. 184. 2 Roll. Abr. *Nuisance* (C.).

(*k*) See *post*, p. 805, note (*b*).

(*l*) Bac. Abr. tit. *Highways* (E.). 1 Hawk. P. C. c. 76, ss. 5, 8, 147. *Walker v. Horner*, 1 Q. B. D. 4; 45 L. J. M. C. 34. But the building of a house in a larger manner than it was before, whereby the street became *darker*, has been held not to be a public nuisance by reason of the darkening. *R. v. Webb*, 1 Lord Raym. 737. As to building a bridge across a highway see *post*, p. 790.¹

AMERICAN NOTE.

¹ An inclosed passage-way connecting two buildings across the street is an obstruction of the way. *Bybee v. S.*, 94 Ind. 443.

48 Am. R. 175; *Hawkins v. Sanders*, 45 Mich. 491; *Hyde v. Middlesex*, 2 Gray, 267; *C. v. Goodnow*, 117 Mass. 114.

The general Highway Act, 5 & 6 W. 4, c. 50, also relates to offences of this description, imposing pecuniary penalties upon persons obstructing highways by means of trees or hedges; and penalties are also imposed upon persons laying stones, timber, or other matter, or leaving any carriage, so as to obstruct the passage of any highway; and also upon persons encroaching upon them. (*m*)

It has been held, that if a carrier carries an unreasonable weight, with an unusual number of horses, it is a nuisance to the highway by the common law. (*n*)

It appears to have been holden, that an indictment will not lie for setting a person on the footway in a street to distribute hand-bills, whereby the footway was impeded and obstructed; (*o*) nor for throwing down skins into a public way by which a personal injury is accidentally occasioned; (*p*) but acts of this kind, if improperly performed, might be deemed nuisances, as it seems now to be well established that every unauthorized obstruction of a highway, to the annoyance of the King's subjects, is an indictable offence. (*q*) Thus, where a *waggoner* occupied one side of a public street in the city of Exeter, before his warehouses, in loading and unloading his waggons, for several hours at a time, both day and night, and had one waggon at least usually standing before his warehouses, so that no carriage could pass on that side of the street, and sometimes even foot passengers were incommoded by cumbrous goods lying on the ground on the same side, ready for loading, he was held to be indictable for a public nuisance, although it appeared that sufficient space was left for two carriages to have passed on the opposite side of the street. (*r*) Upon the same principle it is an indictable offence for *stage-coaches* to stand plying for passengers in the public streets, and thereby obstructing the same; and Lord Ellenborough, C. J., said, 'A stage-coach may set down or take up passengers in the street, this being necessary for public convenience; but it must be done in a reasonable time; and private premises must be procured for the coach to stop in during the interval between the end of one journey and the commencement of another.' (*s*) In the same case his lordship intimated that there could be no doubt but that, if coaches, on the occasion of a rout, should wait an unreasonable length of time in a public street, and obstruct the transit of his Majesty's subjects wishing to pass through it in carriages or on foot, the persons who might cause and permit such coaches so to wait would be guilty of a nuisance. (*t*)

(*m*) 5 & 6 Will. 4, c. 50, ss. 64, 65, 69, 72, &c., which makes provision also for the removal of such annoyances by the surveyor and other persons. This statute does not say that every highway shall be thirty feet wide; and it has been held that it did not authorize the surveyor to remove a fence in front of a house for the purpose of widening the road, which in that part was not more than twenty-four feet in breadth, such fence not being *on* the highway. *Lowen v. Kaye*, 4 B. & C. 3. *Easton v. The Highway Board of the Richmond Highway District*, 41 L. J. M. C. 25. Simply suffering trees to grow over the highway is not a wilful obstruction

within the meaning of 5 & 6 Will. 4, c. 50, s. 72; *Walker v. Horner*, 1 Q. B. D. 4, but an omission after notice to remove an obstruction is within the section. *Gully v. Smith*, 12 Q. B. D. 121. See the Highway Acts noticed *post*, p. 827.

(*n*) Com. Dig. *Chemin* (A.) 3. *R. v. Egerly*, 3 Salk. 183.

(*o*) *R. v. Sarmon*, 1 Burr. 516.

(*p*) *R. v. Gill*, 1 Str. 190.

(*q*) *R. v. Cross*, 3 Campb. 224.

(*r*) *R. v. Russell*, 6 East, 427. *Gerring v. Barfield*, 16 C. B. (N. S.) 597.

(*s*) *R. v. Cross*, 3 Campb. 224.

(*t*) *R. v. Cross*, *supra*.

So it is indictable for a party to exhibit at the windows of his shop, in a public street, effigies, and thereby attract a crowd to look at them, which causes the footway to be obstructed so that the public cannot pass as they ought to do. (u)

Laying *logs* of timber in a highway has been already stated as one of the clear instances of nuisance. (v) And the party will not be excused by showing that he laid them only here and there, so that the people might have a passage through them by windings and turnings. (w) And though it is not a nuisance for an inhabitant of a town to unlade billets, &c., in the street before his house, by reason of the necessity of the case, yet he must do it promptly, and not suffer them to continue in the street an unreasonable length of time. (x) An obstruction to a public highway will not be excused on the plea of its being necessary for the carrying on of the party's business, though such obstruction be only occasional. The defendant, who was a *timber merchant*, occupied a small timber-yard close to a street, and from the narrowness of the street and the construction of his own premises, he had, in several instances, necessarily deposited long sticks of timber in the street, and had them sawed into shorter pieces there before they could be carried into his yard: and it was contended on his behalf that he had a right so to do, as it was necessary to the carrying on of his business; and that it could not occasion more inconvenience to the public than draymen taking hogsheads of beer from their drays, and letting them down into the cellar of a publican. But Lord Ellenborough, C. J., said, 'If an unreasonable time is occupied in the operation of delivering beer from a brewer's dray into the cellar of a publican, this is certainly a nuisance. A cart or waggon may be unloaded at a gateway; but this must be done with promptness. So as to the *repairing of a house*, the public must submit to the inconvenience occasioned necessarily in repairing the house; but if this inconvenience be prolonged for an unreasonable time, the public have a right to complain, and the party may be indicted for a nuisance. The rule of law upon this subject is much neglected, and great advantages would arise from a strict and steady application of it. I cannot bring myself to doubt of the guilt of the present defendant. He is not to eke out the inconvenience of his own premises by taking in the public highway into his timber-yard; and if the street be narrow, he must remove to a more commodious situation for carrying on his business,' (y) And in repairing or rebuilding a house, care must be taken that the encroachment on the highway be not unreasonable. The owner will himself be responsible for any excess, if committed by his servants; for, according to Eyre, C. J., 'suppose that the owner of a house, with a view to rebuild or

(u) *R. v. Carlisle*, 6 C. & P. 636. *Park, J.*,
Bolland, B., and Sir J. Cross.¹

(v) *Ante*, p. 785.

(w) 2 Roll. Abr. 137. 1 Hawk. P. C.
c. 76, s. 145.

(x) *Id. ibid.* and Bac. Abr. tit. *Highways*
(E.).

(y) *R. v. Jones*, 3 Campb. 230.

AMERICAN NOTE.

¹ As to rights of processions, see *C. v. v. Ward*, 13 Mass. 299; *Cole v. Fisher*, 11 Ruggles, 6 Allen, 588; *S. v. Hughes*, 72 Mass. 137. N. C. 25. As to military parade, see *Moody*

repair, employ his own servants to erect a hoarding in the street (which being for the benefit of the public, they may lawfully do), and they carry it out so far as to encroach unreasonably on the highway, it is clear that the owner would be guilty of a nuisance.' (z)

By an old Act, an ancient highway running over the land of Lord Stourton was made a turnpike road, and afterwards collieries were worked on each side of the road, and railways made from time to time across the road for the conveyance of the coals from the collieries. In the 1 & 2 Geo. 4, a new Act passed for repairing the same road. One of the former railways was continued and new railways made afterwards across the road for the same purposes as before. By a clause in this Act a penalty, recoverable on summary conviction, was imposed on any person who made any railway across the road 'without the consent of the trustees or legal authority:' and it was held that the making and continuing of the railways was indictable, and that no inference could be drawn to the contrary from the facts of the case or the words of the last Act. To do the work complained of, the turnpike road was dug into, but filled up again and restored to its former state, except that the railroad remained, forming a groove of wood, adapted to the wheels of the railway carriages, and so far sunk into the road that the highest part of it was on a level with the road; and, upon a special case empowering the Court to draw inferences as a jury, after a verdict of guilty, it was held that the Court could not pronounce the injury created by this work to be too slight and uncertain to be indictable. (a)

Upon an indictment for obstructing a highway, it appeared that the defendant laid down on a highway a double line of *tramways*, on which omnibuses plied for hire; and these tramways and omnibuses were dangerous and inconvenient to many of the public, as the wheels of vehicles skidded when crossing the tramways, and horses which put their feet upon them were frightened; a very large number of persons used the omnibuses as a means of transit, to the great saving of their time and money, and the vestry-men of the parish through which the tramways ran had sanctioned their being made; Erle, C. J., directed the jury that, if the tramways were a source of danger and inconvenience to a portion of the public, who had a right to use the highway, they were a nuisance without reference to their being for the general convenience; and it was held that this direction was right; for supposing it possible that an arrangement for the use of a highway in a particular manner being for the advantage of the public would be an answer to an indictment for that arrangement, this was not an arrangement for the ordinary use of the highway, but was withdrawing so much of the highway from its ordinary use as such; for it was impossible to use as an ordinary part of this highway the portion taken up by the tramways. (b) So where, on a like indictment it appeared that *telegraph posts* were erected with the assent of the authorities, who were the guardians of the highways, either on the highway, or on strips of land by the side thereof; Martin, B., held that a permanent obstruction erected on a highway, without

(z) *Bush v. Steinman*, 1 Bos. & Pul. 407, 408.

(b) *R. v. Train*, 2 B. & S. 640. *R. v. Morris*, 1 B. & Ad. 441.

(a) *R. v. Charlesworth*, 16 Q. B. 1012.

lawful authority, which renders the way less commodious to the public, is a nuisance; and if the jury believed that the defendants placed [for the purpose of profit to themselves] posts with the intention of keeping them permanently there [in order to make a telegraph communication between distant places], and did permanently keep them there, and the posts were of such size as to obstruct the passage of carriages, horses, or foot passengers on the part of the road where they stood, the jury ought to find the defendants guilty; and that the circumstances that the posts were not placed on the hard part of the road, or upon a footpath formed upon it, or that sufficient space for the public traffic remained, were immaterial; and this ruling was held right; because in effect it came to this, whether there was a practical obstruction to the public using the highway. (c)

It is a nuisance to break up the streets in a town for the purpose of laying down *gas pipes*, (d) and where certain commissioners had power to light the public streets of a town and to lay down pipes for that purpose, but no power to lay down pipes for the supply of private houses, and they transferred their powers to a company who had no powers as a gas company; it was held that this company was indictable for laying down pipes to private houses, but not for laying down pipes for the public lighting of the town. (e)

Wherever a public way exists, the public have a right to enjoy it with ease and security, and if a man prevents that enjoyment, even by the use of his own property, he is guilty of a nuisance. If, therefore, the owner of land over which a public way passes excavates his land on each side thereof so as to leave the line of the way between two precipices, or makes an excavation so near to one side of the way that a person walking upon it might, by making a false step, or being affected by sudden giddiness, or in consequence of its being dark, or in the case of a horse or carriage way, might by the sudden starting of a horse, be thrown into the excavation, this is a public nuisance; for the danger thus created may reasonably deter prudent persons from using the way, and thus the full enjoyment of it by the public, is, in effect, as much impeded as in the case of an ordinary nuisance to a highway. (f)

Nor can it be doubted that many other things may be done so near to a highway as to create a nuisance, as the running of *railway locomotives*, (g) erecting a *windmill* and the like, so near to the highway as to frighten horses travelling upon it.

(c) *R v. The United Kingdom Electric Telegraph Co.*, 6 Law T. 378. 9 Cox, C. C. 137, 174. The parts between brackets are clearly immaterial; and 'permanently' is too strong a term, as an obstruction for even a day would be enough.

(d) *Ellis v. Sheffield Gas Consumers Co.*, 2 E. & B. 767.

(e) *R. v. Longton Gas Co.*, 8 Cox, C. C. 317. 2 E. & E. 651.

(f) *Barnes v. Ward*, 9 C. B. 392; where an area was excavated close to an immemorial footway, and left unfenced, and a person passing along the way, the night being dark, without any negligence of her own, fell into

the area and was killed. *Hardcastle v. The S. Yorkshire Railway and River Dun Co.*, 4 H. & N. 67. *Hounsell v. Smyth*, 7 C. B. (N. S.) 731. *Wettor v. Tunk*, 4 F. & F. 298.

(g) *Vaughan v. aff Vale R. Co.*, 5 H. & N. 679; *R. v. Pease*, 4 B. & Adol. 30. Using a traction engine and trucks on a highway is not an indictable nuisance unless it creates a substantial obstruction and occasions greater delay and inconvenience than would have been caused by carts or horses. *R. v. Chittenden*, 15 Cox, C. C. 725,¹ and see *Simkin v. L. & N. W. R. Co.*, 21 Q. B. D. 453.

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¹ Anything adjoining a public carriage-way which will probably frighten ordinarily quiet horses is an obstruction to the highway.

Ayer v. Norwich, 39 Conn. 376, 12 Am. R. 396; *S. v. Useful Society*, 13 Vroom, 504; *Cincinnati Ry. v. C.*, 80 Ky. 137.

It has been doubted whether a person can build a *bridge* over a highway. (*h*) But it is plain that this must be a question for a jury in every case; for a bridge may be built in such a manner as either to be no nuisance or a great nuisance to a highway. (*i*)

Defendant had a *lamp* projecting from his premises over a footway in a street. It fell on the plaintiff, who was passing underneath, and injured her. Defendant had shortly before employed a competent person, C., to put the lamp in good repair, but at the time it fell it was, though not to his knowledge, in a dangerous and decayed state. The jury found there was no personal negligence in the defendant, but there was negligence in C.:—Held, by Lush and Quain, JJ., that it was the absolute duty of the defendant, as occupier of the premises having a lamp in such a position, to prevent its becoming dangerous to the public; that if, in fact, it did become dangerous, it was a nuisance, and for any injury caused by such nuisance defendant was liable; and that he could not shift the liability arising from such a duty from himself by having employed a competent person to do the necessary repairs. By Blackburn, J., 'that as the defendant in this case had express knowledge shortly before the injury of the lamp needing repair, he was then bound to put it into reasonable repair; and was liable for the consequences of its not being in repair, arising from the breach of duty in the person, however competent, whom he had employed; it was therefore not necessary to decide, and *quære*, whether, if the danger arose from a latent defect, or from the act of a wrongdoer without defendant's knowledge, he would be liable for an injury so happening.' (*j*)

There can be no doubt that any contracting or narrowing of a public highway is a nuisance: it is frequently, however, difficult to determine how far in breadth a highway extends, as where it runs across a common, or where there is a hedge only on one side of the way, or where, though there are hedges on both sides, the space between them is much larger than what is necessary for the use of the public: in these cases it would be for a jury to determine how far the way extended. (*k*) In one case, Lord Tenterden, C. J., said, 'I am strongly of opinion when I see a space of fifty or sixty feet, through which a road passes, between enclosures set out under an Act of Parliament, that, unless the contrary be shown, the public are entitled to the whole of that space, although, perhaps, from economy the whole may not have been kept in repair. If it were once held that only the middle part, which carriages ordinarily run upon, was the road, you might by degrees enclose up to it, so that there would not be room left for two carriages to pass. The space at the sides is also necessary to afford the benefit of air and sun. If trees and hedges might be brought close up to the part actually used as the road, it could not be kept sound.' (*l*) The extent of a highway where it passes over a common, is frequently still more indefinite to the

(*h*) *Hole v. Sittingbourne and Sheerness Railway Co.*, 6 H. & N. 488.

(*i*) See *R. v. Betts*, 16 Q. B. 1022, *post*, *Rivers*.

(*j*) *Tarry v. Ashton*, 45 L. J. Q. B. 260; 1 Q. B. D. 314.

(*k*) See *Brownlow v. Tomlinson*, 1 M. & Gr. 484.

(*l*) *R. v. Wright*, 3 B. & Ad. 681. *Ante*, p. 768. The space at the sides of roads is also particularly useful for cattle to travel upon, as they get footsore on the stoned

right and left of what may be the ordinary passage. Upon an indictment for enclosing strips of land upon the sides of a highway, the question is, were these strips part of the highway, and used as such by the public? (*m*)

And as it has been held that it is no defence to an indictment for a nuisance to a navigable river to prove that, although the work be in some degree a hindrance to navigation, it is advantageous in a greater degree to other uses of the river; (*n*) so, it should seem, that it is no defence to an indictment for a nuisance to a highway, that the thing complained of furnishes, on the whole, a greater convenience to the public than it takes away. (*o*)

But where an Act authorised the making of a railroad near a highway, and the locomotive engines frightened the horses travelling on the highway, it was held that an indictment could not be sustained; for the legislature must be presumed to have known that travellers upon the highway would, in all probability, be incommoded by the engines using the railroad, and therefore there was nothing unreasonable in supposing the legislature intended that the part of the public which should use the highway should sustain some inconvenience for the sake of the greater good to be obtained by other part of the public travelling along the railway. (*p*)

But where a statute authorises any company or persons to intermeddle with a highway provided they fulfil certain conditions, and they interfere with the highway without performing those conditions, they are liable to be indicted, and either the body corporate or the persons who cause the highway to be interfered with may be indicted.

Upon an indictment for obstructing a highway, it appeared that the Manchester and Leeds Railway Company were empowered by statute to cut through and make obstructions in public roads for the purposes of the Act, doing as little damage as might be, and subject to the provisions and restrictions therein mentioned, and a subsequent section enacted that wherever any part of any public road should be found necessary to be cut through or so much injured as to be impassable or inconvenient for passengers, the company should, before any such road should be cut through, cause a good and sufficient road to be made instead thereof, as convenient for passengers and carriages as the road cut through, or as near thereto as might be. The company when making their railway, stopped up the public highway, and made a branch restoring the communication between the *termini* formerly connected by that highway, but by a different line. The new road was stated to be in some respects more convenient to the public than the old, but in others less so. The level of the adjacent land made it impracticable to give a more convenient line consistently with the regulations of the Act, unless at an expense which, it was said, would

roads. *R. v. The London and Birmingham R. Co.*, 1 Railway Cases, 317. *R. v. The United Kingdom Electric Telegraph Co.*, *ante*, p. 789. *Elwood v. Bullock*, 6 Q. B. 383.

(*m*) *R. v. Johnson*, 1 F. & F. 657.

(*n*) *R. v. Ward*, 4 Ad. & E. 384, overruling *R. v. Russell*, 6 B. & C. 566.

(*o*) See *R. v. Train*, *ante*, p. 788.

(*p*) *R. v. Pease*, 4 B. & Ad. 30. *R. v. Bradford Navigation*, 34 L. J. Q. B. 191. *Vaughan v. Taff Vale R. Co.*, 5 H. & N. 679.

be unreasonably great, and quite disproportioned to the benefit which would accrue from it to any part of the public. Maule, J., directed the jury to find a verdict of not guilty if they thought that the company had done no more damage than was necessary, and had made the road as convenient as the former one, or as nearly so as might be: intimating, as his own opinion, that the road could not be deemed absolutely as convenient even after allowing for the advantages which the public might have gained from it. But that the company were not, in his opinion, bound to lay out enormous sums of money to procure a slight accommodation to some persons; and that the proper rule seemed to be, that, if they could not make the road as convenient as before without a very disproportionate and unwarrantable expenditure, they should make it as nearly so as they could. And he left it to them to say whether the new road was as convenient as the old, or if not as nearly so as might be. The jury found a verdict of guilty, and on a motion for a new trial it was contended that an indictment would not lie because the act charged was one which the statute permitted. Lord Denman, C. J., 'The work complained of as a nuisance, and undoubtedly making one, is the *cutting through* of the carriage road. Now there is no question as to their right to do this; and though they are required, when they do it, to cause another road to be set out and made instead of it, they argue that they are no longer indictable for a nuisance in doing the lawful act, however they may be for disobedience of the law in neglecting to substitute another. The prosecutors reply by referring to the section, which requires the company to cause the new road to be made before they cut through the old. But the company rejoin, that from the state of the earth there it was impossible to do this, and could not be intended by the legislature. This argument we think inadmissible, for reasons too obvious to require a full statement of them. The company have done what the Act legalizes only on a condition, which they have not performed. They stand convicted of the nuisance and show no justification. The verdict will therefore not be disturbed.' (q)

The Railway Clauses Consolidation Act, 8 & 9 Vict. c. 20, s. 49, enacts that when any railway is carried over a turnpike road by a bridge, the arch shall be such as to leave a clear space of not less than thirty-five feet. Sec. 51 enacts that wherever the average available width for the passage of carriages of any existing roads is less than the width hereinbefore prescribed for bridges over the railway, the width of such bridges need not be greater than such average available width; but so that such bridges be not of less width in the case of a turnpike or public carriage road than twenty feet; that if such average available width shall be at any time increased beyond the width of such bridge, the railway company shall be bound to widen the bridge to such extent as they may be required by the trustees or surveyors of the road, not exceeding the width of the road as so widened, or the maximum width herein or in the special Act prescribed for a bridge in like case over a railway; and it has been held that the effect of this clause is that if the average available width for the passage of carriages on any road is more than thirty-

(q) *R. v. Scott*, 8 Q. B. 543, and see *R. v. Birmingham and Gloucester R. Co.*, 2 Q. B. 47. *R. v. Burt*, 11 Cox, C. C. 399.

five feet, the road may be narrowed to thirty-five feet under the arch; where it is less, the arch may be made the same width as the road, so that it be not less than twenty feet wide, and if the road be afterwards widened, the arch must be widened in proportion up to, but not beyond, thirty-five feet; but in this reckoning footpaths are not to be included. By the Local Government Act, 1894, it is now the duty of a district council to protect all public rights of way, and to prevent as far as possible the stopping or obstruction of any such right of way whether within their own district or in an adjoining district, where the stoppage would be prejudicial to the interests of their district, and also to prevent any unlawful encroachment on any roadside waste within their district, and for this purpose they may institute legal proceedings and take such steps as they deem expedient, and if they fail to take proceedings the parish council may petition the county council, who may then have all the powers of the district council (see 56 & 57 Vic. c. 73, s. 26). (r)

An incorporated railway or other company may be indicted for obstructing a highway;¹ for though a corporation cannot be guilty of treason, felony, or other offences, which derive their character from the corrupted mind of the person committing them, and are violations of the social duties that belong to men and subjects, they may be guilty as a body corporate of commanding acts to be done to the nuisance of the community at large. (s)

Of Nuisances to a Highway by the Neglect to Repair.

As a nuisance in not *repairing* highways is an offence (t) in the nature of a nonfeasance, the principal inquiry upon this subject will be as to the persons who are liable to be called upon to keep them in repair.

The inhabitants of the parish at large are *primâ facie*, and of common right, bound to repair all highways lying within it, unless, by prescription or otherwise, they can throw the burden upon particular persons. (u) And to such an extent is this

(r) *R. v. Rigby*, 14 Q. B. 687.

(s) *R. v. The Great North of England R. Co.*, 9 Q. B. 315. See *R. v. The Birmingham and Gloucester R. Co.*, 3 Q. B. 223. Where two defendants, members of a corporate body, entered into their recognizances to appear and plead to an indictment for non-repair of a highway, the judge sitting at the assizes in the Crown Court ordered them to be discharged from such recognizances on the ground that they were entered into *per incuriam*. *R. v. The Bury Improvement Commissioners*, 11 Cox, C. C. 641, *et per* Cleasby, B. 'They cannot plead here because they cannot plead in person, being a

body corporate; and they cannot plead by attorney here, because, although they can appoint an attorney, the attorney cannot plead for them in this Court.' The indictment should have been removed by *certiorari* to the civil side of the Court, where the defendants could appear by attorney.

(t) Under the 11 & 12 Vict. c. 63 (Public Health Act, 1848), no action lies against a local board for the non-repair of a highway. *Gibson v. Preston* (Mayor of), 39 L. J. Q. B. 131. L. R. 5 Q. B. 218. *Cowley v. Newmarket Local Board* (1892), A. C. 345.

(u) 1 Hawk. P. C. c. 76, ss. 5, 6, 7, 8. *Austin's case*, 1 Vent. 189. *Anon.*, 1 Lord

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¹ This is so in New Jersey, Massachusetts, not in Maine or Virginia. See Bishop i. Vermont, Pennsylvania, and Tennessee, but 420.

obligation, that if the inhabitants of a township bound by prescription to repair the roads within the township be expressly exempted by the provisions of a road Act from the charge of repairing new roads to be made within the township, that charge must necessarily fall upon the rest of the parish. (*v*) And where a statute enacted that the paving of a particular street should be under the care of commissioners, and provided a fund to be applied to that purpose, and another statute, which was passed for paving the streets of the parish, contained a clause that it should not extend to the particular street, it was held that the inhabitants of the parish were not exempted from their common-law liability to keep that street in repair; that the duty of repairing might be imposed upon others, and the parish be still liable; and that the parish were under the obligation, in the first instance, of seeing that the street was properly paved, and might seek a remedy over against the commissioners. (*w*) And where a local turnpike Act, empowering the trustees under it to take tolls, directed that the roads should from time to time be repaired by the trustees, out of the money arising by virtue of that Act, it was holden that this only made the tolls an auxiliary fund in the hands of the trustees; and that the inhabitants of the township where the road was situate, who by prescription were bound to repair all roads within it, were nevertheless liable to be indicted for the nonrepair of the road. (*x*) And where upon an indictment against a township for the nonrepair of a highway it appeared that by the 12 Geo. 1, c. 38, s. 15, the proprietors of a canal were ordered to make the highway in question and keep it in repair, and were made liable to indictment and fine in case of default, and the 17th section provided that nothing in the Act should excuse the inhabitants of the township from contributing to the repairs with their carts, &c., or otherwise, as they were then obliged to do by law; and the jury found that the highway was an ancient highway, and therefore the liability of the township existed at the time the Act passed; the Court of Queen's Bench held that the intention to preserve the common-law liability of the township was sufficiently declared, and although the probable intention was that each party should contribute to the repair, and no provision was made for adjusting the proportion of each, the difficulty of apportioning the burden did not create an exemption for either, and therefore an indictment for nonrepair lay against the township, (*y*) and also against the company; for although the expenses of the repairs of the road had exceeded the amount of tolls received, it did not follow that the other resources of the company were not adequate, and, even if they were not, the obligation was imposed without condition, and the liability to indictment for nonrepair expressly enacted. (*z*)

Raym. 725. The common-law liability of a parish to repair its highways has not been transferred by the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), to the vestries constituted under that Act. *Parsons v. the Vestry of the parish of St. Matthew, Bethnal Green*, 37 L. J. C. P. 62.

(*v*) *R. v. Sheffield*, 8 T. R. 106. See *Anon.*, 1 Lord Raym. 725.

(*w*) *R. v. St. George, Hanover Square*, 3 Campb. 222.

(*x*) *R. v. Netherthong*, 2 B. & A. 179. It was also holden that such inhabitants might, after conviction, apply by motion for relief against the trustees under the 13 Geo. 3, c. 84, s. 33. See also *R. v. The Inhabitants of Oxfordshire*, 4 B. & C. 194, *post*, *Bridges*.

(*y*) *R. v. Brightside Bierlow*, 13 Q. B. 933.

(*z*) *R. v. Sheffield Canal Co.*, 13 Q. B. 913.

No *agreement* can exonerate a parish from the common-law liability to repair; and a count in an indictment against the corporation of Liverpool, stating that they were liable to repair a highway, *by virtue of a certain agreement* with the owners of houses alongside of it, was held to be bad, on the ground that the inhabitants of the parish, who are *primá facie* bound to the repair of all highways within their boundaries, cannot be discharged from such liability by any *agreement* with others. (a)

Upon an indictment against the township of S., for not repairing a road within it, on a custom alleged and proved that all the townships in the parish repaired their own roads, it was proved that the township was adjacent to the township of N. M. in another parish, and that an agreement had been made, two hundred and fifty years before, between the then owner of the whole of S., and the then owners of the whole of N. M., whereby the boundary between the properties was marked out, and the owner of S. agreed to allow the owners of N. M., and the rest of the inhabitants of N. M., a road through S., of which the owner of S. was to repair half and the owners of N. M. the other half (which was the part indicted), and that a sufficient lawyer should make further assurance for the performance of the agreement. The owner of S. afterwards filed a bill for a specific performance, but it did not appear what the result of the suit was. As far back as living memory went, the inhabitants of N. M. had repaired the road from the boundary of the townships for the distance mentioned in the agreement within about twenty yards; it was held that this was not evidence for a jury of an instrument binding the owners of N. M., and all claiming through them. (b)

With respect to the repair of roads dedicated to the public by the owner of the soil, although it was once considered that, notwithstanding the use by the public, the parish was not liable to repair, unless there had been on their part some act of acquiescence or adoption; (c) it was afterwards expressly decided, (d) that the inhabitants of a parish were bound to repair all roads within it dedicated to and used by the public, although there were no adoption of such roads by the parish. (e)

But now by the 5 & 6 Will. 4, c. 50, s. 23, 'no road or occupation way made or hereafter to be made by and at the expense of any individual or private person, body politic or corporate, nor any roads already set out or to be hereafter set out as a private driftway or horsepath in any award of commissioners under an inclosure Act, shall be deemed or taken to be a highway which the inhabitants of any parish shall be compellable or liable to repair, unless the person, body politic or corporate, proposing to dedicate such highway to the use of the public, shall give three calendar months' previous notice in writing to the surveyor of the parish of his intention to dedicate such highway to the use of the public, describing its situation and extent,

(a) *R. v. The Mayor, &c., of Liverpool*, 3 East, 86. And see Bac. Abr. tit. *Highways* (F.).

(b) *R. v. Scarsbrick*, 6 A. & E. 509; 2 N. & M. 583; see *post*, p. 800.

(c) *R. v. St. Benedict*, 4 B. & A. 450. Per Bayley, J.

(d) *R. v. Horley*, 8 Law T. 382.

(e) *R. v. Leake*, 5 B. & Ad. 469. *R. v. Newbold*, 11 Cox, C. C. 231, and see *R. v. Southampton*, 19 Q. B. D. 590, *post*, p. 819.

and shall have made or shall make the same in a substantial manner, and of the width required by this Act, and to the satisfaction of the said surveyor and of any two justices of the peace of the division in which such highway is situate in petty sessions assembled, who are hereby required, on receiving notice from such person or body politic or corporate to view the same, and to certify that such highway has been made in a substantial manner, and of the width required by this Act, at the expense of the party requiring such view, which certificate shall be enrolled at the quarter sessions holden next after the granting thereof, then and in such case, after the said highway shall have been used by the public, and duly repaired and kept in repair by the said person, body politic or corporate, for the space of twelve calendar months, such highway shall for ever thereafter be kept in repair by the parish in which it is situate; (*f*) provided, nevertheless, that on receipt of such notice as aforesaid the surveyor of the said parish shall call a vestry meeting of the inhabitants of such parish, and if such vestry shall deem such highway not to be of sufficient utility to the inhabitants of the said parish to justify its being kept in repair at the expense of the said parish, any one justice of the peace, on the application of the said surveyor, shall summon the party proposing to make the new highway to appear before the justices at the next (*g*) special sessions for the highways to be held in and for the division in which the said intended highway shall be situate; and the question as to the utility as aforesaid of such highway shall be determined at the discretion of such justices.' (*h*)

The term 'made' as used in the Act, applies to a road formed or made, but not completely dedicated by use or otherwise at the passing of the Act; but roads dedicated at that time are out of the operation of the Act. (*i*)

This section does not prevent the way from becoming public, but only exempts a parish from the liability to repair the way where the steps required by this section have not been adopted. An action, therefore, may be maintained for obstructing a way dedicated to the public and used by them, although it has never been repaired by the parish, and neither the notice of dedication has been published, nor the certificate given as required by this section. (*j*) And where a road has been dedicated to the public by a landowner, but the conditions of

(*f*) As to making private roads repairable by the parish, under the Highway Act, 1862, see 25 & 26 Vict. c. 61, s. 36, noticed *post*, p. 830. As to declaring private streets where properly made, &c., highways, under the Public Health Act, 1875, see s. 152, *post*, p. 836. And as to making, under that Act of Parliament, new roads repairable by the inhabitants of the district, see s. 146, *post*, p. 834.

(*g*) See *R. v. Bagge*, 44 L. J. M. C. 45, where the surveyor omitted to summon the party at the next sessions.

(*h*) See *R. v. Bagge*, 44 L. J. M. C. 45. If the justices make an order deciding in conformity with the vestry that the way is not of sufficient utility, an appeal lies by the person dedicating the way to the sessions.

B. v. Derbyshire, E. B. & E. 69. See *R. v. the Paddington Vestry*, 9 B. & C. 456, where a somewhat similar clause in a local Act was brought in question. See *R. v. Dukinfield*, 4 B. & S. 158, as to the steps necessary to be taken under this sect., and the Public Health Act, 11 & 12 Vict. c. 63, s. 70, to render a road repairable by a parish.

(*i*) *R. v. Westmark*, 2 M. & Rob. 305, Maule, J. See *R. v. East Hagbourne*, *ante*, p. 783, where the decision turned on another point, and this point was not noticed. See *Hirst v. Halifax* (Local Board of Health of), 40 L. J. M. C. 43. *R. v. Thomas*, 7 E. & B. 399; *ante*, p. 773, where a road was made by turnpike trustees.

(*j*) *Roberts v. Hunt*, 15 Q. B. 17

this section have not been fulfilled, if a positive obstruction be erected in it, the party causing such obstruction is liable for so doing; but if the road be simply unfit for use, from the state of the weather, or from mere want of repair, the public lose the use of it, and neither the landlord nor any one else is liable to the repair of it. (*k*)

Formerly it was held that if a parish lay in two counties, the inhabitants of *that part* of the parish in which the road charged to be out of repair lay, were bound to repair it, and not the inhabitants of the whole parish. (*l*) But it has since been decided that if part of a parish be situate in one county and the rest in another, and a highway lying in one part be out of repair, an indictment against the inhabitants of *that part only* is bad; and that in such case the indictment must be against the whole parish. (*m*) And it appears to have been always considered that the indictment under such circumstances must be preferred in that county wherein the ruinous part of the road lies. (*n*) If the indictment be against that part of the parish only which lies in the county in which the indictment is preferred, it must show on what account such part only is chargeable, otherwise it will be bad in substance: and the objection may be taken, even after an issue on the point, whether the inhabitants of that part were bound to repair, and a verdict for the crown. (*o*)

The 5 & 6 Will. 4, c. 50, s. 58, which, when the boundaries of parishes are in the middle of highways, gives two justices power to divide such highways by a transverse line, has been already noticed. (*p*) The object of that statute was to facilitate the repairing of a highway so situated: and it enacts that the justices may order that the whole of such highway, on both sides, in one of such parts, shall be repaired by one of such parishes; and that the whole of such highway, on both sides, in the other of such parts, shall be repaired by the other of such parishes: and that they shall cause their order and plan of the highway to be filed with the clerk of the peace. Provided, nevertheless, 'that in the case of any such last-mentioned highway, the repair of any part of which belongs to any body politic or corporate, or to any person, by the reason of tenure of any lands, or otherwise howsoever, the same proceedings may be adopted, but the said body politic or corporate, or person, or some one on their behalf, may appear before such justices, and object to such last-mentioned proceedings, in which case the said justices shall, before they divide such highway as aforesaid, hear and consider the objection so made, and determine the same.'

Sec. 59. 'After such order and plan shall be so filed with the clerk of the peace as aforesaid, such parishes and body politic or corporate, or person aforesaid, respectively, shall be bound as of common

(*k*) *R. v. Wilson*, 18 Q. B. 348. The fact that the landowner has done repairs since the dedication, makes no difference.

(*l*) *R. v. Weston*, 4 Burr. 2507.

(*m*) *R. v. Clifton*, 5 T. R. 498.

(*n*) *R. v. Clifton*, 5 T. R. 498; and *R. v. Weston*, *supra*. In *R. v. Clifton*, Lord Kenyon, C. J., in answer to one of the supposed difficulties of this mode of proceeding, said, 'On an indictment against a parish for

not repairing a road, it is not necessary for the prosecutor to serve every individual in the parish with process; he may compel the appearance of any two, who live within the county, upon whom the whole fine may be levied; and the rest of the inhabitants must reimburse those two under the general highway Act.'

(*o*) *R. v. Clifton*, *supra*.

(*p*) *Ante*, p. 780.

right to maintain and keep in repair such parts of such highways so allotted to them as aforesaid, and shall be liable to be proceeded against for neglect of such duty, and shall in all respects whatsoever be liable and subject to all the provisions, regulations, and penalties contained in this Act, and also shall be discharged from the repair of such part of such highway as shall not be included in their respective allotment.' (g) Sec. 61, the statute shall not affect or alter the boundaries of counties, lordships, &c., nor any other division of public or private property, nor the boundaries of parishes, otherwise than for the purpose of repairing such particular portion of the highways.

Where an order was made by two justices for apportioning a highway in the form given by the 34 Geo. 3, c. 64, s. 1 (r) it was held that such order was conclusive as to the fact that part of the highway so apportioned lay in each of the parishes, and that it was not competent for one of the parishes, upon an indictment for not repairing the part allotted to it by the order, to prove that in fact at the time the order was made no portion of such part was in that parish, and therefore the justices had no jurisdiction to make the order, on the ground that, although the statute did not require the justices to find expressly that part of the way is in either parish, yet as they are 'to examine' and then 'finally determine the matter,' that implies that they are to be satisfied as to the situation of the highway in the respective parishes. (s)

Where a road lay in two parishes, and no division and allotment under this statute had been made, it was held that an indictment against one of the parishes for not repairing one side of the road ought to have stated that the parish was liable to repair *ad filum viæ*; and it seems that in such case it is not sufficient to aver that a certain part of the road (setting out the length and one-half of the breadth) is out of repair, and that the inhabitants, &c., ought to repair it. (t)

Exceptions were taken to an indictment for suffering a highway to be very muddy, and so narrow that people could not pass without danger of their lives; first, that it is no offence for a highway to be dirty in winter; and, secondly, that the parish had no power to widen it, as there was a particular power vested by Act of Parliament in justices of the peace to do so. The indictment was held bad for want of saying that the way was out of repair; and one of the judges observed, that saying that the way was so *narrow* that the people could not pass was repugnant to its being 'the King's highway;' for that if it had been so narrow, the people could never have passed there time out of mind. (u)

(g) Sec. 60 provides for the costs in thus apportioning highways; and sec. 61 provides for the manner in which highways repairable by reason of tenure, or otherwise howsoever, may be made parish highways. See the 25 & 26 Vict. c. 61, ss. 34, 35, noticed *post*, p. 829, where there are district boards.

(r) Which contained similar provisions to the 5 & 6 Will. 4, c. 50, s. 58, and is repealed by the latter Act.

(s) *R. v. Hickling*, 7 Q. B. 880. See *R. v. Perkins*, 14 Q. B. 229, that to the jurisdiction under this clause the existence of a

boundary on the highway to be divided is a condition precedent, and the Court quashed an order, which had been confirmed at sessions, because on the facts stated it did not appear that there was such a boundary, but this was on the ground that all the facts were brought before the Court. See *Mould v. Williams*, 5 Q. B. 469.

(t) *R. v. St. Pancras*, Peake Rep. 219.

(u) *R. v. Stretford*, 2 Lord Raym. 1169. And it is the same as to a bridge; an indictment does not lie for not widening it. *R. v. Devon*, 4 B. & C. 670.

Where a road indicted led across a small inlet or estuary of a river not far from its mouth, and was not passable at high water, and was usually a soft sludge at ebb; Patteson, J., directed the jury that if they thought the want of repair arose from the nature of the spot over which the road passed, and was occasioned by the river flowing over it at every tide, washing away the materials placed there to form the road, and leaving in their place a deposit of mud, it would be absurd to require the parish to do repairs, which, from the nature of things, must always be ineffectual. (v) And in the same case the same learned judge held that where two parishes are separated by a river, the presumption is that the boundary line is the middle line of the channel. (v)

But though the parish is bound *prima facie*, and of common right, to repair the highways within it, yet a particular subdivision of a parish, or particular individuals, may be liable to relieve them from that *onus*, by reason of prescription, or the inclosure of the land in which the highway lies. (w)

Thus the inhabitants of a district, township, or other division of a parish, may be bound to repair a highway by *prescription*: and it is said, that a corporation aggregate may be charged by a general prescription that it ought and hath used to do it, without showing that it used to do so in respect of the tenure of certain lands, or for any other consideration; because such a corporation never dies, and, therefore, if it were ever bound to such a duty, it must continue to be so. (x) But it is said, that such a general prescription is not sufficient to charge a private person; because no man is bound to do a thing which his ancestors have done, unless it be for some special reason; as having lands descended to him holden by such service, &c. (y) And a man cannot be liable to repairs merely as lord of a manor, though it is stated that the lords have repaired it from time whereof, &c. (z) This applies to individual persons only, and not to an aggregate of persons who compose the inhabitants of a district or division in a parish or township in which the road is situate. (a) But it has been holden that where a parish is charged with the reparation of a highway, lying *in aliend parochia*, a consideration must be stated. To an indictment against a parish for not repairing a highway lying within it, a plea that the inhabitants of another parish 'have repaired, and been used and accustomed to repair, and of right ought to have repaired,' was held ill, and it was held that the plea ought to have shown a consideration. Holroyd, J., at the conclusion of his judgment, said, 'I say nothing as to the form of pleading where the highway lies within a township or division of a parish which is charged with the repairs.' (b)

(v) R. v. Landulph, 1 M. & Rob. 393.

(w) As to highways repaired by parties *ratione tenuræ*, being made repairable by the parish, see 5 & 6 Will. 4, c. 50, s. 62, 25 & 26 Vict. c. 61, ss. 34 & 35.

(x) 1 Hawk. P. C. c. 76, s. 8. Bac. Abr. tit. *Highways* (F.).

(y) *Id.* *ibid.*

(z) Lord Raym. 792, 804. It should be laid *ratione tenuræ* of the demesnes of the manor.

(a) R. v. Ecclesfield, 1 B. & A. 348.

(b) R. v. St. Giles, Cambridge, 5 M. & S. 260. And see R. v. Machynlleth, *post*, p. 802. Upon an indictment against a township for the non-repair of a highway within it, in defence it was proved that the way had for many years past been repaired by another township, but it was contended that the liability to repair could not be fixed on the latter township without showing some consideration, and no evidence of this kind was

To an indictment against the inhabitants of the parish of A. for the nonrepair of a highway within the parish, the inhabitants pleaded that the inhabitants of the parish of G., from time immemorial, and in consideration of levying and receiving certain rates in respect of certain lands in the parish of A., adjacent to the highway, had repaired, and ought to repair, the highway so often as there should be occasion. Replication, that the said agreement in the plea mentioned was duly determined by notice in that behalf. Held, on demurrer to the replication, that the plea was bad, since the alleged consideration was insufficient to support the liability of the parish of G., because it could not be enforced, and because it could not from its nature be immemorial, and the repairs must have been done by the parish of G., by virtue of some arrangement between the two parishes, which might be, and had been, put an end to. (c)

And where the inhabitants of a county pleaded that the inhabitants of a particular township had immemorially repaired the highway at the end of a county bridge, situate within the township, the Court held, that it was not necessary to state any consideration for such prescription. (d)

Where to an indictment against a parish for not repairing a highway the defendants pleaded that the parish had immemorially been divided into five townships, and that each of them had immemorially repaired all the highways within it that would otherwise be repairable by the parish, and that the highway indicted was situated within one of the townships, and ought to be repaired by it; the Court of Queen's Bench held that evidence that the four other townships had immemorially repaired their own highways, that no surveyor of highways had ever been appointed for the parish, and that the township in question had repaired a highway lately formed within it, was evidence upon which the jury might find that the township in question was liable to repair all highways within it, and that it was not necessary to prove that there were or had been any ancient highways within it. (e)

Where an extra-parochial and uninhabited district was divided into seven townships by certain Acts of Parliament, it was held that one of the townships was not liable to repair a public road situate within it, as the Acts did not expressly impose such liability upon the township, and the origin of everything (including the township and the road itself) being clearly ascertained, no inference could be raised as to the liability to repair the road by usage or prescription. (f)

The liability of a township to repair by prescription may be such as to place the township on the same footing as a parish, in respect to

given; it was answered that a consideration might be inferred from the fact of repair; but the point was not decided. *R. v. Denton*, 18 Q. B. 761. *Qu.* whether the repair be not evidence that the road is in the township that had repaired. See *R. v. Gate Fulford*, *ante*, p. 784.

(c) *R. v. Ashby Folville*, 35 L. J. M. C. 154. It seems to have been considered in this case that a parish cannot be liable by prescription to repair a highway in another parish.

(d) *R. v. West Riding of Yorkshire*, 4 B. & A. 623.

(e) *R. v. Barnoldswick*, 4 Q. B. 499: Parke, B., at the trial thought that there might be a perfectly valid custom in point of law that the inhabitants of either township should repair any highways, which from time to time became public. See *Freeman v. Reed*, 4 B. & S. 174, and *R. v. Ardsley*, 3 Q. B. D. 255.

(f) *R. v. Midville*, 4 Q. B. 240. *R. v. Hudson*, 2 Str. 909.

the roads within its limits. The liability may be to repair all highways within the township, which but for the prescription and usage would have been repairable by the parish at large; and in such case the township must not only repair immemorial roads, but also any new highway which may have been made within its limits, and which the parish might have been called upon to repair in the absence of any such prescription. (g) Where an indictment against a township for not repairing part of a highway situate within the township, averred that 'the inhabitants of the said township from time whereof the memory, &c., have repaired and amended, and been used and accustomed to repair and amend, and still ought to repair and amend all common and public highways situate within the township used for all the liege subjects of the realm to go, return,' &c.; after a verdict of guilty it was moved in arrest of judgment that it charged the township with a customary liability to repair all roads within it, whereas it ought to have charged a liability to repair all roads within it, 'which but for the custom would be repairable by the parish.' But the Court of Queen's Bench held that although those words had of late years been introduced, they were not necessary: where they were introduced they put the township *primâ facie* in the same position as a parish; and if the defendants meant to assert that any individuals were liable to repair the road in question, *ratione tenuræ* or otherwise (if it could be), they must plead that matter specially; but where those words were omitted and the defendants pleaded not guilty, it became incumbent on the prosecutor to prove that the township was liable to repair *all* roads within it; which might be if there were none repairable by individuals: but if the defendants could show that there were any so repairable, they would negative the custom as being laid too largely. It was a question of evidence, and not of pleading; and in truth the words in question were introduced within living memory for the very purpose of avoiding a failure which frequently happened by reason of the custom laid being larger than the evidence warranted. Nevertheless the custom may be laid as in the present indictment, if no roads in the township are repairable by individuals other than the inhabitants at large. (h) An indictment stated, that part of a highway in an extra-parochial hamlet was out of repair, and that the inhabitants of the hamlet ought to repair it. Upon error brought, on the ground that no immemorial obligation, nor any special ground to make them liable, was stated, it was urged that they were liable of common right, and that an extra-parochial place stood in this respect on the footing of a parish: but the Court held, that they could not consider a common-law obligation as attaching upon the inhabitants of the hamlet from necessity, unless it were shown negatively that the hamlet was not parcel of any other district liable to repair its own roads; and the judgment was reversed. (i)

The inhabitants of a district cannot be charged *ratione tenuræ*, because unincorporated inhabitants cannot, *quâ* inhabitants, hold

(g) *R. v. Ecclesfield*, 1 B. & A. 348. *R. v. Netherthong*, 2 B. & A. 179. *R. v. Hatfield*, 4 B. & A. 75.

(h) *R. v. Heage*, 2 Q. B. 128. *R. v. Hatfield*, 4 B. & A. 75.

(i) *R. v. Kingsmoor*, 2 B. & C. 190.

lands; and a district cannot be charged by prescription alone (without a consideration) to repair what is not within such district. The indictment stated that an ancient bridge, in the parishes of M. and P., in the highway there, was out of repair; and that the inhabitants of the parish of P. and of the town of M. aforesaid, 'from time whereof,' &c., and by reason of the tenure of certain lands in the said parish and town, had repaired and of right ought to repair it. Upon error it was urged that inhabitants as such could not be charged *ratione tenuræ*; and that as it did not appear that any part of the bridge was in the township of M., the indictment against the township, on the ground of immemorial obligation, could not be supported; and the Court being of that opinion the judgment was reversed. (j) Where an indictment alleged that the inhabitants of three townships in a parish were liable to repair a public road, it was objected, but without success, that the indictment was bad for charging three townships conjointly; since, if all were liable, it was the separate neglect of each. (k)

Where lands bound to the repair of a bridge or highway *ratione tenuræ* are conveyed to several persons, every one of the grantees, being a tenant of any parcel, is liable to the whole charge, and must have contribution from the others. So where a manor so bound is conveyed to several persons, a tenant of any parcel, either of the demesnes or services, is liable to the whole repair, and may call upon the tenants of the residue to contribute; and the grantees are chargeable with the repair, though the grantor should convey the lands or manor discharged of the repair; and the grantees must have their remedy against the grantor. And the reason seems to be, because the whole manor or land, and every part thereof, in the possession of one tenant, being once chargeable with the repair, it shall remain so, notwithstanding any act of the owner. For the law will not suffer him to apportion the charge, and so make the remedy for the public benefit more difficult; or, by alienations to insolvent persons, to render the remedy against such persons quite frustrate. And though such lands or manor come into the hands of the crown, yet the obligation or duty continues: and any person afterwards claiming the whole, or any part of it, under the crown, will be liable to an indictment for not repairing. (l)

If the owner of lands not inclosed next adjoining to a highway, where the public have the right of going upon the adjoining lands when the highway is out of repair, incloses his lands on both sides, he is bound to make a perfectly good way as long as the inclosure lasts; (m) and is not excused by showing that he has made the way as good as it was at the time of the inclosure; because, if it was then defective, the public might have gone upon the adjoining land. (n)

(i) *R. v. Machynlleth*, 2 B. & C. 166.

(k) *R. v. Bishop Auckland*, 1 A. & E. 744.

(l) Note (9) to *R. v. Stoughton*, 2 Saund. 159, citing *R. v. Duchess of Buccleuch*, 1 Salk. 358. 3 Viner, tit. *Apportionment*, 5, pl. 9. See *R. v. Mizen*, 2 M. & Rob. 382.

(m) See the 25 & 26 Vict. c. 61, s. 46, noticed *post*, p. 833, where there are district boards.

(n) 1 Roll. Abr. 390 (B.), pl. 1. Dun-

combe's case. Cro. Car. 366. Henn's case, Sir W. Jones, 296. Sty. 364. 2 Lord Raym. 1170. 1 Hawk. P. C. c. 76, s. 6. Bac. Abr. tit. *Highways* (F.). *R. v. Stoughton*, 2 Saund. 160, note (12). And see *Steel v. Prickett*, 2 Stark. R. 469. *Arnold v. Holbrook*, 42 L. J. Q. B. 80. Where such a road has been so inclosed, and it is insufficient, any passenger may break down the inclosure and go over the adjoining land; 3 Salk. 182.

So, if there be an old hedge, time out of mind, belonging to A., on the one side of the way, and B. having land lying on the other side, make a new hedge, then B. shall be charged with the whole repair: but if A. make a hedge on the one side of the way, and B. on the other, they shall be chargeable by moieties. (o) A strong opinion, has, however, been expressed that such liability does not accrue where the adjoining land inclosed has not been used for passage before the inclosure. (p) And where such a liability exists, it lies on the occupier of the lands inclosed and not on the owner as owner. (q) A person, having made himself liable to repair a highway by reason of inclosure, may relieve himself from the burthen of any further reparations by throwing it open again. (r) Thus if a person remove an encroachment, and leave that part of the road which was injured by the encroachment in a perfect state, his liability to repair *ratione coarctationis* ceases. (s) Where a highway is inclosed under the authority of an Act of Parliament for dividing and inclosing open common fields, the person who incloses is not bound to repair it. (t)

As to the liability to repair a new road made in pursuance of a writ of *ad quod damnum*, see *Ex parte Vennor*, 3 Atk. 771, 2, 1 Hawk. P. C. c. 76, ss. 7, 74, 75.

The General Turnpike Act, 3 Geo. 4, c. 126, s. 106, enacts, that it

(o) Bac. Abr. tit. *Highways* (F.). *R. v. Stoughton*, 1 Sid. 464. 1 Hawk. P. C. c. 76, s. 7. *R. v. Stoughton*, 2 Saund. 161, note (12).

(p) Per Erle, J., and *semble* per Crompton, J., in *R. v. Ramsden*, E. B. & E. 949. Where the origin of a road is recent, the circumstances of the dedication, or the user by which the right of road has been acquired, may well exclude any right to go on the adjoining land; e. g., where the object of laying out a street is that houses may be built on both sides of it. See the judgment of Crompton, J., *ibid*. The public had a right to use a footpath across the field of A., but subject to the right of A. to plough it up when he ploughed the rest of the field. He did so plough it up, and having done so, did not set out or mark the line of the path, but left the public to tread it out. The public continued to walk across the field in the direction in which the path had been, but soon finding the path in a muddy and bad condition, turned out of it, and walked on either side thereof. To prevent them from doing so, A. placed hurdles on the parts upon which the public so walked, leaving a space of about six feet in width where the path had been. The respondent having thrown down the hurdles, an action was brought against him by A. in a county court. The judge having given judgment in favour of the respondent the Court of Queen's Bench reversed that judgment, holding that the respondent could not claim a right to go off the line of the footpath or a right to pull down the hurdles. *Arnold v. Holbrook*, 42 L. J. Q. B. 80; *et per Blackburn, J.*, 'I hold that where there is a prescriptive highway over an open common, there would probably be a prescriptive

right to deviate when the road itself becomes impassable, but I cannot think that there is a right in the public to deviate in such a case as the present, or to traverse the field in directions which they have not before used. I should require an extreme authority to show that where in modern times a man gives a right of way to the public, he also gives a right to deviate from that way, and go over other parts of his land. In this case no such thing is found; the land has been under cultivation, and there has always been a right to plough the path up. It is impossible to suppose that a right was given to deviate from the line of the path, and trample down the corn which was sown upon the land.'

(q) *R. v. Ramsden*, *supra*. In this case the road indicted was set out under an inclosure Act, and the land on each side was allotted under the Act, which authorised the persons to whom the lands were allotted to inclose them; it is extremely difficult, therefore, to see how any liability could be incurred by making such an inclosure, and equally so to see how the public could have any right to go out of the line of road set out under the Act. In such a case the rights of the public and the liabilities of the owners would seem to depend entirely on the Act, and yet no notice whatever was taken of it in the case.

(r) Bac. Abr. *Ibid*. *R. v. Flecknow*, 1 Burr. 465. 1 Hawk. P. C. c. 76, s. 7. But where the party is charged with the repairing *ratione tenuræ*, he will be still bound to repair, though he lay the ground open to the highway. 3 Salk. 392.

(s) *R. v. Skinner*, 5 Esp. 219.

(t) *R. v. Flecknow*, 1 Burr. 465.

shall be lawful for the trustees or commissioners of any turnpike road, to contract and agree with any person or persons liable to the repair of any part of the road, under the care and management of such trustees or commissioners, or of any bridges thereon, by tenure, or otherwise, for the repair thereof, for such term as they shall think proper not exceeding three years; and to contribute towards the repair of such road or bridges such sum or sums of money as they shall think proper out of the tolls arising on such turnpike road. (u) The Turnpike Act, 4 Geo. 4, c. 95, s. 68, enacts, that where parts of old turnpike roads are widened, altered, diverted, or turned by legal authority, the body corporate and person who were liable to the repair of the old road shall be liable to the repair of the new, or so much thereof as shall be equal to the burthen and expense of repairing such old road from which they were exonerated by so altering the same. And if the several parties interested cannot agree, two justices are empowered in the manner therein mentioned to view and settle the same; and to fix a gross sum or annual sum, to be paid by the body corporate or person towards the repair of the new road, with such consent and in such manner as is therein mentioned. But when a highway which was repairable *ratione tenuræ* was converted by trustees under a Turnpike Act into a macadamized road, and was diverted and straightened, it was held that the original subject of repair had been destroyed and that the liability to repair *ratione tenuræ* had ceased. (v)

The 4 Geo. 4, c. 95, s. 68, applies to parishes as well as to individuals. Where, therefore, disputes having arisen between two parishes as to the proportion of a turnpike road which each was bound to repair after it had been diverted by trustees, two justices made an order determining the proportions each parish was to repair; it was held that each parish was liable to repair the part so determined. (w)

The general statutes, making provision for repairing *highways*, were repealed and reduced into one Act: namely, the 5 & 6 Will. 4, c. 50, and this Act has been altered and amended by the Highway Acts, noticed *post*, pp. 827 *et seq.* There are also turnpike Acts, inclosure Acts, and other statutes, both of a public and private nature, which relate to the repairs and management of the roads in particular places and districts. But these Acts, and especially the general statutes, are of great length, and branch out into a variety of clauses, a detail of which would not be consistent with the proposed limits of this work. It may, however, be useful to notice a few of the decided points which relate to their construction.

It is no excuse for parishioners, being indicted at common law for not repairing the highways, that they have done their full work required by statute; for the statutes, being made in the affirmative, do not abrogate any provision of this kind by the common law. (x)

If trustees under a road Act turn a road through an inclosure, and

(u) As to power of an urban authority to enter into agreements with turnpike trustees as to repairs, &c., of roads under the Public Health Act 1875, see s. 148 of the Act, *post*, p. 519.

(v) *R. v. Barker*, 25 Q. B. D. 213. *Heath v. Weaverham (Overseers)*, (1894), 2 Q. B. 108.

(w) *R. v. Barton*, 11 A. & E. 343; 3 P. & D. 190. *Quære*, whether the Act applies where a parish is liable to repair one side of a road, and an individual the other.

(x) 1 Hawk. P. C. c. 76, s. 43. *Bac. Abr. tit. Highways (G.)*.

make the fences at their own expense, and repair them for several years, they cannot be compelled to continue such repairs, unless there be a special provision in the Act to that effect. (y)

Where an indictment alleged in the usual way that the liege subjects could not pass and repass as they were wont and accustomed to do, and it appeared that there were precipices on the sides of the road, and no fences or guards to protect the passengers from such precipices, but there was no evidence of there having been any fences before, except that some had been put up after a former indictment; it was held that evidence of the want of fences was not admissible, for the public were in no worse a situation than they were wont and accustomed to be before, on account of the want of fences. (z) So where an open ditch or sewer, which ran along the side of a highway, had existed from time immemorial, and was a tidal stream, and the commissioners of sewers had from time to time cleansed it, but had never put up any fence to it; there had formerly been a wooden fence, but it had been permitted to go to decay, and it did not appear by whom it was erected; it was held that the commissioners were under no obligation to protect the highway: for this was an ancient sewer, which had existed with the highway time out of mind, and therefore the public had only a right to the highway subject to the sewer. (a) It seems that a parish cannot be indicted for not cleansing the ditches by the side of a highway. (b)

It has been held that a turnpike Act, giving directions for repairing the road *to* and *from* a town, *excludes* the town. (c) The town had, lately before the Act was passed, been *paved* by the inhabitants, and it was kept in repair by them, and in several parts of the Act the roads were described as leading *from*, *to*, and *through*, particular towns; but when it mentioned the town in question, it only said, *to* and *from* the town, omitting the word '*through*.' (d)

So upon an indictment for illegally erecting a turnpike gate across a road leading 'from the town of Cheltenham to a place called Hewlett's Hill,' it was held that the town was excluded. (e) So where an indictment alleged a road to lead 'from and through the town of Upton,' towards the parish of Great Malvern, it was held that the town was thereby excluded. (f) So where an indictment charged that the defendant erected a gate across a certain road

(y) *R. v. The Com. of the Llandilo District*, 2 T. R. 232.

(z) *R. v. Whitney*, 7 C. & P. 208. J. A. Park, J.

(a) *Cornwell v. Metropolitan Commissioners of Sewers*, 10 Ex. 771.

(b) *R. v. Upton on Severn*, MSS. C. S. G. Wor. Sum. Ass. 1833. Tindal, C. J. But see 5 & 6 Will. 4, c. 50, s. 67, which gives the surveyor power to cleanse all ditches, &c., he deems necessary, in and through any lands or grounds adjoining, or lying near to any highway. See the Public Health Act, 1875.

(c) *Hammond v. Brewer*, 1 Burr. R. 376. The word 'town' in a local Act may be understood in a popular sense, as a congregation of houses so reasonably near that the inhab-

itants may be fairly said to dwell together: *R. v. Cottle*, 16 Q. B. 412; or a congregation of inhabited houses so near to each other that they may reasonably be said to be continuous, and the term will include a space of open ground surrounded by continuous houses, and it should seem also all open spaces occupied as mere accessories to such houses, although not so surrounded. *Elliott v. S. Devon R. Co.*, 2 Ex. R. 725.

(d) *Hammond v. Brewer*, 1 Burr. R. 376; and see *R. v. Gamlingay*, *post*, p. 811; and *R. v. Harrow*, 4 Burr. 2091.

(e) *R. v. Fisher*, 8 C. & P. 612. Patten-son, J.

(f) *R. v. Upton on Severn*, 6 C. & P. 132. Tindal, C. J. MSS. C. S. G. S. C.

'leading from the township of Detton' 'unto the town of Cleobury Mortimer,' and it appeared that the gate was erected across that part of the highway which was situate in the township of Detton; Coleridge, J., held that the indictment was not supported, as the words 'from' and 'to' excluded the *termini*. (g)

The commissioners appointed by the 6 Geo. 3, c. 78 (an Act for dividing and inclosing certain lands in the parish of Cottingham) which enacted, that the public roads to be set out by them should be repaired in such manner as other public roads are by law to be repaired, and that the private roads should be repaired by *such person or persons* as they should award, had no power to impose on the parish at large the burden of repairing any of the private roads set out in pursuance of the Act. (h)

And where under a similar Act the commissioners had made an order in 1802, that the private ways set out by them should be repaired by the inhabitants, and one of them had been used by the public in every way, and repaired by the parish up to 1825, when the inhabitants having, as was alleged, found out that they were not bound to obey the order, discontinued the repairs, and evidence was offered to show that the parish had been acting under a mistake; it was held that the inhabitants were not bound to obey the order, but that that was not conclusive of the case. In ordinary cases there was an owner of the land, but here there was none, except as directed by the Act; for the presumption that roads are the property of the adjacent owners (which is founded on the supposition that the roads originally passed over the lands of the owners, and therefore they still belong *ad medium filum viæ* to the adjacent owners) does not hold where roads are made under an inclosure Act. The case turns on this question only, whether or no the parish repaired under a mistaken notion of liability. If they acted on a voluntary disposition on their part to repair a road, which was useful to a large class of persons, and for the convenience of the public, they ought to be convicted. If it was a mistake, they ought to be acquitted. (i)

Upon an indictment against the parish of Haslingfield, for not repairing a highway, an award made by commissioners under an inclosure Act, which awarded the highway to be in a different parish, was holden not to be admissible evidence for the defendants, without showing that the commissioners had given notices which the Act required to be given previously to the boundaries having been ascertained by them; it appeared that the usage had not been pursuant to the award; the defendants had since the award, as well as before, repaired the highway. The learned judge who tried this case reported that he should have had no difficulty in admitting the award, if the usage had been pursuant to it, and presuming that the proper notices had been given. (j)

(g) R. v. Botfield, C. & Mars. 151.

(h) R. v. Cottingham, 6 T. R. 20. See R. v. Wright, 3 B. & Ad. 681. *Ante*, p. 768. See R. v. Richards, 3 T. R. 634, that a disobedience to repair a private road is not indictable, but an action lies by the party injured by the non-repair.

(i) R. v. Edmonton, 1 M. & Rob. 24. Lord Tenterden, C. J. *Quære*, whether in

such a case the soil be not in the lord of the manor; it was so before the inclosure, and it would seem so to continue, unless there were an express provision vesting it elsewhere. C. S. G. See accordingly, Poole v. Huskinson, 11 M. & W. 827, and Johnson v. Hodgson, 8 East, R. 38.

(j) R. v. Haslingfield, 2 M. & S. 558. See the cases, *ante*, pp. 783, 784.

Under the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), s. 105, the vestry or district board of a parish or district, after having once compelled the owners of the houses forming a new street, to pay the cost of providing and laying the pavement, are bound for the future to keep it in repair, and this obligation may be enforced by mandamus: The H. Board of Works acting under the powers of the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), s. 105, paved and flagged a new street, charging the expense on the adjoining owners. The Board afterwards neglected to repair the road on the ground that a barrier had been erected upon it by the owner of the soil. Held, that the Board, having exercised their power to pave a new street at the expense of the adjoining owners, were bound to keep it in repair, and that the obstruction by the owner of the soil did not exonerate them from the performance of such duty. (*k*)

We may now shortly consider the modes of proceeding by which persons guilty of these nuisances to highways may be prosecuted.

Nuisances or annoyances to highways, whether positive, in the nature of actual obstructions, or negative, by the defect of proper reparations, may be made the subject of indictment, which is the more usual course of proceeding. And formerly justices of assize and of the peace might have presented highways which were out of repair, but now by the 5 & 6 Will. 4, c. 50, s. 99, it is not lawful 'to take or commence any legal proceeding by presentment against the inhabitants of any parish, or other person, on account of any highway or turnpike road being out of repair.' (*l*)

A new mode of compelling the repairs of highways (*m*) has been introduced by the 5 & 6 Will. 4, c. 50, s. 94, which enacts, that 'if any highway (*n*) is out of repair, or is not well and sufficiently repaired and amended, and information thereof, on the oath of one credible witness, is given to any justice of the peace, it shall and may be lawful for such justice, and he is hereby authorized and required to issue a summons requiring the surveyor (*o*) of the parish, or other person or body politic or corporate chargeable with such repairs, to appear before the justices at some special sessions for the highways in the said summons mentioned, to be held within the division in which the said highway may be situate; and the said justices shall either appoint some competent person to view the same, and report thereon to the justices in special sessions assembled, on a certain day and place to be then and there fixed, at which the said surveyor of the highways or other party as aforesaid, shall be directed to attend, or the said justices shall fix a day whereon they or any two of them shall attend to view the said highway; and if to the justices at special sessions, on the day and at the place so fixed as aforesaid, it shall appear, either on the report of the said person so appointed by them to view, or on

(*k*) *R. v. The Hackney Board of Works*, 42 L. J. M. C. 151.

(*l*) See *R. v. Mawgan*, 8 A. & E. 496. A presentment and indictment differ, 2 Inst. 739. Comb. 225.

(*m*) The 25 & 26 Vict. c. 61, s. 18, noticed *post*, p. 827, provides for those cases where district boards are established under that Act.

(*n*) It seems this section only applies to

cases where the way is admittedly a public highway. *R. v. Heanor*, 6 Q. B. 748. *R. v. Somersetshire*, 3 Law T. 316. See *R. v. Johnson*, *post*, p. 808. *R. v. Farrer*, 35 L. J. M. C. 211.

(*o*) As to the powers of surveyors of highways being vested in urban authority under the Public Health Act 1875, see s. 144, *post*, p. 834.

the view of such justices, that the said highway is not in a state of thorough and effectual repair, they the said justices at such last-mentioned special sessions shall (p) convict the said surveyor or other party liable to the repair of the said highway in any penalty not exceeding five pounds, and shall make an order on the said surveyor, or other person or bodies politic or corporate liable to repair such highway, by which order they shall limit and appoint a time for the repairing of the same; and in default of such repairs being effectually made within the time so limited, the said surveyor, or such other person or body politic or corporate as aforesaid, shall forfeit and pay to some person to be named and appointed in a second order, a sum of money to be therein stated, and which shall be equal in amount to the sum which the said justices shall, on the evidence produced before them, judge requisite for repairing such highway, which money shall be recoverable in the same manner as any forfeiture is recoverable under this Act, and such money when recovered shall be applied to the repair of such highway, and in case more parties than one are bound to repair any such highway, the said justices shall direct in their said order what proportion shall be paid by each of the said parties; provided, that if the said highway so out of repair is a part of the turnpike road, the said justices shall (q) summon the treasurer or surveyor or other officer of such turnpike road, and the order herein directed to be made shall be made on such treasurer or surveyor or other officer as aforesaid, and the money therein stated shall be recoverable as aforesaid; provided nevertheless that the said justices shall not have power to make such order as aforesaid in any case where the duty or obligation of repairing the said highway comes in question.'

Sec. 95. (r) 'If on the hearing of any such summons respecting the repair of any highway the duty or obligation of such repairs is denied by the surveyor on behalf of the inhabitants of the parish, or by any other party charged therewith, it shall then be lawful for such justices, and they are hereby required (s) to direct a bill of indictment to be preferred, and the necessary witnesses in support thereof to be subpoenaed, at the next assizes to be holden in and for the said county, or at the next general quarter sessions of the peace for the county, riding, division, or place wherein such highway shall be, against the inhabitants of the parish or the party to be named in such order, for suffering and permitting the said highway to be out of repair; and the costs of such prosecution shall (t) be directed by the judge of assize before whom the said indictment is tried, or by the justices at such quarter sessions, to be paid out of the rate made and levied in pursuance of this Act in the parish in which such highway

(p) This is not compulsory, but the justices may exercise a discretion whether they will convict. *R. v. Lord Radnor*, 8 Dow. P. C. 717.

(q) See *R. v. Trafford*, 5 E. & B. 967.

(r) This section is in force in South Wales notwithstanding the 23 & 24 Vict. c. 63. *R. v. James*, 3 B. & S. 901. See the 25 & 26 Vict. c. 61, s. 19, noticed *post*, p. 823, where there is a district board.

(s) If the liability to repair is denied, on the ground that the alleged highway is not a highway, the justices cannot proceed to make an order under this section that an indictment be preferred, without making any inquiry as to whether the road be a highway. *R. v. Johnson*, 34 L. J. M. C. 85. See *ante*, p. 807.

(t) See *post*, p. 822.

shall be situate; provided nevertheless that it shall be lawful for the party against whom such indictment shall be so preferred at the quarter sessions (*u*) as aforesaid to remove such indictment by *certiorari* or otherwise into his Majesty's Court of King's Bench.'

By the Highways Act 1878 (41 & 42 Vict. c. 77) (*v*) s. 10, which gives power to a county authority to enforce the performance of their duty by a highway authority by making an order upon them, it is provided 'If the county authority decide to submit the question to a jury they shall direct a bill of indictment to be preferred to the next practicable assizes to be holden in and for their county, with a view to try the liability of the defaulting authority to repair the highway. Until the trial of the indictment is concluded the order of the county authority shall be suspended. On the conclusion of the trial, if the jury find the defendants guilty, the order of the county authority shall forthwith be deemed to come into force; but if the jury acquit the defendants the order of the county authority shall forthwith become void. The costs of the indictment and of the proceedings consequent thereon shall be paid by such parties to the proceedings as the court before whom the case is tried may direct.'

Another mode of proceeding is by *information*, which may be granted by the Court of Queen's Bench at their discretion. But they will not grant an information to compel a parish to repair a highway which is not much used; and when it appears that another highway, equally convenient to the public, is in good repair. And indeed they never give leave to file an information for not repairing a highway, unless it appear that the grand jury have been guilty of gross misbehaviour in not finding a bill; and they refuse it for this reason, that the fine set on conviction upon an information cannot be expended in the repair of the highway, whereas on an indictment it is always so expended. (*w*) But it has been granted against the inhabitants of a parish where it was shown that a bill of indictment had been thrown out by the grand jury, and that two of the grand jury were proprietors of land in the parish, and had taken an active part in opposing the finding of the indictment. (*x*)

A mandamus will not be granted to repair a highway. (*y*)

Though it is often stated in indictments for nuisances (*z*) to highways, that 'from time whereof the memory of man is not to the contrary,' or, 'from time immemorial,' there was and is a common and ancient Queen's highway, yet it is not necessary to do so; for it is sufficient to state in a compendious manner *that it is a highway*. (*a*) And if an indictment against a parish unnecessarily allege the road to have existed 'from time whereof the memory of man runneth not to the

(*u*) An indictment found at the assizes may also be removed by the defendants. *R. v. Sandon*, 3 E. & B. 547.

(*v*) See *post*, p. 836.

(*w*) *Bac. Abr. tit. Highways* (H.). *R. v. Steyning*, 3 Bay. 92.

(*x*) *R. v. Upton St. Leonards*, 10 Q. B. 627.

(*y*) *R. v. The Trustees of the Oxford and Witney Turnpike Roads*, 12 A. & E. 427.

(*z*) It is not within the scope of this work

to treat particularly of the forms of the pleadings, though some of the prominent points concerning them are occasionally mentioned. For indictments, pleas, &c., relating to nuisances to highways the reader is referred to the *Cro. Circ. Comp.* (8th edit.) 801. 6 *Wentw.* 405. 2 *Stark.* 664. 3 *Chit. Cr. L.* 576, 607; and the notes to *R. v. Stoughton*. 2 *Saund.* 157 *et seq.*

(*a*) *Aspidall v. Brown*, 3 T. R. 265.

contrary,' and it appear that part of the highway was made within living memory, this is no variance; for in an indictment against a parish it is not material whether the way be immemorial or not, as the instant it becomes a public way the parish is liable. (b) But it is otherwise where an immemorial custom is necessary to raise the liability. Where, therefore, an indictment for non-repair of a highway stated that the inhabitants of a tithing from time immemorial had been used and accustomed to repair the said highway, and the way in question had been set out as a private road and a drift-way under an inclosure Act in 1784, for the use of the adjoining owners, who were directed to repair it; and the award under a power in the Act extinguished all ways, both public and private, not set out in it. The way had been publicly used before the inclosure, and since had been repaired occasionally by the tithing, and been used to a great extent by the public. It was objected, that whatever might be the facts as to the use and repair by the tithing before and since the inclosure, the award extinguished the road as a public way for some time at least, and therefore the allegation of immemorial user and liability to repair was not proved; and Maule, J., held that the indictment clearly failed on the facts. (c) And though it is usual to state the *termini* of the highway, it is said not to be necessary; on the ground that a public highway is intended to go through all the realm, and to lead from sea to sea. (d) But if the *termini* are stated, they must be substantially proved, according to the statement. (e) Thus, where a highway leading from A. to C. not passing through B., though communicating with it by means of a cross-road, was described as a road leading from A. to B. and from thence to C., the variance was held to be fatal. (f) An indictment describing a footpath as leading from A. towards and unto the parish church, is satisfied by proof of a public way leading from A. to the parish church, though turning backwards between A. and the church at an acute angle, and though the part from A. to the angle be an immemorial way, and the part from the angle to the church be recently dedicated. (g) So where an indictment alleged that the highway led from T. to E., and it appeared that a person travelling from T. to E. on the way described would pass into a turnpike road, travel a short distance along that road, and then turn off into a distinct road which led to E., it was objected that the portion of the highway between the turnpike road and E. was not part of a road from T. to E., inasmuch as a person leaving T. came into and travelled along a distinct line of turnpike road, before he entered upon the highway in question, which immediately led to E.; but the Court of Queen's Bench held that the way was properly described, as it was the nearest between T. and E., and a turnpike road is itself a parish road. (h)

(b) *R. v. Turweston*, 16 Q. B. 109.

(c) *R. v. Westmark*, 2 M. & Rob. 305.

(d) *R. v. Hammond*, Str. 44. 10 Mod. 332. *Halsell's case*, Noy, 90. Latch. 183. *R. v. St. Weonards*, 6 C. & P. 582. *R. v. Neale*, 3 Keb. 89. *Rouse v. Bardin*, 1 H. Black. 351; but see Lord Loughborough's judgment, who differed.

(e) *Rouse v. Bardin*, 1 H. Black. 351. *R. v. St. Weonards*, 6 C. & P. 582.

(f) *R. v. Great Canfield, cor. Ellenborough*, C. J., 6 Esp. C. 136.

(g) *R. v. Marchioness of Downshire*, 4 A. & E. 232; 5 N. & M. 662.

(h) *R. v. Turweston*, 16 Q. B. 109. So where part is an ancient highway, and part of recent date, it may well be described as a highway. *R. v. Marchioness of Downshire, supra*. See *R. v. Steventon*, 1 C. & K. 55. *Erskine, J.*

As to the power of amendment in case of variance between the indictment and the proof, see *ante*, p. 53.

But the *termini* of the part out of repair are not material. Where, therefore, the unrepaired part of a highway was described as leading out of a highway, 'at or near a place called Parkside,' and the place was Parkgate; it was held that this was immaterial. (*i*)

In an indictment against a parish, charging them on their common law liability to repair, the highway must be alleged in the indictment to lie in the parish indicted; and if it be not so alleged, the indictment is erroneous, and judgment will be reversed. (*j*) Such indictment should also state that the way is a highway and that it is out of repair. Where an indictment against the parish of Gamlingay stated that there was a highway leading from the parish of Hartley St. George towards and unto the parish of Gamlingay, and that a certain part of the said highway situate in the said parish of Gamlingay was out of repair, it was moved in arrest of judgment that no part of the road, as described, lay in Gamlingay; and the Court held the objection fatal. (*k*) So where an indictment against the parish of Upton on Severn stated that there was a highway 'from and through the town of Upton on Severn,' and there was no express averment that the part out of repair was in the parish, it was held bad. (*l*) Where an indictment charged that the defendant, at the township of W., upon a highway there leading from a highway leading from the village of W. towards the parish church of C., towards and unto a highway leading from the said village of W. towards and unto the township of L. W., by a certain wall *there* extending into the *said* highway unlawfully encroached, it was held that the words 'there' and 'said' could only be referred to the first-mentioned highway, and that the indictment was sufficient. (*m*) Where the indictment is against a particular person, charging him with the repair of a highway in respect of certain lands, it seems that the occupier, and not the owner, is the proper person against whom the indictment should be brought; on the ground that the public have no means of knowing who is the *owner* of the lands charged with the repair: and it does not seem to be material what estate the occupier has in the lands liable. (*n*) The averment of obligation to repair, in an indictment against a person for not repairing *by reason of tenure*, will, it seems, be sufficient, if it state that the defendant ought to repair *by reason of the tenure of his lands*, without adding that those who held the lands for the time being have *immemorially* repaired; a prescription being implied in the estate of inheritance in the land. (*o*) But it is not sufficient to state that the party is chargeable by being owner and proprietor of the property subject to the charge. (*p*) But an

(*i*) *R. v. Waverton*, 17 Q. B. 562.

(*j*) *R. v. Hartford*, Cowp. 111. See *R. v. Bishop Auckland*, 1 A. & E. 746.

(*k*) *R. v. Gamlingay*, 3 T. R. 513. And see *Hammond v. Brewer*, *ante*, p. 805, and *Rose v. Barden*, 1 H. Black. 356, Lord Loughborough's judgment. *R. v. Knight*, 7 B. & C. 413; 1 M. & R. 217. Lord Tenterden, C. J., doubted the propriety of the decision in *R. v. Gamlingay*, saying that, in common parlance, the words 'leading from a place,'

include as well as exclude that place. See *Fry v. Whittle*, 6 Exch. R. 411.

(*l*) *R. v. Upton on Severn*, 6 C. & P. 132. *Tindal*, C. J. MSS. C. S. G.

(*m*) *R. v. Wright*, 1 A. & E. 434.

(*n*) *R. v. Watts*, 1 Salk. 357. *R. v. Bucknell*, 7 Mod. 55. *R. v. Sutton*, 3 A. & E. 597. *R. v. Barker*, 25 Q. B. D. 213.

(*o*) *R. v. Stoughton*, 2 Saund. 158 d. note (9). 1 Chit. C. L. 475, *et seq.*

(*p*) *R. v. Kerrison*, 1 M. & S. 435. See *Russell v. Shenton*, 3 Q. B. 449.

indictment against a particular part of a parish, such as a district, township, division, or the like, for not repairing a highway in the parish, stating that the inhabitants of the district from time immemorial ought to repair and amend it, is erroneous; it should state that the inhabitants of such district from time whereof, &c. have used and been accustomed, and of right ought to repair and amend it: for the inhabitants of a particular division of a parish not being bound to repair by common law, and their obligation arising necessarily only from custom or prescription, the indictment ought to show such custom, prescription, or reason of their obligation. (g)

Where the first count of an indictment alleged that there was a highway in the county of C., and that 'a certain part of the said highway situate, &c. in the township of W. in the parish of W. in the county aforesaid (describing it, and stating its length and breadth) was very ruinous,' &c.: and the second count alleged an immemorial usage for the inhabitants of the said township to amend so many of the highways, situate in the said township, as would otherwise be repairable by the parish at large, and that 'the said part of the same common highway hereinbefore mentioned to be ruinous, &c., as aforesaid' was a highway, which but for the said usage would be repairable by the parish at large; and that by reason of the premises the inhabitants of the said township ought to have repaired 'the same part of the said common highway so being ruinous, &c., as aforesaid;' the jury having found the defendants not guilty on the first count, but guilty on the second, it was objected, in arrest of judgment, that the second count was bad on the ground that it did not contain any sufficient averment that the highway was in the township, or out of repair; but the Court of Queen's Bench held that the words 'so being ruinous, &c., as aforesaid,' were a clear and specific reference to the first count, which contained a formal allegation that this part of the highway was out of repair, and there were many authorities to show that one count of an indictment might refer to another, and that under such circumstances the maxim applies *verba relata inesse videntur*. And as to the objection, that the second count did not show that the part indicted was situate in the township of W.; it had been determined that any qualities or adjuncts averred in one count to belong to any subject, if they are separate from it, shall not be supposed to be alleged as belonging to it in a subsequent count, which merely introduces it by reference as the same subject 'before mentioned.' (r) But the local situation of the part of the highway described must necessarily and invariably belong to it, and if once described as being in a particular township, when there is afterwards enough to identify it as being what is so described, a repetition of the allegation that it is within the township is not strictly necessary. (s)

A highway may be described as a common highway for carts, carriages, &c., although it has always been arched over, provided it be capable of being used by all ordinary carriages and notwithstand-

(g) *Ante*, p. 811, note (o). *R. v. Broughton*, 5 Burr. 2700. *Freem.* 522. *R. v. Stoughton*, *R. v. Sheffield*, 2 T. R. 111.

(r) See *R. v. Martin*, 9 C. & P. 215; *R. v. Waters*, 1 Den. C. C. 356.

(s) *R. v. Waverton*, 2 Den. C. C. 340, 17 Q. B. 562.

ing the archway be not sufficiently high to permit road waggons and other carriages of unusual dimensions to pass under it. (*t*)

Where an indictment charged the non-repair of a highway for horses, coaches, carts, and carriages, and there was no evidence that any carriages had ever gone the whole length of it, but the road had been repaired by the parish, and persons on horseback had frequently passed along it; it was held that the defendants could not be convicted, as there was no count charging that it was a road for horses. (*u*) And where an indictment stated that there was a pack and prime way between certain specified places, and it appeared that part of that road was a turnpike road, it was held that this was fatal, for the statement in the indictment was matter of description, and must be proved as laid. (*v*) On an indictment for obstructing a footway leading from a turnpike road to Gravesend, it appeared that from the turnpike road to the top of a hill the road was a carriage-way, but from thence to Gravesend it was a footway, and the obstruction was in the latter part, and it was held that, assuming this to be a misdescription, it was amendable under the 14 & 15 Vict. c. 100, s. 1. (*w*)

A map made by order of a former lord of a manor in which a way lies, which has been used for more than thirty years by the stewards of the manor, for the purpose of defining the copyholds, and which set out the way in question, but did not describe it as a highway, and set out other ways in a similar manner which were only occupation roads, is not admissible as a declaration by a deceased person as to a public highway; for the map, if a declaration at all, was only a declaration as to the matter for which it had been used, viz., the defining of the copyholds, and the map itself did not describe the way as a highway. (*x*)

Where a person, who is bound *ratione tenuræ* to repair a highway, lives out of the county in which such highway is situate, he may nevertheless be indicted in such county for not repairing it. (*y*)

It cannot, under the plea of the general issue, be objected at the trial that the description of the highway in an indictment for the non-repair of it is too indefinite, being equally applicable to several highways. (*z*)

When an indictment is against the inhabitants of a parish at large, who, as it has been seen, are bound of common right to repair all the highways lying within it, they may upon the general issue, *not guilty*, show that the highway is in repair, or that it is not a highway, or that it does not lie within the parish; for all these are facts which the prosecutor must allege in his indictment, and prove on the plea of not guilty. (*a*)

On an indictment for non-repair of a highway it appeared that it

(*t*) *R. v. Lynn*, 1 C. & P. 527, *totâ curiâ*, B. R.

(*u*) *R. v. St. Weonards*, 5 C. & P. 579. Parke, B.

(*v*) *R. v. St. Weonards*, 6 C. & P. 582. Alderson, B., and Williams, J.

(*w*) *R. v. Sturge*, 3 E. & B. 734. As to amendments at the trial, where there is a variance between the proof and the indictment, see *ante*, p. 53.

(*x*) *Pipe v. Fulcher*, E. & E. 111. See *R. v. Milton*, 1 C. & K. 58. Erskine, J.

(*y*) *R. v. Clifton*, 5 T. R. 502, 503.

(*z*) *R. v. Hammersmith*, 1 Stark. Rep. 357. Particulars of the roads indicted may be obtained. See *ante*, p. 758.

(*a*) *R. v. Norwich*, 1 Str. 181, *et seq.* *R. v. Stoughton*, 2 Saund. 158, note (3).

had always been a green road, and was in very bad repair. Patteson, J., told the jury that it was not enough to say that it was as good as ever it was, or as it usually had been; and that if it were a public road, and the necessities of the public required it, the inhabitants might be bound to convert it from a green road into a hard road; it was contended that this was a misdirection, that the road was proved to be in as good a state as it had ever been, and that that was an answer to the indictment; but it was held that the direction was right; and that the degree of repair necessary had reference to the existing use of the road; if the road was little used, then little repair was necessary; but if much used, then proportionably more. (b) On an indictment for non-repair of a highway it appeared that the road was an old soft road formed of weald of Kent clay, and had never been repaired with hard substances; the defence was that the parish was not bound to make the road a hard road, and that they had sufficiently repaired it by hacking in the ruts, as had before been the custom. Blackburn, J., told the jury that the parish was not bound to make the road hard, or bring stone or other hard substances to repair the road; but they were bound in some way, by stone or other hard substances, if necessary, to put the road in such repair as to be reasonably passable for the ordinary traffic of the neighbourhood at all seasons of the year. (c) But it is settled that the parish cannot, upon the general issue, throw the burthen of repairing on particular persons, by prescription or otherwise; but must set forth their discharge in a special plea. (d) Where a person is charged with the repairs of a highway or bridge, against common right, he may discharge himself upon *not guilty* to the indictment: and therefore where a particular division of a parish is charged with the repair by prescription, or a particular person by reason of tenure or the like, which are obligations against the common law, they may throw the burthen either on the parish, or even on an individual on the general issue. And the reason seems to be, because upon this issue the prosecutor is bound to prove that the defendants are chargeable by tenure or prescription, and therefore the defendants may disprove it by opposite evidence; but if they will, though unnecessarily, plead the special matter, it is held not to be enough to say that they ought not to repair, but they must go further and show who ought. (e)

If a parish consisting of several townships be indicted for not repairing a road within it, a plea that each township has immemorially maintained its own roads must show how much of the road indicted lies in one township, and how much in another; for it is considered that the parish must know the limits of each township, and is bound to show with certainty the parties liable to repair every part of the highway indicted, and in what right they are so liable. (f) Where an indictment for non-repair of a road the parish plead specially that particular individuals are liable

(b) *R. v. Henley*, 2 Cox, C. C. 334.

(c) *R. v. High Halden*, 1 F. & F. 678.

(d) *R. v. St. Andrews*, 1 Mod. 112.

Anon., 1 Vent. 256. See *R. v. St. George*, 3 Campb. 222, where there was a public Act of Parliament transferring the liability.

(e) *R. v. Yarnton*, 1 Sid. 140. *R. v. Hornsey*, Carth. 213; *R. v. City of Norwich*, 1 Str. 180, *et seq.*; *R. v. St. Andrews*, 3 Salk. 183, pl. 8. *R. v. Stoughton*, 2 Saund. 159 a, note (10).

(f) *R. v. Bridekirk*, 11 East, 304.

ratione tenuræ to repair parts of the road indicted, they must accurately describe the parts such persons are respectively liable to repair, for they can only discharge themselves by showing precisely who are liable, and for what particular parts of the road. To an indictment against a parish for not repairing a road beginning at the confines of the parish of L. and ending at B., containing in length 2390 yards, the parish pleaded as to part commencing at the confines of the parish of L., and continuing thence onward in length 363 yards or thereabouts, that the same adjoined on the north-east side thereof to certain lands in the occupation of V. as tenant to P., and on the south-west side to certain other lands in the occupation of J. as tenant to the said P., and that the said P., by reason of the tenure of such lands ought to repair such part of the said highway adjoining to the said lands being in length as aforesaid or thereabouts, when and as often as there should be occasion, &c.; and as to another part commencing at the termination of the said part of the said highway last described, and continuing thence onwards in length 499 yards or thereabouts, that the same on each side thereof adjoined to certain other lands in the occupation of B. as tenant to C., and that C. by reason of his tenure of such lands ought to repair such part of the said highway adjoining to the last-mentioned lands. (g) The replication was that P., C., &c., by reason of their several and respective tenures of the said several lands ought not respectively to repair such part of the said highway respectively as adjoins to the lands in the several and respective tenures of the said P., C., &c., *modo et formâ*. It appeared that on entering the road from the parish of L. the land of P. extended on both sides of the road, but about eighteen yards further on the left than on the right-hand side. Where P.'s land ended C.'s land began on each side of the road, so that for the eighteen yards P.'s land and C.'s were opposite to each other. It was objected that there was a misdescription, for it was stated that P. was bound to repair the whole road and C. the whole road, but the evidence was that there were about eighteen yards in which P. and C. would be bound to repair *ad medium filum viæ*. It was answered, that the form of the issue, as well as the substance, was, whether persons holding lands were bound to repair the road adjoining to their lands,—that the statement of so many yards 'or thereabouts,' left it quite at large, as much as if it had been alleged under a *videlicet*; but it was held that the plea was not proved; for it was an entire plea which the defendants were bound wholly to prove, and as no part of the plea stated that P. and C. were bound to repair up to the middle of the road there was a variance. (h)

Where a plea to an indictment in the ordinary form against a parish for non-repair of a road, alleged that the road lay within a township, and that the inhabitants of the township had been accustomed from time immemorial to repair all highways within the township, which otherwise would be repairable by the parish at large, and that the inhabitants of the parish at large had not been accus-

(g) The plea proceeded to aver the liability of the owners of the adjoining lands to repair the residue of the roads in a similar manner.

(h) *R. v. Rockfield, Monm. Summer Ass. 1830.* Bosanquet, J. There were similar variances in the proof as to other parts of the road. MSS. C. S. G.

tomed to repair the highways within the township, and that by reason of the premises the township ought to repair the said road, and the replication traversed the custom for the township to repair all highways within it as stated in the plea, and a verdict was found for the defendants; judgment was arrested, because the plea did not aver that the highway was one which, but for the custom, would be repairable by the parish at large, and so did not show what party other than the defendants was liable to repair it. (i)

If a person indicted for not repairing *ratione tenuræ*, or a township, or other particular persons, indicted for not repairing by prescription, plead (though unnecessarily) to the indictment, and show who ought to repair, as they must do, it is necessary to traverse their obligation to repair: but if a parish be indicted for not repairing a highway, or a county for not repairing a bridge, and they throw the charge upon another, they ought not to traverse their obligation to repair, for it is a traverse of matter of law; and such traverse, though very often inserted, is demurrable, and therefore ought always to be omitted. (j) Where an indictment charged that the defendant ought to repair *ratione tenuræ* of certain lands inclosed and encroached by him out of the highway, a plea, traversing the obligation *ratione tenuræ*, was held good; on the ground that it professed to charge the defendant *ratione tenuræ*, and not by reason of the encroachment; and that the obligation *ratione tenuræ* would continue, though the land should be again thrown open to the highway, whereas the obligation by reason of the encroachment would not. (k)

In one case it was held that evidence of reputation could not be admitted to establish a liability to repair *ratione tenuræ*, that liability being a matter of a private nature. (l) But it has since been held that evidence of reputation is admissible in such a case. (m)

Where the inhabitants of a parish pleaded that the inhabitants of a particular district were bound by prescription to repair all common highways situate within that district, save and except one common highway within the said district, it was holden that the plea might be supported, although it appeared that the excepted highway was of recent date; and it was also holden that in such a plea it was not necessary to state by whom the excepted highway was repairable. (n) And such a plea will be good although it does not state any *consideration* for the liability of the inhabitants of the district. (o)

Where any subdivision of a parish is liable to the repair of a highway, and the indictment is, notwithstanding, preferred against the whole parish, care should be taken to plead the liability of such subdivision; for if judgment be given against the parish, whether after

(i) R. v. Eastington, 5 A. & E. 765.
R. v. Colling, 2 Cox, C. C. 184.

(j) R. v. Stoughton, 2 Saund. 159, c. note (10). Bennet v. Filkins, 1 Saund. 23, note (5). In R. v. Ecclesfield, 1 B. & A. 350, 351, J. Williams *arguendo* denied that such traverse is demurrable; and said that R. v. Inhabitants of Glamorgan contained such a traverse (2 East, 356, in *notis*), and that the better precedents have always inserted it. Supposing such traverse to be necessary, it is sufficiently expressed by a

plea concluding thus, 'And that the inhabitants of the said parish at large ought not to be charged with the repairing and amending the same.'

(k) R. v. Stoughton, 2 Saund. 160.

(l) R. v. Wavertree, 2 M. & Rob. 353, Maule, J.

(m) R. v. Bedfordshire, 4 E. & B. 535.

(n) R. v. Ecclesfield, 1 Stark. Rep. 393.

(o) R. v. Ecclesfield, 1 B. & A. 343.

See R. v. Ashby Folville, 35 L. J. M. C. 154.

verdict upon not guilty, or by default, the judgment will be conclusive evidence of the liability of the *whole parish* to repair, unless *fraud* can be shown. (p) Fraud, however, is only put for example. As against the parish at large the judgment is not conclusive, if the defence was conducted by the inhabitants of a particular district in which the indicted road lay, without any notice to the rest of the parish. (q)

Where to an indictment for not repairing a highway against the parish of Eardisland, consisting of three townships, Eardisland, Burton, and Hardwicke, there was a plea on the part of Burton that each of the three townships had immemorially repaired its own highways separately; it was held that the records of indictments against the parish generally for not repairing highways situate in the township of Eardisland, and the township of Hardwicke, with general pleas of *not guilty*, and convictions thereupon, were *prima facie* evidence to disprove the custom for each township to repair separately; but that evidence was admissible to show that these pleas of *not guilty* were pleaded only by the inhabitants of the townships of Eardisland and Hardwicke, without the privity of Burton. (r)

The defendant was indicted for the nonrepair of a highway, which it was alleged he was liable to repair *ratione tenuræ* of certain lands called Saw-pit Field, and pleaded not guilty. To prove this liability evidence was given of the conviction of W. Smith, a former owner and occupier of the same lands, for the non-repair of the same highway, showing that in the year 1801 a presentment had been preferred against him, alleging his liability to repair it *ratione tenuræ* of the lands called Saw-pit Field, to which he pleaded guilty. Evidence was also given of the repair of the said highway subsequently to the said conviction of W. Smith by the occupiers of the lands, of which Saw-pit Field formed part; that public notice was given when Saw-pit Field was offered for sale of the liability to repair the highway in question, and that the defendant, who purchased the lands after such notice, was now the owner and occupier of Saw-pit Field, and, upon a case reserved after a verdict of guilty, the judges were unanimously of opinion that there was evidence to go to the jury of immemorial usage, and of the defendant's liability to repair the highway *ratione tenuræ*; and Parke, B., Alderson, B., Patteson, J., and Coleridge, J., were of opinion that the conviction of W. Smith estopped the defendant, who was privy to him in estate, from denying his liability *ratione tenuræ*. If the defendant had pleaded that he was not liable *ratione tenuræ*, then the prosecutor might have replied the previous conviction as an estoppel, but as he had pleaded the general issue, there was no opportunity of pleading the conviction as an estoppel, and therefore the prosecutor might take advantage of it upon the evidence as conclusive. (s) And on an indictment for non-repair of a highway against a township alleging it to be liable by prescription to

(p) *R. v. St. Pancras*, Peake, Rep. 219.
R. v. Whitney, 7 C. & P. 208. J. A. Park, J.; see the same case, 3 A. & E. 69;
Read v. Jackson, 1 East, Rep. 355. *R. v. Blakemore*, 21 L. J. M. C. 60. *R. v. Haughton*, 21 L. J. M. C. 89.

(q) *R. v. Townsend*, Doug. 421. *R. v. Lancaster*, 2 Saund. 159 n. *R. v. Eardisland*, 2 Camp. 494.

(r) *R. v. Eardisland*, *supra*.

(s) *R. v. Blakemore*, 2 Den. C. C. 410.

repair such highways in the township as the parish but for the prescription would have been liable to repair, with a plea of not guilty, a record of a presentment by a justice, under the 13 Geo. 3, c. 78, on his own view, that the road in question was out of repair, and alleging that it was in the township, and that the township ought to repair it, with a plea of guilty by two of the inhabitants, and a sentence of a fine, was held conclusive evidence against the township that the highway was situate within it, and that the township was liable to repair it; and that, though the presentment might be bad on demurrer, in arrest of judgment or on error, the conviction being before a competent tribunal, and unreversed, was not the less an estoppel. It was also held that it was unnecessary to prove that the fine had been paid, as no fraud or collusion was shown. (t) So where a road ran over a waste in the township of Ecclesall, but had always been repaired by Hallam, both before and after an inclosure Act for Ecclesall, and three years before the inclosure Act Hallam had submitted to an indictment for non-repair of the road; it was held that that conviction was conclusive evidence that the road lay in Hallam, and that an award under the Act was void as to that road, as the commissioners had only jurisdiction over roads in Ecclesall. (u)

Upon an indictment against the inhabitants of the township of B., it appeared that the road indicted passed through three adjoining townships, B., Attercliffe, and T.; and the Court of Queen's Bench held that the record of an indictment against the township of Attercliffe for non-repair of part of the highway in that township, to which that township appeared to have submitted, was admissible for the purpose of proving that the way in question was a highway. It was clear that user by the public and repair by the township would be admissible as facts raising a presumption of highway; and an indictment was another fact of the same class: and proceedings at law to compel the repair of a highway (when submitted to) show the right as much or more than acts of repair without compulsion would have done. (v)

It has been held that the record of an *acquittal* upon an indictment for not repairing a highway is not evidence to show that the parish is not liable; on the ground that some other parties might have indicted them, and that those parties could not be bound by this record. (w) And a satisfactory reason for rejecting such evidence altogether seems to be that the acquittal might have proceeded upon the want of proof that the road was out of repair. (x) In the case of an indictment for not repairing a highway, which it was alleged the defendant was bound to repair *ratione tenuræ*, it was held that an award made under a submission by a former tenant for years of the premises, could neither be received as an adjudication, the tenant having no authority to bind the rights of his landlord, nor as evidence of reputation, being *post litem motum*. (y)

(t) R. v. Haughton, 1 E. & B. 501. It was also held that a recital in an Act that the highway was in another township was only evidence, and did not prevail over the estoppel. See R. v. Maybury, 4 F. & F. 90.

(u) R. v. Nether Hallam, 6 Cox, C. C. 435. Petrie v. Nuttall, 11 Exc. R. 569.

(v) R. v. Brightside Bierlow, 13 Q. B. 933.

(w) R. v. St. Pancras, Peake, Rep. 219.

(x) Mann. Ind. N. P. R. 128.

(y) R. v. Cotton, 3 Camp. 444, *cor.* Dampier, J.

As to witnesses not now being incompetent on the ground of their being interested, see Vol. 3, Evidence. The prosecutor is a competent witness for the prosecution. (z)

Though the 13 Geo. 3, c. 78, s. 24, declared that no presentments or indictments should be removed by *certiorari* before traverse and judgment, except where the obligation of repairing came in question, yet this clause did not take away the writ at the instance of the prosecutor, for the crown does not traverse; and it was calculated merely to prevent delay on the part of defendants. (a) And it was held to be no objection to a *certiorari* to remove such a presentment, that it was prosecuted by another than the justice presenting, if it were by his consent. (b) The 5 Will. & M. c. 11, s. 6, also provided, that if any indictment or presentment be against any person for not repairing highways or bridges, and the right or title to repair the same may come in question, upon a suggestion and affidavit made of the truth thereof, a *certiorari* may be granted, provided that the party prosecuting such *certiorari* enter into the recognizance mentioned in the Act. Upon an indictment against a parish for not repairing a highway, the right to repair may come in question so as to entitle the parish to remove it by *certiorari*, though the parish plead not guilty only, it being stated in an affidavit filed by the defendants, that, on the trial of the indictment, the question, whether the parish were liable to repair, and the right to repair, would come in issue. (c) And the prosecutor may remove an indictment by *certiorari*, though there be no recognizance given according to the statute. (d)

The general rule of a new trial never being allowed where the defendant is acquitted in a criminal case, seems to apply in a prosecution for not repairing a highway, though such prosecution is usually carried on for the purpose of trying or enforcing a civil liability. (e) But if the justice of the case seemed to require it, the Court used to stay the judgment upon payment of costs, until another indictment was preferred for the purpose of trying the question of liability to repair. (f) But it has been held that where the proceeding is in substance merely to try a civil right a new trial may be granted after an acquittal: (g) and therefore a new trial would be granted in a case where the question was as to the liability to repair or the non-repair of

(z) *R. v. Hammersmith*, 1 Stark. 337.

(a) *R. v. Bodenham*, Cowp. 78.

(b) *R. v. Penderryn*, 2 T. R. 260.

(c) *R. v. Taunton St. Mary*, 3 M. & S. 465.

(d) *R. v. Farewell*, 2 Str. 1209. Leave, however, must be obtained by motion in the same way by the prosecutor as by the defendants, by the 5 & 6 Will. 4, c. 33.

(e) *R. v. Silvertown*, 1 Wils. 298, cited 2 Salk. 646, in the note. *R. v. Mann*, 4 M. & S. 337. *R. v. Cohen*, 1 Starkie, 516. *R. v. Reynell*, 6 East, 315. *R. v. Wandsworth*, 1 B. & A. 63. *R. v. Sutton*, 5 B. & Ad. 52.

(f) *R. v. Southampton*, 19 Q. B. D. 590, approving *R. v. Wandsworth*, 1 B. & Ald. 63. *R. v. Oxfordshire*, 16 East, 223. It was said by Lord Kenyon, C. J., in *R. v.*

Mawbey, 6 T. R. 619, 'In misdemeanors there is no authority to show that we cannot grant a new trial in order that the guilt or innocence of those who have been convicted may be again examined into.' It may be observed also that, in cases of indictments for misdemeanors, the Court will, in its discretion, save the point for consideration, giving the defendant an opportunity, in case he shall be convicted, to move to have an acquittal entered. *R. v. Gash and another*, 1 Starkie R. 445.

(g) *R. v. Chorley*, 12 Q. B. 515. *R. v. Russell*, 3 E. & B. 942. *R. v. Leigh*, 10 A. & E. 398. These cases would seem to have been overruled by the decision in *R. v. Southampton*, *supra*, in which case, however, these cases were not cited.

a highway; but not where the charge was a wrongful obstruction of a highway. (*h*)

The object of prosecutions for nuisances to highways is to effect either a removal of the nuisance in cases of obstruction, or the repair of the highway in cases where the nuisance charged is the want of reparation. The judgment of the Court is usually a fine, and an order on the defendant, at his own costs, to abate the nuisance in the one case, (*i*) and in the other a fine, for the purpose of obliging the defendants to repair the nuisance; for they will not be discharged by submitting to a fine, as a *distringas* will go *ad infinitum* until they repair. (*j*) But writs of *distringas* are the only further remedy on an indictment, upon which the Court has already pronounced judgment by imposing a fine. For the fine is the punishment for the neglect and offence of which the defendants are indicted; and, though the Court may compel an actual repair, yet the punishment has been inflicted, and they cannot inflict a further punishment or fine. The parish may, however, be again indicted; and a fine may be imposed on such new indictment. (*k*) And upon this principle an order of a Court of quarter sessions by which it was ordered that the fine theretofore imposed for the not repairing a bridge should be increased by a certain sum, was quashed. (*l*) In order to warrant a judgment for abating the nuisance, it must be stated in the indictment to be *continuing*; as otherwise such a judgment would be absurd. (*m*) And if the Court be satisfied that the nuisance is effectually abated before judgment is prayed upon the indictment, they will not in their discretion give judgment to abate it. And though it was contended, on the authority of several cases, (*n*) that if the nuisance be of a permanent nature the regular judgment must be to abate it, the Court refused to give such judgment upon an indictment for an obstruction in a public highway, where the highway, after the conviction of the defendant, was regularly turned by an order of magistrates, and a certificate was obtained of the new way being fit for the passage of the public, and the affidavits stated that so much of the old way indicted as was still retained was freed from all obstruction. (*o*) But where the existence of a building, &c., is a nuisance, and the indictment imports that it was existing at the time of the bill being found, it seems that if a judgment be pronounced, it can only be a judgment to abate the nuisance. (*p*) But where the nuisance arises

(*h*) *R. v. Russell*, *supra*. *R. v. Johnson*, 29 Law J. M. C. 133, 2 E. & E. 613. The principle seems to be that where a defendant is at the first trial in peril of imprisonment no new trial can be granted. See *R. v. Duncan*, 14 Cox, C. C. 771, *per* Lord Coleridge, C. J.

(*i*) *R. v. Pappineau*, 1 Str. 686. 1 Hawk. P. C. c. 75, s. 15.

(*j*) *R. v. Cluworth*, 1 Salk. 358. 6 Mod. 163. 1 Hawk. P. C. c. 76, s. 249.

(*k*) *R. v. Old Malton*, 4 B. & A. 470, note.

(*l*) *R. v. Machynnleth*, 4 B. & A. 469.

(*m*) *R. v. Stead*, 8 T. R. 142.

(*n*) *R. v. Pappineau*, *supra*. *R. v. The Justices of Yorkshire*, 7 T. R. 467. *R. v. Stead*, *supra*.

(*o*) *R. v. Incledon*, 13 East, 164. Judgment was given that the defendant should pay a fine to the King of 6s. 8d. In *R. v. Mawbey*, 6 T. R. 619, it was held that a certificate by justices of the peace, that a highway indicted is in repair is a legal instrument recognized by the Courts of Law, and admissible in evidence after conviction when the Court are about to impose a fine. In *R. v. Wingfield*, 1 Black. Rep. 602, where a person was convicted upon an indictment for not repairing a road *ratione tenuræ*, it was held that the Court would not inflict a small fine, on a certificate of the road being repaired, until the prosecutor's costs were paid.

(*p*) 1 Str. 686.

not from the existence of the thing, but from the use to which it is applied, a judgment to abate, &c., is not necessary; (q) and, therefore, if a stinking trade is indicted, it does not follow that the house in which it is carried on is to be pulled down. (r) And if a house is a nuisance from being too high, so much only as is too high shall be pulled down. (s)

The 5 & 6 Will. 4, c. 50, s. 96, enacts, that 'no fine, issue, penalty, or forfeiture for not repairing the highway, or not appearing to any indictment for not repairing the same, shall hereafter be returned into the Court of Exchequer or other Court, but shall be levied by and paid into the hands of such person residing in or near the parish where the road shall lie, as the justices or Court imposing such fines, issues, penalties, or forfeitures, shall order and direct, to be applied towards the repair and amendment of such highway; and the person so ordered to receive such fine shall and is hereby required to receive, apply, and account for the same according to the direction of such justices or Court, or in default thereof shall forfeit double the sum received; and if any fine, issue, penalty, or forfeiture to be imposed for not repairing the highway, or not appearing as aforesaid, shall hereafter be levied on any inhabitant of such parish, township, or place, then such inhabitant shall and may make his complaint to the justices at a special sessions for the highways; and the said justices are hereby empowered and authorized, by warrant under their hands, to make an order on the surveyor of the parish for payment of the same out of the money receivable by him for the highway rate, and shall, within two months next after service of the said order on him, pay unto such inhabitant the money therein mentioned.'

Upon the latter part of sec. 47 of the 13 Geo. 3, c. 78, which was similar to the 5 & 6 W. 4, c. 50, s. 96, it was held that the application for the rate to reimburse the inhabitants, on whom a fine has been levied, after a conviction upon an indictment against the parish for nonrepair, ought to be made within a reasonable time after such levy, and before any material change of inhabitants; and the Court of King's Bench refused a mandamus to the justices to make such rate after an interval of eight years; though applications had been made in the interval, from time to time, to the magistrates below, who had declined to make the rate on the ground that the parish at large had been improperly indicted and convicted, and though, so lately as the year before the application to the Court of King's Bench, the magistrates had ordered an account to be taken of the *quantum* expended upon the repairs out of the money levied. (t) In a case where, although separate parts of a parish were bound to maintain their own roads, there had been an indictment and judgment against the parish generally, but such indictment was only known to and defended by that part of the parish in which the defective road lay, it was held that the justices might make a warrant to reimburse upon that part only; and the Court of King's Bench granted a mandamus to collect to the surveyor of that part only. (u)

(q) *Id. ib.*(r) By Lord Raymond and Reynolds, J.,
1 Str. 688, 9.

(s) By Ld. Raymond, 1 Str. 688.

(t) *R. v. The Justices of Lancashire*, 12
East, 366.(u) *R. v. Townsend*, Dougl. 421.

The 3 Geo. 4, c. 126, s. 10, provides for a portion of the fine being paid by the turnpike trustees when the highway shall be a turnpike road; and enacts, that when the inhabitants of any parish, township, or place, shall be indicted or presented for not repairing any highway, being a turnpike road, and the Court, before whom such indictment or presentment shall be preferred, shall impose a fine for the repair of such road, such fine shall be apportioned, together with the costs and charges between such inhabitants and the turnpike trustees as to the Court shall seem just: and the Court may order the treasurer of such turnpike road to pay the same out of the money then in his hands, or next to be received by him, in case it shall appear to such Court, from the circumstances of such turnpike debts and revenues, that the same may be paid without endangering the security of the creditors who have advanced their money upon the credit of the tolls. The true construction of a similar provision in the repealed Act of 13 Geo. 3, was held to be, that the Court which imposed the fine had the power to apportion it between the parish and the trust; so that where an indictment was originally preferred at the assizes and afterwards removed into the Court of King's Bench by *certiorari*, it was held that the Court of King's Bench might apportion the fine. (*v*)

Where an indictment was preferred at the assizes under an order of two justices, pursuant to sec. 95 of the 5 & 6 Will. 4, c. 50, and the defendants were found guilty upon the trial of the traverse at a subsequent assizes, it was held that the judge had no discretion, but was bound to award costs to the prosecutor. (*w*) But where an indictment was preferred under a similar order, and tried at *nisi prius*, after having been removed by *certiorari*, and the defendants acquitted on the ground that the road was not a highway, it was objected that the prosecutor was not entitled to costs under sec. 95 of 5 & 6 Will. 4, c. 50; 1st, because that section only applied to cases where the publicity of the road was admitted, but the liability to repair disputed; 2ndly, that the section did not apply to cases where the indictment was removed by *certiorari*; 3rdly, that sec. 95 was to be construed together with sec. 98, and merely meant that where the defence was frivolous the costs were to be paid out of the fund there mentioned; and it was held that the prosecutor was not entitled to costs. (*x*) And it is now settled that there is no jurisdiction to make an order for costs unless the jury find, or it appear affirmatively, that the road is a highway. (*y*) Where a jury is discharged without giving a verdict there is no power to order the costs to be paid out of the highway rate. (*z*) So the judge has no jurisdiction to certify for costs under sec. 95, where the road described in the indictment is not the road

(*v*) R. v. Upper Papworth, 2 East, R. 413. R. v. Preston, 2 Lew. 193. Alderson, B.

(*w*) R. v. Yarkhill, 9 C. & P. 218, Williams, J., after consulting the other Judges of B. R. See the section, *ante*, p. 808.

(*x*) R. v. Chedworth, 9 C. & P. 285. Patteson, J., after consideration. The ground on which the costs were refused, was that the road was not a highway. See R. v.

Heanor, *infra*. His Lordship intimated that he thought the last point untenable. See R. v. Cleckheaton, 11 Law T. 305.

(*y*) R. v. Heanor, 6 Q. B. 745. R. v. Downholland, 2 Sess. C. 177. R. v. Challicombe, 2 M. & Rob. 311 (*a*). R. v. Paul, 2 M. & Rob. 307. R. v. Buckland, 34 L. J. M. C. 178; 6 B. & S. 397.

(*z*) R. v. Heytesbury, 8 Law T. 315.

ordered to be indicted. (a) The Court may order the costs under this section where the defendants plead guilty. (b)

Before the Highway Act, 1864, s. 46, (c) an order directing an indictment for the non-repair of a road was void, unless it appeared on the face of it that it was made at a special sessions for the highways within the division in which the road was; an order so void would not support an order for payment of the costs. (d) The order for costs must state out of what funds the costs are to be paid or it is bad. (e) Where an indictment is found at one quarter sessions and the trial adjourned to the next sessions, the latter may make an order for costs. (f) Where an indictment was preferred against a parish under an order, and they pleaded that an individual was liable to repair the road *ratione tenuræ*, and the jury found a verdict for the defendants; Wightman, J. held that the prosecutor was entitled to his costs, and granted a mandamus to compel the sessions to order payment of them. (g)

Where an order for costs is made in a Criminal Court the Court or its officer ought to ascertain the amount. Where therefore a judge on the Crown side at the assizes ordered the costs to be paid generally, but they were not ascertained or taxed during the continuance of the commission; it was held that a mandamus to enforce their payment could not be granted. (h) If the costs are not paid by the defendants in pursuance of a rule of Court an attachment for contempt will be awarded against them. (i) The words 'rate made and levied' in sec. 95 do not point merely to any particular rate already made and levied at the time when an order of costs is made, but to the highway rate in general, and it is the duty of the surveyors in office at the time an order is made to pay the costs out of any funds then in their hands, or, if they have none, to make and levy a rate for the purpose; and the order binds not only the surveyors in office at the time it was made but their successors also until the costs are paid, and if they are not paid a mandamus will be granted to take proper steps towards their payment. (j)

Where an indictment for the non-repair of a highway has been preferred by order of justices under 5 & 6 Will. 4, c. 50, s. 95, and has been removed by *certiorari* into the Court of Queen's Bench at the instance of the defendants, the judge who tries the indictment has no power under that section, to direct that the costs of the

(a) *R. v. Fifehead*, 3 Cox, C. C. 59.
R. v. Aston Ingham, Hereford Sum. Ass. 1840.
R. v. Linton, *ibid.*, Williams, J.
R. v. Vowchurch, 2 C. & K. 393.
R. v. Stainhall, 1 F. & F. 363.
R. v. Langley, 2 F. & F. 170.
R. v. Lee, 1 Q. B. D. 198;
 45 L. J. M. C. 54, where an indictment which charged the inhabitants of a township with the non-repair of a general highway was amended at the trial, so as to charge them in respect only of a limited highway, and it was held that the judge had no power to order the costs to be paid under the above section.

(b) *R. v. Haselmere*, 32 L. J. M. C. 30, 3 B. & S. 313. There were prior decisions

the other way. See *R. v. Denton*, *post*, . 824.

(c) See this Sect. *post*, p. 833.

(d) *R. v. Hickling*, 7 Q. B. 880. *R. v. Martin*, 2 Q. B. 1037. *R. v. Heytesbury*, 8 Law T. 315.

(e) *R. v. Watford*, 4 D. & L. 593. See *R. v. Eardisland*, 3 E. & B. 960. *R. v. Justices of Surrey*, 1 Bail. C. C. 70.

(f) *R. v. Justices of Surrey*, *supra*.

(g) *R. v. Justices of Surrey*, *supra*.

(h) *R. v. Clark*, 5 Q. B. 887. *R. v. Lambeth*, 3 C. L. R. 35.

(i) *R. v. Pembridge*, 3 Q. B. 901.

(j) *R. v. Eyton*, 3 E. & B. 390. The Court also held that the costs could not be recovered under sec. 103.

prosecution shall be paid out of the rate, The costs in such a case are provided for by the 5 W. & M. c. 11. (*k*)

The 5 & 6 Will. 4, c. 50, s. 98, enacts, 'that it shall and may be lawful for the Court before whom any indictment shall be preferred for not repairing highways, to award costs to the prosecutor, to be paid by the person so indicted, if it shall appear to the said Court that the defence made to such indictment was frivolous or vexatious.' (*l*)

If the defendant pleads guilty, costs cannot be awarded under this section. (*m*)

Where at the trial the judge certified under the 13 Geo. 3, c. 78, s. 64 (the repealed enactment on this subject), that the defence was frivolous, the prosecutor was entitled to costs, although the defendant obtained a rule to arrest the judgment. (*n*)

It was once held that the judge on the trial of an indictment, preferred by order of two justices under the 5 & 6 Will. 4, c. 50, s. 95, and removed by *certiorari* and tried at the assizes, had no authority to award costs, because the defence was frivolous, under sec. 98, as that power was limited to the Court at which the indictment was preferred; (*o*) but in that case the Court of Queen's Bench awarded the costs to the prosecutor, for 'the Court before whom any indictment shall be preferred' included the Queen's Bench. (*p*) It has since, however, been held, that where an indictment for non-repair of a highway is removed by *certiorari*, the judge at the trial may certify that the defence is frivolous, and award the costs. (*q*)

The 5 Will. & M. c. 11, s. 3, enacts, that if the defendant, prosecuting such writ of *certiorari* as is mentioned in that Act, 'be convicted of the offence for which he was indicted, that then the Court of King's Bench shall give reasonable costs to the prosecutor if he be the party grieved (*r*) or injured, or be a justice of the peace, mayor, bailiff, constable, &c., or any other civil officer, who shall prosecute upon the account of any fact committed or done that concerned him or them as officer or officers to prosecute or present' to be taxed, &c. Upon this statute it has been held, that a justice of the peace who indicts a road for being out of repair is entitled to his costs, after a removal of the indictment by *certiorari* if the defendant be convicted. (*s*) In a case where this statute was considered as a remedial law, (*t*) it was held that several persons were entitled to costs under it as prosecutors of an indictment, removed by *certiorari*, for not repairing a highway: one, as constable of the manor within which,

(*k*) *R. v. Ipstones*, 37 L. J. M. C. 37, L. R. 3 Q. B. 216. *R. v. Eardisland* dissented from.

(*l*) This section gives no costs in any case to the defendant. The 13 Geo. 3, c. 78, s. 64, gave them to the person indicted, where the prosecution was vexatious. *C. S. G. R. v. Commerell*, 4 M. & S. 203. *R. v. Clifton*, 6 T. R. 344. *R. v. Margate*, 6 M. & S. 130. *R. v. Salwick*, 2 B. & Ad. 136. *R. v. Chadderton*, 5 T. R. 272.

(*m*) *R. v. Denton* (township of), 34 L. J. M. C. 13; 10 Cox, C. C. 61.

(*n*) *R. v. Margate*, 6 M. & S. 130.

(*o*) *R. v. Preston*, 2 M. & Rob. 137.

(*p*) *R. v. Preston*, 7 Dow. P. C. 593.

See *R. v. Upper Papworth*, *ante*, p. 822.

(*q*) *R. v. Pembroke*, 3 Q. B. 901. *R. v. Great Broughton*, 2 M. & Rob. 444, Rolfe, B. *R. v. Chadderton*, 5 T. R. 272.

(*r*) *R. v. Incledon*, 1 M. & S. 268.

(*s*) *R. v. Kettleworth*, 5 T. R. 33.

(*t*) By Lord Ellenborough, C. J., in conformity with the opinion of Lord Kenyon, C. J., in *R. v. Kettleworth*, 5 T. R. 33, and contrary to the view taken of it by Buller, J.,

the highway lay; the others, as parties grieved; they having used the way for many years in passing and repassing from their homes to the next market town, and being obliged, by reason of the want of repair, to take a more circuitous route. (*u*)

By 16 & 17 Vict. c. 30, s. 5, after reciting that it is expedient to make further provision for preventing the vexatious removal of indictments into the Court of Queen's Bench, 'whenever any writ of *certiorari* to remove an indictment into the said Court shall be awarded at the instance of a defendant or defendants, the recognizance now by law required to be entered into before the allowance of such writ shall contain the further provisions following, that is to say, that the defendant or defendants, in case he or they shall be convicted, shall pay to the prosecutor his costs incurred subsequent to the removal of such indictment,' &c. Held, that the prosecutor is entitled to his costs in the case of an indictment removed by *certiorari* under this section, though he is not 'the party grieved or injured,' to whom costs are limited by the previous Act, 5 & 6 W. & M. c. 11, s. 3. (*v*)

The 5 & 6 Will. 4, c. 50, s. 111, enacts, 'that if the inhabitants of any parish shall agree at a vestry to defend any indictment found against any such parish, or to appeal against any order made by or proceeding of any justice of the peace in the execution of any powers given by this Act, or to defend any appeal, it shall and may be lawful for the surveyor of such parish to charge in his account the reasonable expenses incurred in defending such prosecution, or prosecuting or defending such appeal, after the same shall have been agreed to by such inhabitants at a vestry or public meeting as aforesaid, and allowed by two justices of the peace within the division where such highway shall be; which expenses, when so agreed to or allowed, shall be paid by such parish out of the fines, forfeitures, payments, and rates authorised to be collected and raised by virtue of this Act: provided, nevertheless, that if the money so collected and raised is not sufficient to defray the expenses of repairing the highways in the said parish, as well as of defending such prosecution, or prosecuting or defending such appeal as aforesaid, the said surveyor is hereby authorised to make, collect, and levy an additional rate in the same manner as the rate by this Act is authorised to be made for the repair of the highway.'

Where two surveyors included in their accounts the expenses of supporting the appointment of one of them for a previous year against an appeal, which was dismissed, and also the expenses of opposing a rule for a *certiorari* to remove their accounts into the Queen's Bench, which rule was discharged, it was held that the justices had jurisdiction to allow these expenses under the 13 Geo. 3, c. 78, s. 48, although these expenses had not been agreed to by the inhabitants under sec. 65. (*w*)

By sec. 113, 'nothing in this Act contained shall apply to any

in *R. v. Sharpness*, 2 T. R. 48, where that learned judge said, that the statute had always been construed as strictly as possible.

(*u*) *R. v. Taunton St. Mary*, 3 M. & S. 465.

(*v*) *R. v. Oastler*, 43 L. J. Q. B. 42; 12 Cox, C. C. 578.

(*w*) *R. v. Fowler*, 1 A. & E. 836; 3 N. & M. 826.

turnpike-roads, except where expressly mentioned, or to any roads, bridges, carriageways, cartways, horseways, bridleways, footways, causeways, churchways, or pavements, which now are or may hereafter be paved, repaired, or cleansed, broken up, or diverted, under or by virtue of the provisions of any local or personal Act or Acts of Parliament.'

By sec. 5, 'In the construction of this Act the word "surveyor" shall be understood to mean surveyor of the highways, or way-warden; the word "parish" shall be construed to include parish, township, tithing, rape, vill, wapentake, division, city, borough, liberty, market-town, franchise, hamlet, precinct, chapelry, or any other place or district maintaining its own highways; and wherever anything in this Act is prescribed to be done by the inhabitants of any parish in vestry assembled, the same shall be construed to extend to any meeting of inhabitants contributing to the highway rates in places where there shall be no vestry meeting, provided the same notice shall have been given of the said meeting as would be required by law for the assembling of a meeting in vestry; and that the word "highways" shall be understood to mean all roads, bridges (not being county bridges), carriageways, cartways, horseways, bridleways, footways, causeways, churchways, and pavements; and that the word "justices" shall be understood to mean justices of the peace for the county, riding, division, shire, city, town, borough, liberty, or place in which the highway may be situate, or in which the offence may be committed; and that the word "church" shall be understood to include chapel; and that the word "division" shall be understood to include limit; and that the word "owner" shall be understood to include occupier; and "inhabitant" to include any person rated to the highway rate; and the words "petty session" or "petty sessions" to mean the petty session or petty sessions held for the division or place; and wherever in this Act, in describing or referring to any person or party, animal, matter, or thing, the word importing the singular number or the masculine gender only is used, the same shall be understood to include and shall be applied to several persons or parties as well as one person or party, and females as well as males, and several animals, matters, or things, as well as one animal, matter, or thing, respectively, unless there be something in the subject or context repugnant to such construction; and all the powers hereby given to, and notices, matters, and things required for, and duties, liabilities, and forfeitures imposed on, surveyors, shall be applicable to all persons, bodies corporate or politic, liable to the repair of any highway.'

A public bridge repairable by immemorial custom by the inhabitants of a hundred, is not a highway within the meaning of the term highway in this section, and is not repairable under this Act by the parish in which it is situated. (x)

By the Local Government Act, 1888, the maintenance of main roads within a county is transferred to the County Council, and it may become a question whether the County Council would be indictable for non-repair of such roads (see 51 and 52 Vic. c. 41, ss. 11, 79, 97).

(x) *R. v. The Inhabitants of the Upper Half Hundred of Chart and Longbridge*, 39 L. J. M. C. 107.

Highway Acts, 1862, 1864, 1878. The Public Health Act, 1875, as to Highways.

The 25 & 26 Vict. c. 61 (Highway Act, 1862) the 27 & 28 Vict. c. 101 (Highway Act, 1864) and the 41 & 42 Vict. c. 77 (Highway Act, 1878) should be shortly noticed.

By these Acts a county, or part of a county, may be formed into a highway district for the more convenient management of highways.

The Highway Board under these Acts consists of the way-wardens elected in the several places within the district in manner mentioned in the Acts, and of the justices acting for the county and residing within the district.

The board is a body corporate by the name of the Highway Board of the district to which it belongs, having a perpetual succession and a common seal, with a power to acquire and hold lands for the purposes of the Highway Acts without any license in mortmain. By 25 & 26 Vict. c. 61, s. 11, all such powers, rights, duties, liabilities, capacities and incapacities (except the power of making, assessing, and levying highway rates) as are vested in or are attached to, or would but for this Act have become vested in or attached to any surveyor or surveyors of any parish forming part of the district, shall vest in and attach to the highway board.

By sec. 16 the district surveyor appointed by the board shall act as the agent of the board in carrying into effect all the works and performing all the duties by this Act required to be carried into effect or to be performed by the board, and he shall in all respects conform to the orders of the board in the execution of his duties, and the assistant surveyor, if any, shall perform such duties as the board may require under the direction of the district surveyor.

By s. 17, the Highway Board shall maintain in good repair the highways within their district, and shall, subject to the provisions of this Act, as respects the highways in each parish within their district perform the same duties, have the same powers, and be liable to the same legal proceedings as the surveyors of such parish would have performed, had, and been liable to if this Act had not passed. It shall be the duty of the district surveyor to submit to the Board at their first meeting in every year an estimate of the expenses likely to be incurred during the ensuing year for maintaining and keeping in repair the highways in each parish within the district of the board, and to deliver a copy of such estimate as approved or modified by the board, so far as the same relates to each parish to the waywarden of such parish.

By sec. 18, where complaint is made to any justice of the peace that any highway within the jurisdiction of the Highway Board is out of repair, the justice shall issue two summonses, the one addressed to the Highway Board and the other to the waywarden of the parish liable to the repair of such highway, requiring such board and waywarden to appear before the justices at some petty sessions in the summons mentioned, to be held in the division where such highway is situate; and at such petty sessions, unless the board undertake to repair the road to the satisfaction of the justices, or

unless the waywarden deny the liability of the parish to repair, the justices shall direct the board to appear at some subsequent petty sessions to be then named, and shall either appoint some competent person to view the highway, and report to them on its state at such other petty sessions, or fix a day previous to such petty sessions, at which two or more of such justices will themselves attend to view the highway. At such last-mentioned petty sessions, if the justices are satisfied, either by the report of the person so appointed, or by such view as aforesaid, that the highway complained of is not in a state of complete repair, it shall be their duty to make an order on the board limiting a time for the repair of the highway complained of; and if such highway is not put in complete and effectual repair by the time limited in the order, the justices in petty sessions shall appoint some person to put the highway into repair, and shall by order direct that the expenses of making such repairs together with a reasonable remuneration to the person appointed for superintending such repairs, and amounting to a sum specified in the order, together with the costs of the proceedings, shall be paid by the board; and any order made for the payment of such costs and expenses may be removed into the Court of Queen's Bench, in the same manner as if it were an order of General or Quarter Sessions, and be enforced accordingly. All expenses so directed to be paid by the board in respect of the repairs of any highway shall be deemed to be expenses incurred by the board in repairing such highway, and shall be recovered accordingly. The Highway Board may appear before the justices at petty sessions by their district surveyor or clerk, or any member of the board.

By sec. 19, when on the hearing of any such summons respecting the repair of any highway the liability to repair is denied by the waywarden on behalf of his parish, or by any party charged therewith, the justices shall direct a bill of indictment to be preferred, and the necessary witnesses in support thereof to be subpoenaed, at the next assizes to be holden, in and for the said county, or at the next General Quarter Sessions of the peace for the county, riding, division or place wherein such highway is situate, against the inhabitants of the parish, or the party charged therewith, for suffering and permitting the said highway to be out of repair; and the costs of such prosecution shall be paid by such party to the proceedings as the court before whom the case is tried shall direct, and if directed to be paid by the parish, shall be deemed to be expenses incurred by such parish in keeping its highways in repair, and shall be paid accordingly.

Under this section 19, the power to direct an indictment to be preferred does not arise when the liability to repair is denied on the ground alone that the road is not a highway, and the liability is admitted if the road be in fact a highway, and the denial of the road being a highway is made *bonâ fide*. In order to give the justices such a power, the liability must be denied on some ground other than that the road is not a highway, such as that some one else is bound to repair. The expression in section 19, 'when the liability to repair is denied,' is to bear the same construction as the expression, 'if the duty or obligation of such repairs is denied,' in section

95 of 5 & 6 Will. 4, c. 50. *Semble* — that sections 94 and 95 of 5 & 6 Will. 4, c. 50, and sections 17, 18 and 19 of 25 & 26 Vict. c. 61, only apply to admitted highways. (y)

Where on the trial of an indictment ordered by justices under the 25 & 26 Vict. c. 61, s. 19, for the non-repair of an alleged highway, the road is found not to be a highway, the court has no power to order costs. (z)

By 25 & 26 Vict. c. 61, s. 34, where any highway which any body politic or corporate, or person is liable to repair by reason of tenure of any land, or otherwise howsoever, shall be adjudged in the manner provided by the principal Act (a) to be out of repair, the highway board of the district in which such highway is situate may, if they see fit, direct their surveyor to repair the same, and the expenses to be incurred in such repair shall be paid by the party liable to repair as aforesaid; and it shall be lawful for any justice, upon the application of any person authorized in this behalf by the highway board, to summon the party liable to pay such expenses to appear before two justices, at a time and place to be named in such summons, and upon the appearance of the parties, or in the absence of either of them, it shall be lawful for such justices to hear and determine the matter, and make such order, as well as to costs or otherwise, as to them may seem just.

By 27 and 28 Vict. c. 101, s. 23, section thirty-four of the 'Highway Act, 1862,' shall be construed as if, instead of the words 'shall be adjudged in the manner provided by the principal Act to be out of repair,' the words were substituted, 'shall be adjudged in manner provided by the "Highway Act, 1862" to be out of repair.'

By 25 & 26 Vict. c. 61, s. 35, where any person or corporation is liable, by reason of tenure of lands or otherwise, to repair any highway situate in a highway district, the person or corporation so liable may apply to any justice of the peace for the purpose of making such highway a highway to be repaired and maintained by the parish in which the same is situate; and such justice shall thereupon issue summonses requiring the waywarden of such parish, the district surveyor, and the party so liable to repair such highway as aforesaid, to appear before two or more justices in petty sessions assembled, and the justices at such petty sessions shall proceed to examine and determine the matter, and shall, if they think fit, make an order under their hands that such highway shall thereafter be a highway to be thereafter repaired and maintained by the parish, and shall in such order fix a certain sum to be paid by such person or corporation to the highway board of the district, in full discharge of all claims thereafter in respect of the repair and maintenance of such highway; and in default of payment of such sum the board may proceed for the recovery thereof, in the same manner as for the recovery of penalties or forfeitures recoverable under this Act: provided always, that when the sum so fixed to be paid in full discharge of all claims thereafter in respect of the repair and maintenance of such highway exceeds fifty pounds, the same, when received, shall be invested in the name

(y) *R. v. Farrer*, 35 L. J. M. C. 210;
ante, p. 807.

(z) *R. v. Buckland*, 34 L. J. M. C. 178.
(a) See *post*, p. 832.

of the highway board of the district in some public government securities, and the interest and dividends arising therefrom shall be applied by such board towards the repair and maintenance of the highways within the parish in which such highway is situate; but when such sum does not exceed £50 the same or any part thereof, at the discretion of such highway board, shall from time to time be applied by such board towards the repair and maintenance of the highways within such parish: provided that any person aggrieved by any order of justices made in pursuance of this section may appeal to a Court of General or Quarter Sessions, holden within four months from the date of such order; but no such appeal shall be entertained unless the appellant has given to the other party to the case a notice in writing of such appeal, and of the matter thereof, within fourteen days after such order, and seven clear days at the least before such sessions, and has entered into a recognizance, with two sufficient sureties, before a justice of the peace, conditioned to appear at the said sessions, and to try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as may be by the court awarded, and upon such notice being given, and such recognizance being entered into, the court at such sessions shall hear and determine the matter of the appeal, and shall make such order thereon, with or without costs to either party, as to the court may seem meet. From and after the making of such order by the justices, or by the court on appeal, as the case may require, such highway shall be repaired in like manner and at the like expense as highways which a parish is liable to repair.

By 27 & 28 Vict. c. 101, s. 24, the highway board may apply, under sec. 35 of the Highway Act of 1862, for the purpose of making any highway to which that section refers a highway to be repaired and maintained by the parish in which the same is situate, and upon such application being made the same proceedings may be had as upon the application of the person or corporation liable to repair the same.

By 25 & 26 Vict. c. 61, s. 36, where the inhabitants of any parish are desirous of undertaking the repair and maintenance of any driftway, or any private carriage or occupation road, within their parish, in return for the use thereof, the district surveyor may, at the request of the inhabitants of such parish assembled in a vestry duly convened for the purpose, and with the consent in writing of the owner and the occupier of every part thereof, apply to the justices in petty sessions to declare such driftway or road to be a public highway, to be repaired at the expense of the parish; and upon such application being made it shall be lawful for the justices to declare the same to be a public carriage road, to be repaired at the expense of the parish. (See *ante*, p. 795.)

By sec. 41, any parish or part of a parish included in a highway district may adopt the Local Government Act in the same manner and under the same circumstances in and under which it might have adopted the same if it had not been included in such district; and upon such adoption being made, such parish or part of a parish shall cease to form part of such district, subject, nevertheless, to the payment of any contribution that may at the time of such adoption be due from such parish or part of a parish to the highway board.

By sec. 42, this Act shall be construed as one with the principal Act, (b) so far as is consistent with the provisions of this Act.

Sub-sec. 6, any summons or notice, or any writ, or any proceeding at law or in equity requiring to be served upon the board, may be served by the same being left at or transmitted through the post in a prepaid letter directed to the office of the board, or being given personally to the district surveyor or clerk of the board.

By sec. 44, all the provisions of the principal Act (b) for widening, diverting, and stopping up highways, shall be applicable to all highways which now are or may hereafter be paved, repaired, or cleansed under or by virtue of any local or personal Act or Acts of Parliament, or which may be situate within the limits of any such Act or Acts, except highways which any railway company, or the owners, conservators, commissioners, trustees, or undertakers of any canal, river, or inland navigation, are liable by virtue of any Act of Parliament relating to such railway, canal, river, or inland navigation to make, maintain, repair, or cleanse.

By sec. 45, whereas there are in certain boroughs in England and Wales, roads and highways that are now and have heretofore been repaired by the inhabitants of the several parishes or townships within which such roads and highways are situated, and who also contribute and pay to the general rates levied for the repair of the public streets, roads, and highways maintained and kept in repair by the council of such boroughs, by reason whereof a great burthen is imposed upon the ratepayers of the said parishes and townships; and it being doubtful whether the council of such boroughs have the power to adopt such parish roads and highways, or to apply the rates collected in such boroughs in repairing the same: be it enacted, that it shall and may be lawful for the council of every such borough in England and Wales, upon the petition of the majority of the ratepayers of such parishes or townships present at a public meeting duly convened, to adopt all or any of such parish roads and highways as the council shall in its discretion consider advisable, and to apply the rates levied and collected by the said council for the repair of the public streets, roads, and highways within such borough in repairing and maintaining such parish roads and highways; provided always, that it shall be competent for such council, previous to adopting such parish roads and highways, to require the provisions contained in any local Act applying to the public streets, roads, and highways of such borough to be complied with.

By sec. 46, no person through whose land a highway passes, which is to be repaired by the parish, shall become liable for the repair of such highway by erecting fences between such highway and the adjoining land, if such fences are erected with the consent in writing of the highway board of the district within which such highway is situate, in the case of a place within the jurisdiction of a highway board, and in the case of any other place, with the consent of the surveyor or other authority having jurisdiction over the highway. (c)

By sec. 3, the word 'parish' shall include any place maintaining its own highways; the expressions 'highway district' and 'highway

(b) See *post*, p. 832.

(c) As to the liability to repair by reason of enclosure, see *ante*, p. 802.

board' shall refer only to highway districts formed and highway boards constituted in pursuance of this Act.

By sec. 4, the 5 & 6 Will. 4, c. 50, is hereinafter distinguished as 'the principal Act;' and this Act and the principal Act, and the other Acts amending the principal Act, are hereinafter included under the expression 'the Highway Acts.'

By sec. 8 of 25 and 26 Vict. c. 61, no objection shall be made at any trial or in any legal proceeding to the validity of any orders or proceedings relating to the formation of a highway district, after the expiration of three calendar months from the date of the publication in the Gazette of the order under which the district is formed; and the production of a copy of the London Gazette containing a copy of the order of justices forming a highway district shall be receivable in all courts of justice, and in all legal proceedings, as evidence of the formation of the district, and of the matters in the said order mentioned.

By 27 & 28 Vict. c. 101, s. 12, no order of the justices forming a highway district shall be invalidated by reason of its not being published in the London Gazette; and where any reference is made in any section of the 'Highway Act, 1862,' to the date of the publication in the Gazette of the order, such section shall be construed as if the date of the making of the final order under which the district is formed were substituted for 'the date of the publication in the Gazette of the order under which the district is formed;' and any copy of the provisional or final order of the justices forming a highway district, certified under the hand of the clerk of the peace to be a true copy, shall be receivable in all courts of justice and in all legal proceedings as evidence of the formation of the district, and of the matters in the said order mentioned.

The 27 & 28 Vict. c. 101, amends the above Act, 25 & 26 Vict. c. 61.

By sec. 1 the Acts hereinafter mentioned may be cited for all purposes by the short titles following; that is to say:—

The Act 5 & 6 Will. 4, c. 50, by the short title of the 'Highway Act, 1835.'

The said Act, 25 & 26 Vict. c. 61, by the short title of the 'Highway Act, 1862.'

This Act, 27 & 28 Vict. c. 101, by the short title of the 'Highway Act, 1864.'

All the above-mentioned Acts and any Acts passed or to be passed amending the same, shall be included under the short title of 'The Highway Acts.'

By sec. 2, this Act, so far as is consistent with the tenor thereof, shall be construed as one with the 'Highway Act, 1862.'

By sec. 3 'Poor Law Parish' shall mean a place that separately maintains its own poor. 'Highway Parish' shall mean a place that, after the constitution of a highway district, separately maintains its own highways, and is entitled to return a waywarden or waywardens to the highway board of the district. 'Highway Rate' shall include any rate, whether poor rate or not, out of the produce of which moneys are payable in satisfaction of precepts of a highway board. 'County' shall include any division of a county that has a separate county treasurer.

By sec. 21, when any highway board consider any highway unnecessary for public use, they may direct the district surveyor to apply to two justices to view the same, and thereupon the like (*d*) proceedings shall be had as where application is made under the 'Highway Act, 1835,' to procure the stopping up of any highway, save only that the order to be made thereupon, instead of directing the highway to be stopped up, shall direct that the same shall cease to be a highway which the parish is liable to repair, and the liability of the parish shall cease accordingly; and for the purpose of such proceedings under this enactment, such variations shall be made in any notice, certificate, or other matter preliminary to the making of such order, as the nature of the case may require: provided, that if at any time thereafter, upon application of any person interested in the maintenance of such highway, after one month's previous notice in writing thereof to the clerk of the highway board for the district in which such highway is situated, it appear to any court of general or quarter sessions of the peace that, from any change of circumstances since the time of the making of any such order as aforesaid, under which the liability of the parish to repair such highway has ceased, the same has become of public use, and ought to be kept in repair by the parish, they may direct that the liability of the parish to repair the same, shall revive from and after such day as they may name in their order, and such liability shall revive accordingly as if the first-mentioned order had not been made; and the said court may by their order direct the expenses of and incident to such application to be paid as they may see fit.

By sec. 26, any notice in respect of which no other mode of service is provided by the highway board in pursuance of powers in that behalf conferred on them, and any precept, summons, or order issued by the highway board, may be served —

By delivery of the same personally on the party required to be served; or

By leaving the same at the usual or last known place of abode of such party as aforesaid; or

By forwarding the same by post as a prepaid letter, addressed to the usual or last known place of abode of such party.

In proving service of a document by post it shall be sufficient to prove that the document was properly directed, and that it was put as a prepaid letter into the post-office; and in serving notice on the overseers or the waywardens (if more than one) of any parish, it shall be sufficient to serve the same on any one of such officers in a parish.

By sec. 46, the justices assembled in petty sessions at their usual place of meeting may exercise any jurisdiction which they are authorized under the Highway Acts or any of them, to exercise in special sessions; and no justice of the peace shall be disabled from acting as such at any petty or special, or general quarter sessions, in any matter merely on the ground that he is by virtue of his office, a member of any highway board complaining, interested or concerned in such matter, or has acted as such at any meeting of such board.

(*d*) See *R. v. Surrey* (Justices of), 39 L. J. M. C. 145; *ante*, p. 776.

By sec. 47, a highway board may make certain improvements in the highways within their jurisdiction.

By sec. 48, the following works shall be deemed to be improvements of highways:—

(1) The conversion of any road that has not been stoned, into a stoned road.

(2) The widening of any road, the cutting off the corners in any road where land is required to be purchased for that purpose, the levelling roads, the making any new road and the building or enlarging bridges.

(3) The doing of any other work in respect of highways beyond ordinary repairs, essential to placing any existing highway in a proper state of repair.

By the Public Health Act, 1875, 38 & 39 Vict. c. 55, s. 144, every urban authority (*e*) shall within their district, exclusively of any other person, execute the office of and be surveyor of highways, and have exercise and be subject to all the powers, authorities, duties and liabilities of surveyors of highways under the law for the time being in force, save so far as such powers, authorities, or duties are or may be inconsistent with the provisions of this Act; every urban authority shall also have exercise and be subject to all the powers, authorities, duties, and liabilities, which by the Highway Act, 1835, or any Act amending the same, are vested in and given to the inhabitants in vestry assembled, of any parish within their district.

All ministerial Acts required by any Act of Parliament to be done by, or to the surveyor of highways, may be done by or to the surveyor of the urban authority, or by or to such other person as they may appoint.

By sec. 146, any urban authority may agree with any person for the making of roads within their district for the public use, through the lands and at the expense of such person, and may agree that such roads shall become, and the same shall accordingly become on completion, highways maintainable and repairable by the inhabitants at large within their district; they may also, with the consent of two-thirds of their number, agree with such person to pay, and may accordingly pay, any portion of the expenses of making such roads.

By sec. 147, any urban authority may agree with the proprietors of any canal, railway or tramway, to adopt and maintain any existing or projected bridge, viaduct or arch within their district, over or under any such canal, railway or tramway, and the approaches thereto, and may accordingly adopt and maintain such bridge, viaduct or arch and approaches, as parts of public streets or roads maintainable and repairable by the inhabitants at large within their district; or such authority may themselves agree to construct any such bridge, viaduct or arch at the expense of such proprietors; they may also, with the consent of two-thirds of their number, agree to pay, and may accordingly pay, any portion of the expenses of the construction or altera-

(*e*) Sec. 6 of the Act defines urban authority. Nothing in this Act, however, makes the urban authority liable to indictment for non-repair in the same sense as that in which the parish or other persons liable

ratione tenuræ are liable. *R. v. Mayor of Poole*, 19 Q. B. D. 602. See as to indicting such an authority, 41 & 42 Vic. c. 77, s. 10, and *R. v. Mayor of Wakefield*, 20 Q. B. D. 810; *post*, p. 838.

tion of any such bridge, viaduct or arch, or of the purchase of any adjoining lands required for the foundation and support thereof, or for the approaches thereto.

By sec. 148, any urban authority may by agreement with the trustees of any turnpike road, or with any person liable to repair any street or road, or any part thereof, or with the surveyor of any county bridge, take on themselves the maintenance, repair, cleansing or watering of any such street or road, or any part thereof, or of any road over any county bridge, and the approaches thereto, or of any part of the said streets or roads within their district, and may remove any turnpike-gates, toll-gates or bars which may be situated within their district, and may erect other turnpike-gates, toll-gates or bars in lieu thereof, on such terms as the urban authority and such trustees, or person or surveyor, as aforesaid may agree on :

Provided,

That where any mortgage debt is charged on the tolls of any such turnpike road, no agreement shall be made for the removal of any of the toll-gates or bars thereon, unless with the previous consent in writing of a majority of at least two thirds in value of the mortgagees ; and

That where the terms arranged include any annual or other payments from such urban authority to the trustees of any such turnpike road, then the payments may be secured on any fund or rate applicable by such authority to any of the purposes of this Act, in the same manner as other charges on any such fund or rate are authorized by this Act.

Any executors, administrators, guardians, trustees or committee of the estate of any idiot or lunatic, who are as such for the time being entitled to any money charged or secured on the tolls of any such turnpike road, may consent to any such agreement as aforesaid, as fully as if they respectively were so entitled in their own right, discharged of all trusts in respect thereof, and all executors, administrators, guardians, trustees and committees so consenting, are hereby severally indemnified for so doing.

By sec. 149, all streets, being or which at any time become highways repairable by the inhabitants at large within any urban district, and the pavements, stones and other materials thereof, and all buildings, implements and other things provided for the purposes thereof, shall vest in (f) and be under the control of the urban authority. The urban authority shall from time to time cause all such streets to be levelled, paved, metalled, flagged, channelled, altered, and repaired as occasion may require ; they may from time to time cause the soil of any such street to be raised, lowered or altered as they may think fit, and may place and keep in repair fences and posts for the safety of foot passengers.

Any person who, without the consent of the urban authority, willfully displaces or takes up, or who injures the pavement, stones, materials, fences or posts of, or the trees in any such street, shall be liable to a penalty not exceeding five pounds, and to a further

(f) See *Coverdale v. Charlton*, 4 Q. B. D. 785 ; *Wandsworth Board of Works v. D. 104* ; *Rolls v. S. George's Vestry*, 14 Ch. United Telephone Co., 13 Q. B. D. 904.

penalty not exceeding five shillings for every square foot of pavement, stones or other materials so displaced, taken up or injured; he shall also be liable in the case of any injury to trees, to pay to the local authority such amount of compensation as the Court may award.

By sec. 152, when any street within any urban district, not being a highway repairable by the inhabitants at large, has been sewered, levelled, paved, flagged, metalled, channelled, and made good and provided with proper means of lighting, to the satisfaction of the urban authority, such authority may, if they think fit, by notice in writing, put up in any part of the street, declare the same to be a highway, and thereupon the same shall become a highway repairable by the inhabitants at large; and every such notice shall be entered among the proceedings of the urban authority.

Provided that no such street shall become a highway so repairable, if within one month after such notice has been put up, the proprietor, or the majority in number of proprietors of such street, by notice in writing to the urban authority, object thereto, and in ascertaining such majority, joint proprietors shall be reckoned as one proprietor.

By the Highways and Locomotives (Amendment) Act, 1878, 41 & 42 Vict. c. 77:—

By sec. 5. (1.) 'From and after the commencement of the order declaring a rural sanitary authority entitled to exercise the powers of a highway board within their district, the following consequences shall ensue:—

All such property, real or personal, including all interests, easements and rights, in, to and out of property real and personal, and including things in action, as belongs to or is vested in or would but for such order have belonged to or been vested in the highway board, or any surveyor or surveyors of any parish forming part of the district, shall pass to and vest in the rural sanitary authority for all the estate and interest of the highway board, or of such surveyor or surveyors, but subject to all debts and liabilities affecting the same:

All debts and liabilities incurred in respect of any property transferred to the rural sanitary authority may be enforced against that authority to the extent of the property transferred:

All such powers, rights, duties, liabilities, capacities, and incapacities (except the power of obtaining payment of their expenses by the issue of precepts in manner provided by the Highway Acts, or the power of making, assessing, and levying highway rates) as are vested in or attached to or would but for such order have become vested in or attached to the highway board, or any surveyor or surveyors of any parish forming part of the district, shall vest in and attach to the rural sanitary authority:

All property by this Act transferred to the rural sanitary authority shall be held by them on trust for the several parishes for the benefit of which it was held previously to such transfer.

(2.) 'If at any time after a rural sanitary authority has become invested with the powers of a highway board in pursuance of this Act, the boundaries of the district of such authority are altered, the powers and jurisdiction of such authority in their capacity of highway board shall be exercised within such altered district; and on

the application of any authority or person interested the Local Government Board may by order provide for the adjustment of any accounts, or the settlement of any doubt or difference so far as relates to highways consequent on the alteration of the boundaries of such rural sanitary district.

(3.) 'All expenses incurred by a rural sanitary authority in the performance of their duties as a highway board shall be deemed to be general expenses of such authority within the meaning of the Public Health Act, 1875.'

By sec. 6. 'Any two or more highway boards may unite in appointing and paying the salary of a district surveyor, who shall in relation to the district of each of the boards by whom he is appointed have all the powers and duties of a district surveyor under the Highway Acts.'

By sec. 7. 'All expenses incurred by any highway board in maintaining and keeping in repair the highways of each parish within their district, and all other expenses legally incurred by such board, shall, notwithstanding anything contained in the Highway Acts, on and after the twenty-fifth day of March one thousand eight hundred and seventy-nine be deemed to have been incurred for the common use or benefit of the several parishes within their district, and shall be charged on the district fund: Provided, that if a highway board think it just, by reason of natural differences of soil or locality, or other exceptional circumstances, that any parish or parishes within their district should bear the expenses of maintaining its or their own highways, they may (with the approval of the county authority or authorities of the county or counties within which their district, or any part thereof, is situate) divide their district into two or more parts, and charge exclusively on each of such parts the expenses payable by such highway board in respect of maintaining and keeping in repair the highways situate in each such part; so nevertheless, that each such part shall consist of one or more highway parish or highway parishes.'

By sec. 10. 'Where complaint is made to the county authority that the highway authority of any highway area within their jurisdiction has made default in maintaining or repairing all or any of the highways within their jurisdiction, the county authority, if satisfied after due inquiry and report by their surveyor that the authority has been guilty of the alleged default, shall make an order limiting a time for the performance of the duty of the highway authority in the matter of such complaint.

If such duty is not performed by the time limited in the order, and the highway authority fail to show to the county authority sufficient cause why the order has not been complied with, the county authority may appoint some person to perform such duty, and shall by order direct that the expenses of performing the same, together with the reasonable remuneration of the person appointed for superintending such performance, shall be paid by the authority in default, and any order made for payment of such expenses and costs may be removed into the High Court of Justice, and be enforced in the same manner as if the same were an order of such court.

Any person appointed under this section to perform the duty of

a defaulting highway authority shall, in the performance and for the purpose of such duty, be invested with all the powers of such authority other than the powers of making rates or levying contributions by precept, and the county authority may from time to time, by order, change any person so appointed.

Where an order has been made by a county authority for the repair of a highway on a highway authority alleged to be in default, if such authority, within ten days after service on them of the order of the county authority, give notice to the clerk of the peace that they decline to comply with the requisitions of such order until their liability to repair the highway in respect to which they are alleged to have made default has been determined by a jury, it shall be the duty of the county authority either to satisfy the defaulting authority by cancelling or modifying in such manner as the authority may desire the order of the county authority, or else to submit to a jury the question of the liability of the defaulting authority to repair the highway.

If the county authority decide to submit the question to a jury they shall direct a bill of indictment to be preferred to the next practicable assizes to be holden in and for their county, with a view to try the liability of the defaulting authority to repair the highway. Until the trial of the indictment is concluded the order of the county authority shall be suspended. On the conclusion of the trial, if the jury find the defendants guilty, the order of the county authority shall forthwith be deemed to come into force; but if the jury acquit the defendants the order of the county authority shall forthwith become void. (*g*)

The costs of the indictment, and of the proceedings consequent thereon, shall be paid by such parties to the proceedings as the court before whom the case is tried may direct. Any costs directed to be paid by the county authority shall be deemed to be expenses properly incurred by such authority, and shall be paid accordingly out of the county rate; and any costs directed to be paid by the highway authority shall be deemed to be expenses properly incurred by such authority in maintenance of the roads within their jurisdiction, and shall be paid out of the funds applicable to the maintenance of such roads.

By sec. 13, disturnpiked roads are to become main roads, and half the expense of maintenance is to be contributed out of county rate. (*h*)

By sec. 14. 'The following areas shall be deemed to be highway areas for the purposes of this Act; (that is to say,)

- (1.) Urban sanitary districts:
- (2.) Highway districts:
- (3.) Highway parishes not included within any highway district or any urban sanitary district.'

By sec. 15. 'Where it appears to any highway authority that any

(*g*) An indictment under this section will lie against an urban sanitary authority acting as the highway authority of the district, for non-repair of the highway. *R. v. Mayor of Wakefield*, 20 Q. B. D. 810.

(*h*) As to the duty of the County Council in regard to such roads, see 51 & 52 Vic. c. 41, s. 11. *In re Warminster Local Board*, 25 Q. B. D. 450.

highway within their district ought to become a main road by reason of its being a medium of communication between great towns, or a thoroughfare to a railway station, or otherwise, such highway authority may apply to the county authority for an order declaring such road, as to such parts as aforesaid, to be a main road; and the county authority, if of opinion that there is probable cause for the application, shall cause the road to be inspected, and, if satisfied that it ought to be a main road, shall make an order accordingly.

A copy of the order so made shall be forthwith deposited at the office of the clerk of the peace of the county, and shall be open to the inspection of persons interested at all reasonable hours; and the order so made shall not be of any validity unless and until it is confirmed by a further order of the county authority made within a period of not more than six months after the making of the first-mentioned order.'

By sec. 16 'If it appears to a county authority that any road within their county which, within the period between the thirty-first day of December one thousand eight hundred and seventy and the date of the passing of this Act, ceased to be a turnpike road ought not to become a main road in pursuance of this Act, such authority shall, before the first day of February one thousand eight hundred and seventy-nine, make an application to the Local Government Board for a provisional order declaring that such road ought not to become a main road.

Subject as aforesaid, where it appears to a county authority that any road within their county which has become a main road in pursuance of this Act ought to cease to be a main road and become an ordinary highway, such authority may apply to the Local Government Board for a provisional order declaring that such road has ceased to be a main road and become an ordinary highway.

The Local Government Board, if of opinion that there is probable cause for an application under this section, shall cause the road to be inspected, and if satisfied that it ought not to become or ought to cease to be a main road and become an ordinary highway shall make a provisional order accordingly, to be confirmed as hereinafter mentioned.

All expenses incurred in or incidental to the making or confirmation of any order under this section shall be defrayed by the county authority applying for such order.'

By sec. 17. 'Where a turnpike road subject to one trust extends into divers counties, such road, for the purposes of this Act, shall be treated as a separate turnpike road in each county through which it passes.'

By sec. 19. 'Where a highway district is situate in more than one county, the provisions of this Act, with respect to the expenses of the maintenance of main roads, shall apply as if the portion of such district situate in each county were a separate highway district in that county.'

By sec. 20. 'Notwithstanding the provisions of this Act, in the case of any county in which certain of the bridges within the county are repairable by the county at large, and others are repairable by the several hundreds within the county in which they are situate, it

shall be lawful for the county authority from time to time, by order, to declare any main road or part of a main road within their county to be repairable to the extent only and in manner provided by section thirteen of this Act, either by the county or by the hundred in which such main road or part is situate, as they think fit; and where a main road or part thereof is declared to be repairable by a hundred, the expense of repairing the same shall, to the extent to which but for this section the expense or any contribution towards the expense of repairing the same would be repayable out of the county rate, be repayable out of a separate rate which shall be raised and charged in the like manner as the expenses of repairing the hundred bridges in the same hundred would have been raised and charged.

By sec. 23, power is given to the road authority to recover summarily the expenses of extraordinary traffic from any person by whose order such traffic has been conducted.

By sec. 24. 'If any authority liable to keep any highway in repair is of opinion that so much of such highway as lies within any parish situate in a petty sessional division is unnecessary for public use, and therefore ought not to be maintained at the public expense, such authority (in this section referred to as 'the applicant authority') may apply to the court of summary jurisdiction of such petty sessional division to view by two or more justices, being members of the court, the highway to which such application relates, and on such view being had, if the court of summary jurisdiction is of opinion that the application ought to be proceeded with, it shall by notice in writing to the owners or reputed owners and occupiers of all lands abutting upon such highway, and by public notice appoint a time and place, not earlier than one month from the date of such notice, at which it will be prepared to hear all persons objecting to such highway being declared unnecessary for public use, and not repairable at the expense of the public.

On the day and at the place appointed, the court shall hear any persons objecting to an order being made by the court that such highway is unnecessary for public use and ought not to be repairable at the public expense, and shall make an order either dismissing the application or declaring such highway unnecessary for public use, and that it ought not to be repaired at the public expense.

If the court make such last-mentioned order as aforesaid, the expenses of repairing such highway shall cease to be defrayed out of any public rate.

Public notice of the time and place appointed for hearing a case under this section shall be given by the applicant authority as follows; that is to say,

(1.) By advertising a notice of the time and place appointed for the hearing and the object of the hearing, with a description of the highway to which it refers, in some local newspaper circulating in the district in which such highway is situate once at least in each of the four weeks preceding the hearing; and

(2.) By causing a copy of such notice to be affixed, at least fourteen days before the hearing, to the principal doors of every church and chapel in the parish in which such highway is situate, or in some conspicuous position near such highway.

And the application shall not be entertained by the court until the fact of such public notice having been given is proved to its satisfaction.

If at any time after an order has been made by a court of summary jurisdiction under this section, upon application of any person interested in the maintenance of the highway in respect of which such order has been made, after one month's previous notice in writing thereof to the applicant authority, it appears to the court of quarter sessions that from any change of circumstances since the time of the making of any such order as aforesaid such highway has become of public use, and ought to be maintained at the public expense, the court of quarter sessions may direct that the liability of such highway to be maintained at the public expense shall revive from and after such day as they may name in their order, and such highway shall thenceforth be maintained out of the rate applicable to payment of the expenses of repairing other highways repairable by the applicant authority; and the said court of quarter sessions may by their order direct the expenses of and incident to such application to be paid as they may see fit.

Any order of a court of summary jurisdiction under this section shall be deemed to be an order from which an appeal lies to a court of quarter sessions.' (a)

S. 26 gives power to the county authority to make bye-laws which by s. 35 require in order to be valid to be confirmed by the local Government Board.

By s. 38. 'In this Act —

"Highway authority" means as respects an urban sanitary district the urban sanitary authority, and as respects a highway district the highway board, and as respects a highway parish the surveyor or surveyors or other officers performing similar duties:

"Rural sanitary district" and "rural sanitary authority" mean respectively the districts and authorities declared to be rural sanitary districts and authorities by the Public Health Act, 1875:

"Urban sanitary district" and "urban sanitary authority" mean respectively the districts and authorities declared to be urban sanitary districts and authorities by the Public Health Act, 1875, except that for the purposes of this Act no borough having a separate court of quarter sessions, and no part of any such borough, shall be deemed to be or to be included in any such district, and where part of a parish is included in such district for the purpose only of the repairs of the highways such part shall be deemed to be included in the district for the purposes of this Act.'

S. 25 of the Local Government Act, 1894 (56 & 57 Vic. c. 73), transfers to the district council of every rural district all the powers, duties, and liabilities of the rural sanitary authority in the district, and 'highway boards shall cease to exist, and rural district councils shall be the successors of the rural sanitary authority and highway authority, and shall also have as respects highways all the powers, duties, and liabilities of an urban sanitary authority under ss. 144 to 148 of the Public Health Act, 1875, and those sections shall apply in

(a) The consent of the Parish Council is also necessary. 56 & 57 Vic. c. 73, s. 13.

the case of a rural district and of the council thereof in like manner as in the case of an urban district and an urban authority,' and it further provides that where a highway repairable *ratione tenuræ* appears on the report of a competent surveyor not to be in proper repair, and the person liable to repair the same fails when requested to do so by the district council to place it in proper repair, the district council may place the highway in proper repair and recover from such person the necessary expenses of so doing.

By s. 26 it is to be the duty of the district council to protect all public rights of way, and to prevent as far as possible all stopping or obstruction of such rights, and power is given them to take proceedings for this purpose.

SEC. III.

*Of Nuisances to Public Rivers.*¹

In books of the best authority, a *river* common to all men is called a highway: (i) and if it be considered as a highway, any obstructions, by which its course and the use of it as a highway by the King's subjects are impeded, will fall within the same principles as those which relate to public roads, and which have been considered in the preceding section of this chapter. The public are not entitled at common law to tow on the banks of ancient navigable rivers. (j)

The term, navigable, as applied to a river, is a relative and comprehensive term, containing within it all such rights upon the waterway as, with relation to the circumstances of each river, are necessary for the full and convenient passage of vessels and boats along it. Therefore, where a river was a tidal river, and so shallow at certain states of the tide that a vessel could not float, but necessarily grounded, it was held that the jury were rightly directed that a navigable river was so at all times, and that a person might go upwards or downwards, though he might not be able to reach the port or the deep water in one tide or without grounding, and that even if such grounding subjected him to compensate for injury done, that did not affect the nature of the right in respect to the time of enjoyment. (k)

It has been before observed, that a highway may be changed by the act of God; and upon the same principle it has been holden, that if a water, which has been an ancient highway, by degrees change its course, and go over different ground from that whereon it used to run, yet the highway continues in the new channel, in the same manner as in the old. (l) It has been held that the soil of a navi-

(i) 1 Hawk. P. C. c. 76, s. 1, citing 27 Ass. 23; Fitz. 279. 2 Com. Dig. 397. Williams v. Wilcox, 8 A. & E. 314. And see Anon. Loft. 556.

(j) Ball v. Herbert, 3 T. R. 253. Winch v. The Conservators of the River Thames, 41 L. J. C. P. 241.

(k) Mayor of Colchester v. Brooke, 7 Q. B. 339.

(l) 1 Hawk. P. C. c. 76, s. 4. 22 Ass. 93. 1 Roll. Abr. 390. 4 Vin. Ab. *Chimie* (A.). See R. v. Betts, *post*, p. 847.

AMERICAN NOTE.

¹ See Arnold v. Mundy, 1 Halst. Rep. 1. 198. P. v. Platt, 17 Johns. Rep. 195. C. v. P. v. Vanderbilt, 28 N. Y. 396. Beach v. Breed, 4 Pick. 460. P., 11 Mich. 106. S. v. Freeport, 43 Maine,

gable river *primâ facie*, though not necessarily, belongs to the King; and is not by presumption of law in the owners of the adjoining lands. (*m*)

The public right of navigation in a river or creek may be extinguished either by Act of Parliament or writ of *ad quod damnum* and inquisition thereon, or under certain circumstances by commissioners of sewers, or by natural causes, such as the recess of the sea, or the accumulation of mud or sand. Where, therefore, a public road, obstructing a channel once navigable, has existed for so long a time that the state of the channel, at the time when the road was made, cannot be proved, in favour of the existing state of things it must be presumed that the right of navigation was extinguished in one of the modes before mentioned, and the road cannot be removed as a nuisance to the navigation. (*n*) Every creek or river, into which the tide flows, is not on that account necessarily a public navigable channel, although sufficiently large for that purpose, but the flowing of the tide into such a creek or river is strong *primâ facie* evidence that it is a public navigation. (*o*)

It is a common nuisance to divert part of a public navigable river, whereby the current of it is weakened and made unable to carry vessels of the same burthen as it could before. (*p*) And the laying timber in a public river is as much a nuisance, where the soil belongs to the party, as if it were not his, if thereby the passage of vessels is obstructed. (*q*) The placing a floating dock in a public river has been also held to be a nuisance, though beneficial in repairing ships. (*r*) So where a wooden jetty was erected on piles driven into the bed of the river Thames and extended considerably beyond high-water mark, but not quite to low-water mark, it was held that this was a nuisance to the navigation. (*s*) So a dummy or flush-decked barge fastened by means of chains to a wharf and to a mooring stone sunk into the bed of a navigable river, so as to rise and fall with the tide, for the convenience of embarking and disembarking passengers from vessels, and without which it would have been impossible for boats to land or embark passengers at the wharf at low water, is a nuisance. (*t*) And the bringing a great ship into Billingsgate dock, which, though a common dock, was common only for small ships coming with provisions to the markets in London appears to have been considered as a nuisance, in the same manner as if a man were so to use a common pack and horseway with his cart, as to plough it up, and thereby render it less convenient to riders. (*u*) Where an Act authorizes a company to erect a bridge over a public navigable river,

(*m*) *R. v. Smith*, Dougl. 441; but this seems not free from doubt. See *Williams v. Wilcox*, *post*, p. 851. *R. v. Wharton*, 12 Mod. 610, as to private rivers. As to right of soil in a moiety of a creek, *Lord v. Commissioners for the City of Sydney*, 12 Moore, P. C. 473, cited 10 C. B. (N. S.) 414. As to land left by a river, *Ford v. Lacy*, 7 H. & N. 151.

(*n*) *R. v. Montague*, 4 B. & C. 599.

(*o*) *Ibid.*, per Bayley, J., citing *The*

Mayor of Lynn v. Taylor, Cowp. 86, and *Miles v. Rose*, 5 Taunt. 706.

(*p*) 1 Hawk. P. C. c. 75, s. 11.

(*q*) Bac. Abr. tit. *Nuisance* (A.).

(*r*) *Anon. Surrey Ass. at Kingston*, 1785, cited in the notes to 1 Hawk. P. C. c. 75, s. 11.

(*s*) *Dimes v. Petley*, 15 Q. B. 276.

(*t*) *Eastern Counties R. Co. v. Dorling*, 5 C. B. (N. S.) 821.

(*u*) *R. v. Leech*, 6 Mod. 145. Bac Abr. tit. *Nuisance* (A.).

and they erect it in such a manner as to impede the navigation, and not in compliance with the provisions of the Act, they are guilty of nuisance. (v) And the erection of *weirs* across rivers was reprobated in the earliest periods of our law. 'They were considered as public nuisances. The words of Magna Charta are, that all weirs from henceforth shall be utterly pulled down by Thames and Medway, and through all England, &c. And this was followed up by subsequent Acts treating them as public nuisances, forbidding the erection of new ones, and the enhancing, straightening, or enlarging, of those which had aforetime existed.' (w) Upon the principle, therefore, which has been before stated (x) that the public have an interest in the suppression of public nuisances, though of long standing, it was held that a right to convert a brushwood into a stone weir (whereby fish would be prevented from passing except in flood times), was not evidenced by showing that forty years ago two-thirds of it had been so converted without interruption. (y) So in a more recent case it was holden, that twenty years' possession of the water at a given level was not conclusive as to the right. Abbott, C. J., said, 'If it be admitted that this is a public navigable river, and that all his Majesty's subjects had a right to navigate it, an obstruction to such navigation for a period of twenty years would not have the effect of preventing his Majesty's subjects from using it as such.' (z) But where there was a grant of wreck from Henry 2, to the Abbey of Cerne by all their lands upon the sea, confirmed by *inspeximus* by Henry 8, and also a grant from Henry 8, of the island of Brownsea and the shores thereof, belonging to the late monastery of Cerne, together with wreck, &c.; and there was also evidence that between forty and fifty years ago the proprietor of the island of Brownsea raised an embankment across a small bay, and had ever since asserted an exclusive right to the soil without opposition; it was held, that, although the usage of forty years' duration could not of itself establish such exclusive right, or destroy the rights of the public, yet it was evidence from which prior usage to the same effect might be presumed, and which, coupled with the general words contained in the grants, served to establish such right. If, however, it had appeared, that the public had a right to fish over the place in question, prior to the forty years, and that the raising the bank was an act of usurpation, the exclusive right would not have been established. (a)

At common law every holder of lands adjoining to a river or brook has a right to raise the banks of the river or brook, upon his own lands so as to confine the flood-water within the banks, provided he does not thereby occasion injury to the lands or property of other persons; and if such right has been exercised before the passing of an Act authorizing the making of a public navigable canal, the exercise of such right after the making of the canal will not be a nuisance, although it may be injurious to the canal, as the construction of the canal may be considered as having taken place subject to the enjoyment of such rights as the landholders possessed when the Act passed, except so far as the Act may have restrained such rights.

(v) *Hole v. Sittingbourne and Sheerness R. Co.*, 6 H. & N. 488.

(w) By Lord Ellenborough, C. J., in *Weld v. Hornby*, 7 East, 195.

(x) *Ante*, p. 755.

(y) *Weld v. Hornby*, *supra*.

(z) *Vooght v. Winch*, 2 B. & A. 662.

(a) *Chad v. Tilsed*, 5 Moore, 185.

Upon an indictment for a nuisance to a public canal navigation established by Act of Parliament, it was found by a special verdict that the canal was carried across a river and the adjoining valley by means of an aqueduct and an embankment, in which were several arches and culverts: that a brook fell into the river above its point of intersection with the canal, and that in times of flood the water, which was then penned back into the brook, overflowed its banks, and was carried, by the natural level of the country, to the above-mentioned arches, and through them to the river, doing, however, much mischief to the lands over which it passed; that except for the nuisance after-mentioned, the aqueduct would be sufficiently wide for the passage of the river at all times but those of high flood, notwithstanding the improved drainage of the country, which had increased the body of the water; that the defendants, occupiers of lands adjoining the river and brook, had for the protection of their lands, subsequently to the making of the canal, aqueduct, and embankment, created, or heightened, certain artificial banks, called fenders, on their respective properties, so as to prevent the flood-water from escaping as aforesaid, and that the water had consequently, in time of flood, come down in so large a body against the aqueduct and canal banks as to endanger them, and obstruct the navigation; that the fenders were not unnecessarily high, and that, if they were reduced, many hundred acres of land would again be exposed to inundation. It was held, by the King's Bench, that the defendants were not justified under these circumstances, in altering for their own benefit the course, in which the flood-water had been accustomed to run; that there was no difference in this respect between flood-water and an ordinary stream; that an action on the case would have lain at the suit of an individual for such diversion, and consequently that an indictment lay where the act affected the public. (b) But the Court of Exchequer Chamber, although they agreed in the principle that the ancient course and outlet of the flood-water had been obstructed by the wrongful raising from time to time of the fenders by the defendants, upon which the judgment of the King's Bench proceeded, held that the special verdict ought to have found—1st, whether the raising fenders was an ancient and rightful usage, or whether it had been commenced since the construction of the canal. For there was no doubt that at common law the landholders would have the right to raise the banks of the river and brook from time to time, as it became necessary, upon their own lands, so as to confine the flood-water within the banks, and to prevent it from overflowing their own lands; with this single restriction, that they did not thereby occasion any injury to the lands or property of other persons. And if this right had actually been exercised and enjoyed by them before the passing of the Act, then the construction of the aqueduct and embankment might be considered as having taken place subject to the enjoyment of such rights as the landholders possessed at the time of passing the Act, unless so far as the Act might have restrained the exercise of such rights. 2nd, whether the course

(b) *R. v. Trufford*, 1 B. & Ad. 874. The jury also found that the acts creating the nuisance were done by the defendants severally, and it was held that as the nui-

sance was the result of all those acts jointly, the defendants were rightly joined in one indictment, which stated the acts to have been several.

described by the special verdict to have been taken by the flood-water was, or was not, the ancient and rightful course. And, 3rd, whether or not the raising of the fenders to their present height had become necessary in consequence of the construction of the aqueduct. (c)

It is no defence to an indictment for a nuisance in a navigable river and port to prove that, although the work be in some degree a hindrance to navigation, it is advantageous, in a greater degree, to other uses of the river. Where, therefore, a causeway had been made in the river Medina, which was an inconvenience to the navigation, as small vessels were much obstructed in making their way up with the tide, but it was a great benefit to the public: first, in launching and landing boats more readily; secondly, steam-boats and other vessels could approach where they could not before; thirdly, vessels obtained shelter from the quay; and the jury found it to be a nuisance, but added that the inconvenience was counter-balanced by the public benefit arising from the alteration; it was held that this finding amounted to a verdict of guilty. (d)

On an indictment for a nuisance, in the navigable river Itchen, it appeared that a wharf was built between high and low-water mark, and projected over a portion of the river on which boats formerly passed; before its erection there was no means of unloading trading vessels in the river, except by lightening them in the middle of the stream and then getting them at high water on to the mud between high and low-water mark; but since its erection such vessels have been unloaded at it, and thus the centre of the river was kept clear and the general navigation improved; but Wightman, J., left it to the jury to say whether the wharf itself occasioned any impediment whatever to the navigation of the river by any description of vessels or boats, and told them that they were not to take into consideration the circumstance that a benefit had resulted to the general navigation of the river by the said channel being kept clear. (e) But there may be cases where the injury to the public is too small to support an indictment. Upon the trial of an indictment for a nuisance to a harbour by erecting and continuing piles and planking in the harbour, and thereby obstructing it and rendering it insecure, it was found by a special verdict, that 'by the defendant's works, the harbour is in some extreme cases rendered less secure;' and it was held that the defendant could not be made criminally responsible for consequences so slight, uncertain, and rare, as were stated by this verdict to result from his works. (f)

(c) *Trafford v. Regem*, 8 Bingh. R. 204.

(d) *R. v. Ward*, 4 Ad. & E. 384; 6 N. & M. 38, overruling *R. v. Russell*, 6 B. & C. 566; 9 D. & R. 566. See *R. v. Morris*, 1 B. & Ad. 441.

(e) *R. v. Randall*, C. & M. 496. *White v. Phillips*, 15 C. B. (N. S.) 245.

(f) *R. v. Tindall*, 6 A. & E. 143; 1 N. & P. 719. In *R. v. Russell*, 3 E. & B. 942, on the trial of an indictment for obstructing a navigable piece of water, the jury were asked whether they thought the erection would prove a 'material nuisance,' in which case they were to find a verdict of guilty; but were told that if they thought

the 'nuisance' was so slight, rare and uncertain, that the defendant ought not to be made criminally liable for it, they should acquit him, and the jury said that they considered the erection, 'although a nuisance, was not sufficiently so to render the defendant criminally liable,' and thereon an acquittal was entered; it was held by Coleridge and Crompton, JJ., and *semble* by Lord Campbell, C. J., that the charge was to be understood as meaning, not that a party may legally commit a small nuisance, but that an obstruction might be so insignificant as not to constitute a nuisance; and that the jury must be understood as finding that the

from Lincoln to the sea, but that by sand and silt brought in by the tide the outfall had been greatly obstructed, and powers were given to commissioners to restore the navigation, and they were authorized to make a new cut through lands adjoining the river, and the navigation so made was to be open to all persons paying certain tolls: the commissioners were also authorized by this and another Act to build bridges under certain regulations. The cut was made, and a more direct channel thereby created, through which the waters of the river passed to the sea. The powers of the commissioners were afterwards vested by another Act in a company, who built a bridge over the cut, not according to the regulations of the Act, upon piles fixed in the bed of the cut, and its piers occupied part of the breadth of the river; the jury were told that this was a public highway, and were desired to say whether or not the construction of the bridge was a nuisance to the navigation of the river, and they answered that they did not consider it to be an obstruction to the navigation; and it was held that there was no doubt that this was a public river; that the cut, which merely straightened the course, was in the same situation as the original channel, and the public had the same rights over it as they had over the original channel; and that if the bridge had been so built as to obstruct the navigation, it would have been an indictable offence; but that the verdict amounted to a finding of not guilty. It was for the jury to say whether an erection of this kind was a damage to the navigation or not, and the true question for them was whether a damage accrued to the navigation in the particular locality. (*g*)

By the 1 Eliz. c. 17, the taking of fish, except with the particular trammels or nets therein specified, was prohibited, upon pain of the forfeiture of a certain penalty, of the fish taken, and also of the unlawful engines: and upon this Act it was contended, that a party laying certain illegal engines called *bucks* in his own fishery was guilty of a nuisance; but the Court held that it could not be considered as a nuisance public or private. (*h*)

Where a vessel has been sunk in a navigable river by accident and misfortune, no indictment can be maintained against the owner for not removing it. Lord Kenyon, C. J., said that the grievance had been occasioned, not by any default or wilful misconduct of the defendant, but by accident and misfortune; and that it would be

obstruction was so insignificant; and that, therefore, there was not a misdirection warranting a new trial.

(*g*) *R. v. Betts*, 16 Q. B. 1022. Lord Campbell asked, during the argument, 'May not there be a common-law right to erect bridges not obstructing the navigation?' 'How have bridges ever been legally made over navigable rivers?' His Lordship also expressed his dissent from the opinions of the majority of the judges in *R. v. Russell*, 6 B. & C. 586. And in *The Mayor of Norwich v. Norfolk R. Co.*, 4 E. & B. 440, speaking of a nuisance to a navigable river, Lord Campbell said, 'The doctrine of compensation has not hitherto been applied in

such a case to justify a public nuisance; and I have not before heard it suggested that, without the authority of Parliament, the passage of ships up and down a navigable river could be obstructed for a given period by works which might afterwards enable ships to navigate the river with increased facility. The consent of the Lords of the Admiralty, and of the riparian proprietors, could not supersede the necessity for the authority of the Legislature.' See *Abraham v. G. N. R. Co.*, 16 Q. B. 586, as to the construction of the Railway Clauses Consolidation Act, 8 & 9 Vict. c. 20, in cases of bridges built over rivers.

(*h*) *Bullbrooke v. Goodere*, 3 Burr. 1768.

adding to the calamity to subject the party to an indictment for what had proceeded from causes against which he could not guard, or which he could not prevent: and though it was urged that if the defendant was not punishable for having caused the nuisance, yet it was his duty to have removed it, and that he was liable to be indicted for not having done so, the learned judge said, that perhaps the expense of removing the vessel might have amounted to more than the whole value of the property; and that he was therefore of opinion that the offence charged was not the subject of indictment. (i) And this decision has been fully confirmed in two cases, in which it has been held that it is the duty of a person using a navigable river with a vessel of which he is possessed and has the control, to use reasonable skill and care to prevent mischief to others, and his liability is the same whether his vessel be in motion or stationary, floating or aground, under water or above it. For in all these circumstances the vessel may continue to be in his possession and under his control. This duty arises out of the possession and control of the vessel being in him: and this liability may be transferred, with the transfer of the possession and control, to another person. And on the abandonment of such possession and control the liability ceases. And further, that from an unavoidable accident producing the wreck of a vessel, no duty arises to the owner to take any precautions or to remove the impediment to navigation which it creates. (j)

A weir appurtenant to a fishery, obstructing the whole or a part of a navigable river, is legal, if granted by the crown before the commencement of the reign of Edward 1, and such a grant may be inferred from evidence of its having existed before that time. If the weir, when so first granted, obstruct the navigation of only a part of the river, it does not become illegal by the stream changing its bed, so that the weir obstructs the only navigable passage remaining. Where the crown had no right to obstruct the whole passage of a navigable river, it had no right to obstruct a part by erecting a weir, except subject to the rights of the public; and, therefore, in such case, the weir would become illegal upon the rest of the river being so choked that there could be no passage elsewhere. In an action of trespass for throwing down a weir, the plaintiff established the existence of the weir by a royal grant made at some time prior to the time of Edward 1; but it stood across part of the Severn, a public navigable river,—a part, indeed, not required for the purposes of navigation at the date of the grant, but, at the time of the commission of the trespass, necessary for those purposes, by reason of the residue of the channel having become choked up. The plaintiff contended that, at the date of the grant, the crown had the power of making it, even to the disturbance or total prevention of the right of navigation by the subject; or that, at all events, it had

(i) *R. v. Watts*, 2 Esp. R. 675.

(j) *White v. Crisp*, 10 Exch. R. 312; *Brown v. Mallett*, 5 C. B. 599. See the remarks in this case on *Harmond v. Pearson*, 2 Esp. 675, which is cited in *Hancock v. York, Newcastle, & Berwick R. Co.*, 10 C.

B. 348, to show that it is a nuisance to leave an anchor in a navigable river without a buoy; and where it was held that the owner of an anchor was not guilty of a nuisance created by it in a place to which it had been removed without his knowledge.

circumstances, it did not interfere with the rights of the subject: and that such a grant, valid in its inception, would not become invalid by reason of any change of circumstances, which might afterwards affect the residue of the channel. Lord Denman, C. J., in delivering the judgment of the Court, said, 'If the subject (which this view of the case concedes) had by common law a right of passage in the channel of the river, paramount to the power of the crown, we cannot conceive such right to have been originally other than a right locally unlimited to pass in all and every part of the channel. The nature of the highway which a navigable river affords, liable to be affected by natural and uncontrollable causes, presenting conveniences in different parts and on different sides according to the changes of wind or direction of the vessel, and attended by the important circumstance that on no one is any duty imposed by the common law to do that which would be analogous to the ordinary repair of a common highway to remove obstructions, namely, clear away sand-banks and preserve any accustomed channel,—all these considerations make it an almost irresistible conclusion that the paramount right, if it existed at all, must have been a right in every part of the space between the banks. It cannot be disputed that the channel of a public navigable river is a King's highway, and is properly so described; and, if the analogy between it and a highway by land were complete, there could be no doubt that the right would be such as we now lay down; for the right of passage in a highway by land extends over every part of it. Now, although it may be conceded that the analogy is not complete, yet the very circumstances in which it fails, are strong to show that in this respect at least it holds. The absence of any right to go *extra viam* in case of the channel being choked, and the want of a definite obligation on anyone to repair, only render it more important, in order to make the highway an effectual one, that the right of passage should extend to all parts of the channel. If then, *subject to this right*, the crown had at any period the prerogative of raising weirs in such parts as were not at the time actually required by the subject for the purposes of navigation, it follows, from the very nature of a paramount right on the one hand and a subordinate right on the other, that the latter must cease whensoever it cannot be exercised but to the prejudice of the former. If, in the present case, the subject has not at this moment the right to use that part of the channel on which the weir stands, it is only because of the royal grant; and that grant must then be alleged at its date to have done away for ever, in so much of the channel, the right of the public: but that is to suppose the subordinate right controlling that which is admitted to be paramount, which is absurd. On the other hand, there is nothing unreasonable or unjust in supposing the right to erect the weir subject to the necessities of the public when they should arise, for the right of the public, being supposed to be paramount by law, the grantee must be taken to be cognizant of such right: and the same natural peculiarities, and the same absence of any obligation by law on anyone to counteract those peculiarities above-mentioned, would give him full notice of the probability that

at some period his grant would be determined. We do not therefore think that the plaintiff can sustain his second point.'

With regard to the power of the crown at common law to interfere with the channels of public rivers, Lord Denman, C. J., said, 'On the one side the contention is, that prior to Magna Charta, the power of the crown was absolute over them; and that this weir, by the antiquity assigned to it by the finding of the jury, is saved from the operation of that or any succeeding statute; while, on the other, it is alleged that they are and were highways to all intents and purposes, which the crown had no power to limit or interfere with, and that as well the restraints enacted by, as the confirmations implied from, the statutes alluded to have nothing to do with the present question.

'After an attentive examination of the authorities and the statutes referred to in the argument, we cannot see any satisfactory evidence that the power of the crown in this respect was greater at the common law before the passing of Magna Charta than it has been since. It is clear that the channels of public navigable rivers were always highways: up to the point reached by the flow of the tide the soil was presumably in the crown; and above that point, whether the soil at common law was in the crown or the owners of the adjacent lands (a point perhaps not free from doubt), there was at least a jurisdiction in the crown, according to Sir Matthew Hale, "to reform and punish nuisances in all rivers, whether fresh or salt, that are a common passage, not only for ships and greater vessels, but also for smaller, as barges or boats;" *De Jure Maris*, Part I., c. 2, p. 8. In either case the right of the subject to pass up and down was complete. In the case of the *Bann Fishery* (k), where the reporter is speaking of rivers within the flux and reflux of the tide, it is stated that this right was by *the King's permission*, for the ease and commodity of the people; but if this be the true foundation, and if the same may be also properly said of the same right in the higher parts of rivers, still the permission supposed must be coeval with the monarchy, and anterior to any grant by any particular monarch of the right to erect a weir in any particular river. It is difficult, therefore, to see how any such grant made in derogation of the public right previously existing, and in direct opposition to that duty, which the law casts on the crown, of reforming and punishing all nuisances which obstruct the navigation of public rivers, could have been in its inception valid at common law. Nor can we find, in the language of the statutes referred to, anything inconsistent with this conclusion. They speak indeed of acts done in violation of this public right; but they do not refer them to any power legally existing in the crown, which for the future they propose to abridge. We are, therefore, of opinion that the legality of this weir cannot be sustained on the supposition of any power existing by law in the crown in the time of Edward 1, which is now taken away. But this does not exhaust the question; because that which was not legal at first may have been subsequently legalized.

'The learned counsel for the defendants is probably correct in saying that the twenty-third chapter of Magna Charta may be laid out of the case. The *kidelli* there spoken of appear, from the 2 *Inst.*

(k) *Davies's R.* 57 a.

the taking of fish; and the evil intended to be remedied by the statute was the unlawful destruction of that important article of consumption. That statute, therefore, being pointed at another mischief, might leave any question of nuisance by obstruction to the passage of boats exactly as it stood at common law. But the same remark does not apply to 4 stat. 25 Edw. 3, c. 4. That begins by reciting that the common passage of boats and ships in the great rivers of England is oftentimes annoyed by the inhansing [a mistranslation of the word *lever* for levying or setting up (*m*)] of gorges, mills, weirs, stanks, stakes, and kiddles, and then provides for the utter destruction of all such as have been levied and set up in the time of Edward 1 and after. It further directs that writs shall be sent to the sheriffs of the places where need shall be, to survey and inquire, and to do thereof execution; and also the justices shall be thereupon assigned at all times that shall be needful. It is clear, we think, that, in any criminal proceeding for the demolition of this weir which had been instituted immediately after the passing of this statute, it would have been a sufficient defence to have shown its erection before the time of Edward 1; and, considering the concise language of statutes of that early period, we think the statute would equally have been an answer in any civil proceeding at the suit of a party injured. Assuming the weir to have been illegally erected before the date of Magna Charta, it is not unreasonable to suppose that a sort of compromise was come to: similar nuisances were probably very numerous; but they were probably, many of them, of long standing; it may have been impossible to procure, or it may well have been thought unreasonable to insist on, an Act which should direct those to be abated which had acquired the sanction of time; and a line was therefore drawn, which, preventing an increase of the nuisance for the future, and abating it in all the instances which commenced within a given period, impliedly legalized those which could be traced to an earlier period. This appears to us the proper effect to be attributed to the statute; and, if it be, it disposes of any difference between a criminal and civil proceeding. The earlier weirs were not merely protected against the specific measures mentioned in the Act, but rendered absolutely legal. If this would have been a good answer immediately after the Act passed, it is at least equally good now; and therefore, of stat. 45 Edw. 3, c. 2, and stat. 1 Hen. 4, c. 12, it is unnecessary to say more than that they do not at all weaken the defence which the defendants have under the former statute.' (*n*)

It is said to have been adjudged that if a river be stopped, to the nuisance of the country, and none appear bound by prescription to clear it, those who have the piscary, and the neighbouring towns, who have a common passage and easement therein, may be compelled to do it. (*o*) For nuisances in the nature of obstructions an indictment will of course lie, if the river be such as may be considered a public highway. (*p*)

(*l*) 10 Rep. 137 *b*.

(*m*) Corrected in the translation of the 45 Edw. 3, c. 2 (recital).

(*n*) *Williams v. Wilcox*, 8 Ad. & E. 314.

(*o*) 1 Hawk. P. C. c. 75, s. 13. Bac. Abr.

tit. *Nuisance* (C.). 37 Ass. 10. 2 Roll. Abr. 137.

(*p*) See *R. v. Dobson*, 1 Cox, C. C. 251,

Of Nuisances to Public Bridges.

The more ancient cases do not supply any immediate definition or description in terms of what shall be considered 'public bridges.' But a distinction between a public and a private bridge is taken in one of the books, (q) and made to consist principally in its being built for the common good of all the subjects, as opposed to a bridge made for private purposes; and though the words, 'public bridges,' do not occur in the 22 Hen. 8, c. 5 (called the Statute of Bridges), yet as the statute empowers the justices of the peace to inquire of 'all manner of annoyances of bridges broken *in the highways*,' and applies to bridges of that description, in all its subsequent provisions, it may be inferred that a bridge in a *highway* is a public bridge for all purposes of repair connected with that statute. And 'if the meaning of the words *public bridge* could properly be derived from any other less authentic source than this statutable one, they might safely be defined to be such bridges as all his Majesty's subjects had used freely and without interruption, as of right, for a period of time competent to protect themselves and all who should thereafter use them, from being considered as wrong-doers in respect of such use, in any mode of proceeding, civil or criminal, in which the legality of such use might be questioned.' (r)

But a bridge built for the mere purpose of connecting a private mill with the public highway, or for any other such merely private purpose, would not necessarily become a part of the highway, although the public might occasionally participate with the private proprietor in the use of it; and it is not every sort of bridge, erected possibly for a temporary purpose, during a time of flood, that may have rendered the ordinary fords impassable, or the ordinary means of passage impracticable, which can be considered as a *bridge in a highway*, to be repaired, when broken down, according to the provisions of the Statute of Bridges. (s)

It is a question of fact, whether a particular structure be a bridge or not; and, upon a question whether an arch be a bridge or culvert, the fact that it is built over a stream of water flowing between banks, is not decisive to show that it is a bridge, although there must be such a stream for the structure to be a bridge. Neither is it decisive that it is not a bridge, that there are no parapets to it. (t) On an indictment for not repairing the highway next adjoining each end of Warmley Bridge, it appeared that the bridge was built before

as to costs where an indictment for a nuisance to the Thames had been removed into the Court of Queen's Bench by *certiorari*.

(q) 2 Inst. 701. See *R. v. Inhabitants of Upper Half Hundred of Chart and Longbridge*, 39 L. J. M. C. 107.

(r) By Lord Ellenborough, C. J., in *R. v. Bucks*, 12 East, 204.

(s) *R. v. Bucks*, 12 East, 203, 204.

(t) *R. v. Whitney*, 3 A. & E. 69; 7 C.

& P. 208. The structure in question in this case was an arch of nine feet span, over a stream which fed a mill, and which was usually about three feet deep, but occasionally shallower, and in flood times much deeper, and it had no battlements at either end; the jury having found a verdict of guilty upon an indictment treating this structure as part of the road, the Court refused a rule for a new trial.

the 43 Geo. 3, c. 59, and conveyed a turnpike road between parapet walls over a stream of water, which at that place was confined between banks, which prevented its overflowing the adjacent land in winter when the water averaged two feet and a half in depth; but the stream was never dry at any time of the year; Cresswell, J., told the jury that if they were satisfied that this structure was a bridge their verdict must be for the Crown. If it had been erected for the convenience of the public in passing over the stream, it was a county bridge, and rendered the county liable to repair it, though the bridge might not have been necessary for the convenience of the public when it was built. (u) Where an ancient foot bridge consisted of three planks nine or ten feet long, and was over a stream about a foot and a half deep in summer, but frequently deeper in winter, and had originally been repaired by a parish, it was held that this was not a county bridge. (v)

The inhabitants of a county are bound by common law to repair bridges erected over such water as answers the description of *flumen vel cursus aquæ*, that is, water flowing in a channel between banks more or less defined, although such channel may be occasionally dry; they are, therefore, not bound to repair arches in a raised causeway, more than three hundred feet from the end of a bridge, through which the water passes in flood times only. Where a road, in continuation of a bridge over a river, ran through low meadow ground, liable to be flooded by the river, for five hundred and seventy-six feet from the foot of the bridge, and formed a causeway, in which were placed, at different intervals, five arched openings, two of which were within three hundred feet of the bridge, which the county had always repaired, and the other three more than three hundred feet from the foot of the bridge, and the arches were built not over the ordinary stream or course of the river, but over solid meadow ground, which was subject to be much flooded, and there was generally a strong current in winter through the arches, which, by giving vent to the flood water, helped to protect the bridge, which would be in danger from the penning up of the water if the causeway had no arches; it was held that the county was not liable to repair the arches which were more than three hundred feet from the foot of the bridge. The ancient form of indictment, as mentioned in 2 *Inst.* 701, is, *quod pons publicus et communis situs in alta regia via super flumen seu cursum aquæ, &c.*, and although in many indictments in modern times the words, *super flumen, &c.*, are omitted, yet in such indictments they must be considered as virtually included in the true import of the term bridge; for, otherwise, all such indictments would be bad, there being many structures, bearing the name of bridge, erected across a steep ravine, and in modern times over an ancient road, crossed in a traverse direction by a new road, having no reference to water, and which, unquestionably the county is not bound to repair; and no more certain rule can be laid down than that the words *flumen*

(u) *R. v. Gloucestershire, C. & M.* 506.

(v) *R. v. Southampton, Tinker's Bridge case*, 18 Q. B. 841. The liability to repair county bridges had been transferred from parishes to the county, and the bridge had

not been repaired by the county, but by commissioners who had the charge of the repairs of the highways. See the case, *post*, p. 857.

vel cursus aque are to be considered to denote water, flowing in a channel between banks, more or less defined, although such channel may be occasionally dry. (*w*)

But this case has since been reconsidered. Upon an indictment against the county of Derby for the non-repair of Swarkestone Bridge, it appeared that the bridge was a structure 1,275 yards in length, and consisted of forty-two arches, divided, at some points, by a stone causeway, at others by the piers only. The river Trent flowed constantly under five of the arches at one end of the structure, and a brook flowed constantly under an arch at the opposite end. The other arches lay across meadow land, and in times of flood the water flowed under all of them, and under most of them there was stagnant water at all times. The county had immemorially repaired the whole structure, and had rebuilt and widened twenty-two of the arches under which there was no constant stream. Parts of the whole structure, other than the five arches, had been presented at different times under the name of Swarkestone Bridge, by the grand jury, as out of repair and thereupon repaired by the county. The Court of Queen's Bench held that the county were liable to repair the whole structure; as the whole must be deemed a bridge, and there was no general rule of law that arches, under which there was no constant stream, could not form part of a county bridge, and that, where such arches are contiguous to and as it were in continuation of an acknowledged county bridge, and have been immemorially treated by the county as part of the bridge, there was no rule of law to prevent their being part of the bridge. (*x*)

As there may be a dedication of a road to the public, (*y*) so in the case of a bridge, though it be built by a private individual, in the first instance, for his own convenience, yet it may be dedicated by him to the public, by his suffering them to have the use of it, and by their using it accordingly. (*z*) And though, where there is such a dedication, it must be absolute, (*a*) yet it may be definite in point of time; so that a bridge may be a public bridge, if it be used by the public at all such times only as are dangerous to pass through the river. (*b*) A bar across a public bridge, kept locked, except in times of flood, is conclusive evidence that the public have only a limited right to use the bridge at such times: therefore an indictment for not keeping it in repair should not state that it is used by the King's subjects, 'at their free will and pleasure.' (*c*)

(*w*) *R. v. Oxfordshire*, 1 B. & Ad. 289. The county had previously been indicted for not repairing two of the same arches, which were described in the indictment as bridges, and on a special case it was held that there was not sufficient to show that they were bridges, which the county was liable to repair, as the jury had not found either that they were erected at the same time as the bridge over the river, or for the purpose of enabling the public to pass, and not for the benefit of the owners of the adjoining lands. *R. v. Oxfordshire*, 1 B. & Ad. 297. The indictment in *R. v. Oxfordshire*, 1 B. & Ad. 219, contained six counts, all of which charged the non-repair of a bridge, varying the description in each count.

(*x*) *R. v. Derbyshire*, 2 Q. B. 745.

(*y*) *Ante*, p. 763, *et seq.*

(*z*) *R. v. Glamorgan*, 2 East, 356. *Glusburne Bridge case*, 5 Burr. 2594. 2 Blac. R. 687. *R. v. West Riding of Yorkshire*, 2 East, 342. And see *post*, p. 863, *et seq.*

(*a*) According to the doctrine in *Roberts v. Karr*, 1 Campb. 262, in the note. And see *ante*, p. 769.

(*b*) *R. v. Northampton*, 2 M. & S. 262. In *R. v. Devonshire*, R. & M. N. P. C. 144, Abbott, C. J., held that the county were liable to repair a bridge by the side of a ford, which was only used by the public in times of floods, which made the ford impassable, as the bridge was at all times open to the public.

(*c*) *R. v. The Marquis of Buckingham*, 4 Campb. 189.

But a bridge built in a public way, without public utility, is indictable as a nuisance. (d)

Where a bridge is, in the sense which has been described, a bridge *in a highway*, it will of course be as public as the highway itself in which it is situate, and of which, for the purpose of passage, it must be understood to form a part. (e) All actual obstructions, therefore, to such bridges will come within the rules already stated with respect to nuisances to highways by obstruction, (f) and do not require a repetition in this place. There is, however, one case where the defendant was indicted for not repairing a house adjoining to a public bridge, which he was bound to repair *ratione tenuræ*, but permitted it to be so much out of repair that it was ready to fall upon people passing over the bridge; it was found by a special verdict that the defendant was only tenant at will of the house; but the Court adjudged that he ought to repair, so that the public should not be prejudiced; and though not properly chargeable to repair the house *ratione tenuræ*, yet that the averment should be intended of the possession, and not of the service. (g)

The nuisances which more frequently arise to the public in respect of bridges are in the nature of *nonfeasance*, from the neglect to keep them in a proper state of repair.

As parishes are bound to repair the public ways within their district; so the inhabitants of the county at large are, *primâ facie* and of common right, liable to the repair of all public bridges within its limits, unless they can show a legal obligation on some other persons or public bodies to bear the burden: (h) and this without any distinction as to foot, horse, or carriage bridges. (i) The Statute of Bridges shows that the burden is *primâ facie* on the county; and it is exactly analogous to the liability of the parish to repair a road. (j) But a hundred or parish, or other known portion of a county, may by usage and custom be chargeable to the repair of a bridge erected within it. (k) So where a county of a town has been created by charter and declared to be a separate county, the county in which it was originally situated is not liable for the repair of bridges within its boundaries. (l) And a corporation aggregate, either in respect of a special tenure of certain lands, or in respect of a special prescription, and also any other persons by reason of such special tenure, may be compelled to repair them. (m) And if a part of a bridge lie within a franchise,

(d) *R. v. West Riding of Yorkshire*, 2 East, R. 342. But see *post*, p. 865, 43 Geo. 3, c. 59, s. 5, as to the liability of counties to repair bridges thereafter to be erected.

(e) *R. v. Bucks*, 12 East, 202, 203.

(f) *Ante*, p. 785, *et seq.*

(g) *R. v. Watson*, 2 Lord Raym. 856.

(h) 2 Inst. 700, 701, in the comment upon the statute of bridges, 22 Hen. 8, c. 5. The reparation of public bridges was part of the *trinoda necessitas*, to which, by the ancient law, every man's estate was liable, namely, *expeditio contra hostem, arcium constructio, et pontium reparatio*.

(i) By Lord Ellenborough, C. J., in *R. v. Salop*, 13 East, 97.

(j) By Bayley, J., in *R. v. Oxfordshire*, 4 B. & C. 196.

(k) *R. v. Hendon*, 4 B. & Ad. 628. *R. v. New Sarum*, 7 Q. B. 941. *R. v. Ecclesfield*, 1 B. & A. 359. *Per cur.*, and this without stating any other ground than immemorial usage.

(l) *R. v. Inhabitants of Southampton*, 17 Q. B. D. 424. See this case varied upon another ground, 19 Q. B. D. 590.

(m) 1 Hawk. P. C. c. 77, s. 2. *Bac. Abr. tit. Bridges*. A body politic may be bound either *ratione tenuræ sive prescriptionis*; but a private person is not liable upon a general prescription. 2 Inst. 700. 13 Co. 33. 1 Salk. 358. 3 Salk. 77, 381, and see *ante*, p. 799.

those of the franchise may be charged with the repairs for so much: also by a special tenure a person may be charged with the repairs of one part of a bridge, and the inhabitants of the county be liable to repair the rest. (*n*) A prescription, that the lords of the manor ought to repair a bridge is good, being laid *ratione tenuræ*, by reason of the demesnes of the manor. (*o*) And, as the obligation is by reason of the demesnes of the manor, if part of the demesnes be granted to an individual, he will be obliged to contribute to the repairs: but the indictment may be against any of the tenants of the demesnes, and it will be no defence on an indictment against one of them that another is also liable. (*p*) And where an individual is liable to repair a bridge, his tenant for years, being in possession, will be under the same obligation, and liable to an indictment for the neglect. (*q*) We have seen that the inhabitants of a district cannot be charged *ratione tenuræ*, because unincorporated inhabitants cannot *quâ* inhabitants hold lands: and that a district cannot be charged by prescription alone, without a consideration, to repair what is not within such district. (*r*) As the burden resting upon a county to repair the public bridges is exactly analogous to the liability of a parish to repair a road, it is not removed by an Act of Parliament directing trustees to lay out the tolls thereby granted in repairing roads, and empowering them to make and repair bridges. To an indictment against a county for not repairing a bridge in a highway, there was a plea that, by an Act of Parliament certain trustees were directed to lay out the tolls thereby granted in repairing the roads, and were empowered to make and repair bridges; that the bridge in question was erected by the trustees under that Act; that the trustees had been liable to repairs, and had repaired the bridge from the time it was so erected; and that they were still liable to keep it in repair: the replication traversed that they were so liable; and the Court held that the bridge having been erected for public purposes, in a public highway, the common-law liability to repair attached upon the inhabitants of the county as soon as it was built; and that the plea was clearly insufficient to exonerate them, as it did not aver that the trustees had funds adequate to the repair of the bridge. (*s*)

In 1842 the Isle of Wight was a division of the county of Southampton, but had no separate commission of the peace; before 1842 all public bridges in it, not repairable by tenure, had been repaired either by the tithings, parishes, or townships in which they were situate, or by rates in the nature of county rates levied on all the

(*n*) Bac. Abr. tit. *Bridges*. 1 Hawk. P. C. c. 77, s. 1.

(*o*) *R. v. Bucknall*, 2 Lord Raym. 804. *At nisi prius* (2 Lord Raym. 792) Holt, C. J., ruled that the prescription was good without saying *ratione tenuræ*, on the ground that the manor might have been granted to be held by the service of repairing the bridge before the statute *quia emptores terrarum*, or that the king might make such a grant, he not being bound by the statute: but he afterwards changed his opinion.

(*p*) *Ibid.* 792. *R. v. The Duchess of*

Buccleuch, 1 Salk. 358. And see *ante* p. 802.

(*q*) *R. v. Bucknall*, 2 Lord Raym. 804. And see *R. v. Watson*, 2 Lord Raym. 856, *ante*.

(*r*) *R. v. Machynlleth*, *ante*, p. 486.

(*s*) *R. v. Oxfordshire*, 4 B. & C. 194. And it seems that even if the fact of adequate funds in the hand of the trustees had been averred and proved, the county would still have been primarily liable, and must have taken their remedy against the trustees. And see *R. v. Netherthong*, and other cases *ante*, p. 794.

parishes and places in the island, under the following arrangement. In 1772 the island having been assessed to the general county rate with the other parts of the county, appeals were entered against that assessment, and in 1774 an arrangement was made, by consent, fixing certain proportions to be paid by the parishes in the island towards the general county rate, but leaving the expense of bridges and the house of correction to be raised by a local rate; the order of sessions being that 'the said island be thereby adjudged and declared not to be liable or subject to pay the county bridge rate or to the house of correction; the Isle of Wight agreeing to erect and maintain, from time to time, houses of correction and bridges within the said island.' After this arrangement the practice was for the county quarter sessions, on the application of the justices for the island division, to levy a rate, in the nature of a county rate, on every parish in the island for the repair of the island bridges and bridewell. There was no instance before 1842 of the application of the general county rate to the repair of an island bridge; but the justices of the island used to expend the island rate made in the manner above-mentioned on the island bridges and bridewell. A local Act, 53 Geo. 3, c. 92, appointed commissioners for the repair of the highways in the island, with the power of making assessments, and enacted that all bridges previously repaired by any parishes, &c., within the island should for ever be repaired in the same manner and by the same means as other bridges usually called county bridges, within the said island, had been accustomed to be repaired, and that such particular parishes, &c., should be discharged from the exclusive burden of maintaining such bridges, &c. It was held that all bridges, which, when the Act passed, were repairable by the parishes, &c., in which they were situate, were for the future repairable by the county generally, and that the arrangement of 1774 did not affect the legal liability of the county; for the sessions had no authority to make such a rate upon the parishes in the island, nor could this conventional mode of dividing the performance of the legal obligation alter the right of the public, when the liability to the performance became a legal question. No indictment could be maintained against the island, which was not a district chargeable, as such, with any liability known to the law, and as the statute had expressly removed the obligation from the parishes, &c., the county was bound to repair the bridges. (t)

Where an Act recited that it was convenient that a bridge should be built across the Thames, and empowered S. D. to build a bridge, at his own expense, and in consideration of the great expense he would be at not only in building the bridge, but in erecting, repairing, and maintaining other matters necessary to be erected, it should be lawful for S. D., his heirs and assigns, at all times thereafter to take, for pontage or toll for any passage over the bridge, certain sums; and a clause reciting that it might happen that the passage might for some time become dangerous or impracticable, enabled S. D., his heirs and assigns, to provide and maintain a ferry across the river, and to take the same sums for passage over the river by it as were granted for the toll or pontage; but such ferry was not to continue

longer than should be necessary for repairing or rebuilding the bridge; and the bridge was not to be a county bridge. A later Act recited that it had been found that the pontage or toll was greatly inadequate to the expense of building and keeping in repair the said bridge, and enacted that S. D., his heirs and assigns, might take the tolls therein specified. In 1859 the principal arch of the bridge fell in, and the defendant, who had become proprietor of the bridge in 1829, thereupon provided and maintained a ferry across the river near to the bridge, and for passage over the ferry took the tolls authorized by the Acts; and it was held that these Acts imposed upon the defendant, as proprietor of the bridge, the duty to repair and maintain it as long as he received the tolls. (*u*)

In one case a question was made as to the evidence on which a jury might find that the defendants were an immemorial corporation, and liable, in their corporate character, to the repair of a bridge. The evidence was of a charter of Edw. 6, granted upon the recited prayer of the inhabitants of the borough of Stratford-upon-Avon, 'that the King would esteem them, the inhabitants, worthy to be made, reduced, and erected, into a body corporate and politic;' and thereupon proceeding to 'grant (without any word of confirmation) unto the inhabitants of the borough, that the same borough shall be a free borough for ever thereafter;' and then proceeding to incorporate them by the name of the bailiffs and burgesses, &c.: and this it was considered, would, without more, imply a new corporation. But the same charter recited that it was an ancient borough, in which a guild was theretofore founded, and endowed with lands, out of the rents, revenues, and profits of which a school and an almshouse were maintained, and a bridge was from time to time kept up and repaired; which guild was then dissolved, and its lands lately come into the King's hands; and further recited that the inhabitants of the borough, from time immemorial, had enjoyed franchises, liberties, free customs, jurisdictions, privileges, exemptions, and immunities, by reason and pretence of the guild, and of charters, grants, and confirmations to the guild, and otherwise, which the inhabitants could not then hold and enjoy by the dissolution of the guild, and for other causes, by means whereof it was likely that the borough and its government would fall into a worse state without speedy remedy; and that thereupon the inhabitants of the borough had prayed the King's favour (for bettering the borough and government thereof, and for supporting the great charges which from time to time they were bound to sustain), to be deemed worthy to be made, &c., a body corporate, &c.: and thereupon the King, after granting to the inhabitants of the borough to be a corporation (as before stated), granted them the same bounds and limits as the borough and the jurisdiction thereof from time immemorial had extended to: and then 'willing that the almshouse and school should be kept up and maintained as heretofore (without naming the bridge) and that the great charges to the borough and its inhabitants from time to time incident might be thereafter the better sustained and supported,' granted to the corporation the lands of the late guild. There was also parol evidence, as far back as living memory went, that the corporation had always repaired the bridge.

(*u*) *Nicholl v. Allen*, 1 B. & S. 916.

And the Court held that, taking the whole of the charter and the parol testimony together, the preponderance of the evidence was, first, that this was a corporation by prescription, though words of creation only were used in the incorporating part of the charter of Edw. 6; and, secondly, that the burthen of repairing the bridge was upon such prescriptive corporation, during the existence of the guild, before that charter; though the guild out of their revenues had, in fact, repaired the bridge, but only in ease of the corporation, and not *ratione tenuræ*; and that the corporation were still bound by prescription, and not merely by tenure. A verdict, therefore, against them upon an indictment for the non-repair of the bridge, charging them as immemorially bound to the repair of it, was held to be sustainable. (v)

Upon an indictment for the non-repair of Kelham Bridge, charging the defendants *ratione tenuræ*, they produced at the trial a record from the treasury of the Court of the receipt of the Exchequer, setting forth a presentment in the time of Edw. 3, against the Bishop of Lincoln, who was thereby charged with the liability to repair the same bridge. The record stated a trial of this presentment at the spring assizes, 20 Edw. 3; and that the jury found that the bishop was not liable to repair the bridge, and being asked who of right was bound to repair it, said that they were entirely ignorant; but, that the bridge was built about sixty years before, and then of alms of the men of the country passing that way; and that a former Bishop of Lincoln passing through the country, charitably bestowed 40s. on the workmen of the said bridge, and not in any other manner. The defendants also put in a writ of privy seal, dated 28th of June, 20 Edw. 3, granting to the men of Kelham for three years, customs for things for sale passing the said bridge, in order to repair the said bridge. It was held, that these documents were material to the issue, and good evidence towards proving it. It was argued that the ignorance of the jury of any other liability, and their statement of the origin of the bridge, and the manner in which the bishop had contributed, by way of charity and not upon compulsion, were beyond their province; but the Court thought it could not be assumed that at the remote period of this inquiry, the functions of a jury were bounded within the same limits as at present; every lawyer, indeed, knew that the contrary was the fact; with the reasonable presumption therefore, which must always be made in favour of the regularity of proceedings conducted by proper authority, it might not be too much to hold that this inquest was a public proceeding, in which the jury might properly inquire, not only whether the person charged, but also in general who, and whether any one was liable to the repairs. At the same time there was no necessity for going this length; because, even if there should be some irregularity in setting forth some particulars not inquired of that could not vitiate what was correctly done. The facts then, that the bishop was presented as chargeable by the men of Kelham, acting for the public, that such presentment ended with his acquittal on that ground, and that it was shortly followed by the grant of pontage to the men of Kelham for the same repairs, were strong to negative

any immemorial liability *ratione tenuræ*, because the Court must suppose that the presentment would rather have been made against the person so liable than against the bishop; and that the grant of pontage would not have been made at all. (*w*)

The 22 Hen. 8, c. 5, s. 1, called the Statute of Bridges, and made in affirmance of the common law, enacts that the justices of the peace in every shire, franchise, city, or borough, or four of them, whereof one to be of the quorum, may inquire and determine, in their general sessions, of all manner of annoyances of bridges broken in the highways: and make such process and pains on every presentment against the persons as ought to be charged for the making or amending of such bridges as the King's Bench is used to do, or as it shall seem by their discretions to be necessary and convenient. Secs. 2, 3 enact, that where it cannot be known what hundred, city, town, &c., ought to make such bridges decayed, they shall, if without city, or town corporate, be made by the inhabitants of the shire or riding; and if within any city or town corporate, then by the inhabitants of such city or town corporate; and that if part shall be in one shire, &c., and part in another, the inhabitants of each shall repair and make such part as lies within their respective limits. Sec. 9 enacts, that such parts of highways as lie next adjoining to the ends of bridges by the space of three hundred feet, shall be amended as often as need shall require; and that the justices, or four of them, whereof one to be of the quorum, within their several limits, may inquire and determine, in their general sessions, all annoyances therein, and do in everything concerning the same in as ample a manner as they may do for making and repairing bridges, by virtue of the Act. (*x*) No private bridges are within the purview of this statute, but only such as are common in the highways where all the king's liege people have or may have passage. (*y*) Unless the justices of a town, &c., be four in number, and one of the quorum, they have no jurisdiction under this statute. But the justices of the county in which such town (not being a county of itself, and not having the number of justices), shall lie, may determine as to the annoyances of bridges within the town, &c., if it be known for a certainty what persons are bound to repair them: but if it be not known, it seems that such annoyances are left to the remedy at common law. (*z*)

The term 'riding,' in the 22 Hen. 8, c. 5, is not to be restrained to districts called by that name, but any division of a county, which corresponds in its definition to that of a riding, is to be included within it. The Isle of Ely, therefore, is included within that term; and it is sufficient in an indictment for the non-repair of a bridge within the Isle of Ely to allege that the bridge is in the Isle of Ely, out of repair, and that the inhabitants of the Isle of Ely ought to repair it. (*a*)

(*w*) *R. v. Sutton*, 8 Ad. & E. 516; 3 N. & P. 569.

(*x*) See the 5 & 6 Will. 4, c. 50, s. 21, *post*, p. 870.

(*y*) 1 Hawk. P. C. c. 77, s. 19, and see *ante*, p. 852.

(*z*) 1 Hawk. P. C. c. 77, s. 20. 2 Inst. 702.

(*a*) *R. v. Isle of Ely*, 15 Q. B. 827. The Court held that the 6 & 7 Will. 4, c. 87, 7 Will. 4, & 1 Vict. c. 53, s. 7, and 1 Ann. st. 1, c. 18, s. 1, showed that the Isle of Ely was a division of a county corresponding to a riding.

It appears also to have been holden, that where the King enlarges the boundaries of a city, by annexing part of the county to the county of the city, the enlarged part is to be considered as parcel of the old county of the city, so as to charge its inhabitants with the repairs of bridges which were situate, at the time when the 22 Hen. 8, c. 5, was made, within the county at large. The point was put upon the ground that the statute lays no absolute charge till a bridge is in decay; so that though, when the statute was made, the bridges in question were within the county of Norfolk, yet, as they were not then in decay, the statute had no operation upon them before they were annexed to the city of Norwich. (b) But where a borough incorporated by charter with a non-intromittant clause, was enlarged under the 2 & 3 Will. 4, c. 64, and 5 & 6 Will. 4, c. 76, s. 7, by the addition of a parish in the same county containing a bridge, which until that time the county had repaired, and there was no evidence that the borough had ever been used to maintain any bridge, it was held that the transfer of the new district did not render the borough liable to repair the bridge. (c)

The 13 & 14 Vict. c. 64, s. 5, recites that by the 5 & 6 Will. 4, c. 76, certain bridges and parts of bridges have been included within cities and boroughs, which bridges before that Act were maintained as to the whole or such parts thereof as were within such cities or boroughs by the inhabitants thereof, and the remaining bridges and parts of bridges which were not situate within such limits were maintained by the counties or ridings respectively adjoining thereto, and enacts that 'every bridge which is wholly or in part included within the boundary of any such city or borough, the inhabitants whereof, before the passing of the said recited Act, were by prescription or otherwise liable to and did maintain the bridges and parts of bridges within their respective cities and boroughs, shall as to the whole of such bridges, if the same is (*sic*) wholly within the limits of such city or borough, or as to such part as is within the limits of such city or borough, if part only is within such limits, be maintained, altered, widened, and repaired, improved or rebuilt, under the sole management and control of the council of such city or borough. (d)

But though the inhabitants of a county, by common right, and other persons, by the obligations which have been mentioned, are bound to repair existing bridges, no person can be compelled to build, or contribute to the building of any *new bridge*, without an Act of Parliament; nor can the inhabitants of a county, by their own authority, change a bridge or highway from one place to another. (e). Before the 14 Geo. 2, c. 33, the justices at the sessions had no authority to change the situation of bridges; but by that statute they were overpowered, at their quarter sessions, to purchase any

(b) *R. v. Norwich*, 1 Str. 177. And see also *R. v. St. Peter in York*, 2 Lord Raym. 1249. *R. v. Oswestry*, 6 M. & S. 361, *post*, p. 873.

(c) *R. v. New Sarum*, 5 Q. B. 941.

(d) The previous sections provide for the repair, &c., of bridges within corporate cities and boroughs, and for the raising money for those purposes.

(e) 2 Inst. 700, 701. By *Magna Charta* it is enacted that *nulla villa nec liber homo distringatur facere pontes, aut riparias, nisi qui ab antiquo et de jure facere consueverunt tempore Henrici regis avi nostri*. And see 2 Inst. 29. *R. v. Devon*, 4 B. & C. 670, *post*, p. 870.

piece of land adjoining or near to any county bridge, within the limits of their respective commissions, for the more commodious enlarging or convenient rebuilding the same; but the land was not to exceed an acre for any such bridge. (*f*) It was considered by a very learned judge, that this statute impliedly enabled the magistrates to alter the position of bridges to suit the convenience of the public; (*g*) but a more recent statute expressly gives them that power where bridges are so much in decay as to require to be taken down. The 43 Geo. 3, c. 59, s. 2, enacts, 'that where any bridge or bridges, or roads at the ends thereof, repaired at the expense of any county, shall be narrow and incommodious, it shall and may (*h*) be lawful to and for the justices at any of their general quarter sessions, to order and direct such bridge or bridges and roads to be widened, improved, and made commodious for the public; and that where any bridge or bridges, repaired at the expense of any county, shall be so much in decay as to render the taking the same wholly down necessary or expedient, it shall and may be lawful to and for the said justices, at any of their said general quarter sessions, to order and direct the same to be rebuilt, either on the old site or situation, or in any new one more convenient to the public, contiguous to or within two hundred yards of the former one, as to such justices shall seem meet.' And the statute also provides for the purchasing of land necessary for such purposes, not exceeding an acre at any one bridge; and for assessing a compensation for such land, by means of a jury, where the surveyor cannot agree for the price with the owner, in the same manner as was done by the 13 Geo. 3, c. 78, (*i*) in relation to highways. By 54 Geo. 3, c. 90, s. 1, these provisions, relating to the purchase of land, are extended to such buildings and other erections as may be necessary to be purchased for the purposes of the 43 Geo. 3; and the provisions of the 43 Geo. 3 (except such as relate to bridges thereafter to be re-erected), (*j*) are extended as well to bridges, and the roads at the ends thereof, repaired by the inhabitants of hundreds, and other general divisions in the nature of hundreds, as to bridges and the roads at the ends thereof, repaired by the inhabitants of counties. The 3 Geo. 4, c. 126, s. 107, reciting that 'many bridges on turnpike roads are, by prescription, liable to be repaired by certain parishes, and not by the county or counties in which they are situated, and which bridges, from change of times and circumstances, are become no longer sufficiently convenient for the use of the public, without being enlarged or otherwise improved,' enacts, that 'it shall be lawful for any such county or counties, parish or parishes, respectively, to enter into a composition or agreement with each other, and by the authority of those persons who shall be legally competent to make rates for such county and parish respectively, whereby the improvement and future repair of any such bridge shall be undertaken, and lie upon the county or counties in which

(*f*) 14 Geo. 2, c. 33, s. 1. It also provides for the payment for the land out of the county rates; and its conveyance to such persons as the justices shall appoint, in trust for the purposes of the bridge.

(*g*) By Buller, J., in *R. v. Glamorgan-shire*, 5 T. R. 283.

(*h*) *Re Newport Bridge*, 2 E. & E. 377.

(*i*) Repealed by the 5 & 6 Will. 4, c. 50. This Act of the 43 Geo. 3, is not to extend to bridges repaired by reason of tenure, &c. Sec. 7.

(*j*) *Post*, p. 865.

such bridge is locally situated ; and that all rates made for carrying into effect any such composition, agreement, repairs, or improvement, shall be made and assessed in the same manner as other the rates of such county or parish respectively, and shall be good and valid to all intents and purposes in the law whatsoever.'

Where the justices of the county of Dorset had contracted for the building of a new bridge in a different site, in lieu of the old one, which was ruinous ; and had directed the old bridge to be taken down before the new one was passable, for the benefit of the old materials, which were to be used by the contractor in finishing the new bridge ; the Court refused a writ of prohibition to them, to restrain them from pulling down the old bridge before the new one was passable ; and this, though there were strong affidavits of the inconvenience and loss which would be sustained by the people in the neighbourhood, by being obliged to use a circuitous way in the interval. And they referred the complainants to the ordinary remedy by indictment, if the pulling down the old bridge, under these circumstances, were a nuisance. (*k*)

The question, whether the inhabitants of a county, from their common-law liability to the repair of public bridges, are liable to repair a bridge not originally built by them, appears to have been formerly a subject of much discussion. But, after able argument and great consideration, the principle was established 'that if a man build a bridge, and it *become useful* to the county in general, the county shall repair it.' (*l*) Upon this principle, where the inhabitants of a township took down an ancient foot-bridge, which they were bound to repair, and built another, for horses and carriages, in a different and more commodious part of the river, which became afterwards of general public utility, it was held that this bridge should be repaired by the county, and not by the township. (*m*) And the same principle of the public being obliged to support a bridge of public utility has been acted upon in many subsequent cases. Thus the county was held liable to repair a bridge erected in the King's highway, which about forty years before had been erected by an individual, for his private benefit and utility, and for making a commodious way to his tin-works, upon proof that the public had constantly used the bridge from the time of its being built. (*n*) And where an old foot-bridge had been enlarged, in the first instance to a horse-bridge, and afterwards to a carriage-bridge, by a township, at their expense, it was recognized as the general law that where a township, or any private individuals, build a new bridge, and dedicate it to the public benefit, and it is used by the public, the *onus* of repairing it falls upon the county at large. (*o*) In a case also where the doctrine was fully investigated and considered, it was held that the county or riding was liable to the repair of a bridge built by trustees under a turnpike Act, there being no special provision for exonerating them from the common-law liability, or transferring it to others. (*p*)

(*k*) R. v. Dorset, 15 East, 594.

(*l*) Glusburne Bridge case, 5 Burr. 2594.
2 Blac. R. 685.

(*m*) Id. *ibid*.

(*n*) R. v. Glamorgan, 2 East, 356, note (*a*).
Bac. Abr. *Bridges*.

(*o*) R. v. The West Riding of Yorkshire,
2 East, 353, note (*a*).

(*p*) Id. *Ibid*. 2 East, 342, and the circumstance of the trustees being enabled to raise tolls for the support of the roads was not considered as taking the case out of the general principle.

Where it appeared that Queen Anne, in the year 1708, for her greater convenience in passing to and from Windsor Castle, built a bridge over the Thames, at Datchet, in the common highway leading from London to Windsor, in lieu of an ancient ferry, with a toll, which belonged to the crown; and she and her successors maintained and repaired the bridge till 1796, when, being in part broken down, the whole was removed, and the materials converted to the use of the king, by whom the ferry was re-established as before; it was held that the bridge was a public one, repairable by the inhabitants of the county. (*q*) And where the facts were, that a person about forty-five years before had erected a mill, and dam thereto, for his own profit, by which means he deepened the water of a ford through which there was a public highway, but the passage through which was, before the deepening, very inconvenient at times to the public, and the miller had afterwards built a bridge over it, which the public had ever since used; it was decided that the county, and not the miller, were chargeable with the reparation. (*r*) In this case the Court was much pressed by an ancient authority to this effect: 'If a man erect a mill for his own profit, and make a new cut for the water to come to it, and make a new bridge over it, and the subjects used to go over this as over a common bridge; this bridge ought to be repaired by him who has the mill, and not by the county, because he erected it for his own benefit.' (*s*) And as that authority seemed to constitute an anomaly in the law, and to be at variance with all the cases, the record of the case was examined. From this it appeared that the real question was on an obligation to repair by reason of the tenure of certain lands; and that no such question as was supposed, namely, of a legal obligation resulting from the building of the bridge by the mill-owner for his benefit, was ever directly or indirectly decided, or could properly have been argued. (*t*) Relieved, therefore, from this case, the Court considered the authorities from first to last as uniform; and as establishing the doctrine that if a private person build a private bridge, which afterwards becomes of public convenience, the county is bound to repair it. (*u*)

In these cases there is always that which is to be considered as an acquiescence by the county. The county is not liable, except for bridges made in *highways*. (*v*) Upon the trial of an indictment against the inhabitants of a county for the non-repair of a bridge built by private owners, but not built in an existing highway, the true effect of the evidence as to the dedication and the adoption of

(*q*) *R. v. Bucks*, 12 East, 192.

(*r*) *R. v. Kent*, 2 M. & S. 513.

(*s*) 1 Roll. Abr. 368, citing the 8 Edw. 2, as adjudged in *B. R. for Bow Bridge and Channel Bridge*, against the Prior of Stratford.

(*t*) See a copy of the record, 2 M. & S. 520, *et seq.* But see the observations on this record and case in *R. v. Ely*, 15 Q. B. 327, and *semble*, that the case may be rightly stated by Rolfe.

(*u*) *R. v. Kent*, 2 M. & S. 520. The same doctrine appears to have been laid down long ago in a case cited by Northey, attor-

ney-general, in *R. v. Wilts*, 1 Salk. 359.

With respect to the property in the materials of a bridge, when dedicated to the public, it still continues in the individual, subject to the right of passage by the public, so that, when severed and taken away by a wrongdoer, he may maintain trespass for the asportation. *Harrison v. Parker*, 6 East, 154.

(*v*) By Bayley, J., in *R. v. St. Benedict*, 4 B. & A. 450. *Ante*, p. 795. But there seems no necessity for anything like an adoption in this case any more than in the case of a road. *R. v. Leake*, *ante*, p. 795.

the bridge by the county is always a question for the jury. The fact that such a bridge is of public utility and is used by the public is not necessarily conclusive against the county on the question of liability, uses and utility being only elements for consideration in determining that question, but there need not, in addition to evidence of public uses and public utility, be proof of an overt act amounting to a formal adoption by a body capable of representing and binding the county. (*w*)

But though a bridge built by an individual may thus become public, yet it will not become so from the mere circumstance of its being built in a public way; and it appears to have been considered that a bridge built in a public way, without public utility, or built colourably in an imperfect or inconvenient manner, with a view to throw the burthen of rebuilding or repairing it immediately on the county, may be indicted as a nuisance. (*x*) A protection is also given to counties by the 43 Geo. 3, c. 59, from the burden of repairing certain bridges, erected after the 24th June, 1803. For the more clearly ascertaining the description of bridges, which inhabitants of counties shall be liable to repair and maintain, sec. 5 enacts, 'that no bridge hereafter to be erected or built in any county, by or at the expense of any individual or private person or persons, body politic or corporate, shall be deemed or taken to be a county bridge, or a bridge which the inhabitants of any county shall be compellable or liable to maintain or repair, unless such bridge shall be erected in a substantial and commodious manner, under the direction or to the satisfaction of the county surveyor, or person appointed by the justices of the peace at their general quarter sessions assembled, or by the justices of the peace of the county of Lancaster, at their annual general sessions; and which surveyor, or person so appointed, is hereby required to superintend and inspect the erection of such bridge, when thereunto requested by the party or parties desirous of erecting the same; and in case the said party or parties shall be dissatisfied, the matter shall be determined by the said justices respectively at their next general quarter sessions, or at their annual general sessions in the county of Lancaster.' (*y*)

By 41 & 42 Vic. c. 77, sec. 21, 'Any bridge erected before the passing of this Act in any county without such superintendence as is provided in section five of the statute of the forty-third year of King George the Third, chapter fifty-nine, and which is certified by the county surveyor or other person appointed in that behalf by the county authority to be in good repair and condition, shall, if the county authority see fit so to order, become and be deemed to be a bridge which the inhabitants of the county shall be liable to maintain and repair.'

Sec. 22. 'The county authority may make such contribution as it sees fit out of the county rates towards the cost of any bridge to be hereafter erected, after the same has been certified in accordance with the

(*w*) *R. v. Southampton*, 19 Q. B. D. 590.

(*x*) *R. v. The West Riding of Yorkshire*, 2 East, 342.

(*y*) See *R. v. Netherthong*, 2 B. & A. 183. Sec. 7 provides, that nothing in the Act contained shall extend to any bridges

or roads which any person or persons, bodies politic or corporate, is, are, or shall be liable to maintain or repair by reason of tenure or by prescription, or to alter or affect the right to repair such bridges or roads.

provisions of section five of the statute of the forty-third year of King George the Third, chapter fifty-nine, as a proper bridge to be maintained by the inhabitants of the county; so always that such contribution shall not exceed one half the cost of erecting such bridge.'

Where an ancient bridge in the Isle of Wight had always been repaired by the tithing, in which it was situate, down to the passing of the 53 Geo. 3, c. 92, under the circumstances mentioned in a former page, (z) and in 1814 after the passing of that Act, the bridge being out of repair, the justices for the island caused a bridge of greater width than the old one to be built in a different position, higher up the river, and the expense was paid out of the local rate ordered by the quarter sessions of the county in the manner mentioned at a former page, (a) and levied on the inhabitants of the island, but the directions of the 43 Geo. 3, c. 59, were not complied with; it was held that the county was liable to repair the new bridge. (b)

Upon an indictment for the non-repair of a bridge, it appeared that the bridge had been widened subsequently to the 43 Geo. 3, c. 59, by the trustees of a turnpike road; the bridge had originally been built by them, but had not before been chargeable to the county. The statutes under which they had acted gave them a discretionary power to erect bridges; and the funds of the trusts were made applicable to the repairs. The public had used the bridge in its present state for a number of years; the jury found that it was necessary to have a bridge or culvert for the passage of a stream at the place in question; that a bridge was better for the public; but that a culvert would suffice, and would be beneficial. It was objected that this was substantially a bridge erected since the 43 Geo. 3, and not having been built under the direction of the county surveyor, the county was not liable to repair it. But the Court held that the county were liable; the bridge existed and was used by the public before the Act, and the county were bound to repair it; the trustees widened it after the Act came into force, but it continued the same bridge. The case of a bridge widened, as in the present instance, appears not to have occurred to the legislature; at all events, it is not within the words of the section. As to the finding of the jury, as they were of opinion that a bridge was better than a culvert, the verdict of guilty was right. (c)

Where before the 43 Geo. 3, c. 59, there had been a bridge used as a carriage-bridge, and which the county repaired; the abutments on each side of the river were of stone, but all the rest of the bridge was wood; in 1807 the wooden part of the bridge was, during a flood, carried some distance down the river, but the abutments remained, and such part of the old wooden work as was fit for the purpose, together with some new materials, were replaced on the abutments at the expense of the parish, and the bridge was made about two feet wider than it was before, and the bridge had ever since been used by the public; it was held that this was substantially the same bridge as that which existed before 1807, and that the county were liable to repair it. (d)

(z) *Ante*, p. 857.

(a) *Ante*, p. 857.

(b) *R. v. Southampton, Sandown Bridge case*, 18 Q. B. 841. It rather seems that the ground of this decision was, that this bridge

was built by the justices of the county, and not by 'any individual or private person.'

(c) *R. v. Lancashire*, 2 B. & Ad. 813.

(d) *R. v. Devonshire*, 5 B. & Ad. 383; 2 N. & M. 212.

The words of the 43 Geo. 3, c. 59. s. 5, comprehend every kind of persons, by whom or at whose expense a bridge is built. Where, therefore, a bridge was erected after the passing of the Act, by trustees appointed by a local turnpike Act, but not under the direction or to the satisfaction of the county surveyor, &c., it was held that it was not a bridge which the county was bound to repair. (e)

It may be useful shortly to notice a few cases in which counties have been holden not to be liable to repair certain bridges built by companies or trustees under particular Acts of Parliament.

Where the Medway Navigation Company, being empowered under a local Act to make the river navigable, and to take tolls, and 'to amend or alter such bridges or highways as might hinder the passage or navigation, leaving them or others as convenient in their room,' had, forty years before, destroyed a ford across the river in the common highway, by deepening its bed, and built a bridge over the same place; it was held that they were bound to keep such bridge in repair, as under a continuing condition to preserve the new passage in lieu of the old one, which they destroyed for their own benefit. (f)

A canal company, authorized by an Act of Parliament to make the river Bain navigable, and to make and enlarge certain navigable cuts, and build bridges and other works connected with the navigation, made a navigable cut, and deepened a ford which crossed the highway, for their own benefit, and thereby rendered a bridge necessary for the passage of the public, which was accordingly built at the expense of the company in the first instance: and it was held that the company (who were found to have profitable funds for the purpose) were bound to maintain it. (g)

The 49 Geo. 3, c. 84, appoints trustees for taking down the old and building a new bridge over the river Tone, and empowers them to take tolls; and enacts that it shall be lawful for them, out of the monies received, to build a new bridge, &c., and vests the property in the old and new bridge, during the continuance of the Act, in the trustees; and further enacts, that as soon as the purposes of the Act shall be executed, then and from henceforth the tolls shall cease, and the bridge, &c., shall be repaired by such persons as are by law liable to repair the old bridge. Upon this statute it was decided that, during the time the trustees were engaged in executing the powers of the Act, and before they had completed them, the county was not liable to repair the bridge. (h)

The commissioners appointed by the 22 Car. 2, to make the river Waveney navigable, were authorized to cut through any land they thought fit, and make channels. They cut through a highway; and that cut made a bridge over it necessary for the public, though such bridge was of no use to the navigation. A bridge was accordingly made, but by whom did not appear; and the bridge being out of repair, an indictment was preferred against the proprietor of the navigation (who received tolls upon the navigation) for not repairing it. Upon

(e) *R. v. Derbyshire*, 3 B. & Ad. 147.

(f) *R. v. Kent*, 13 East, 220.

(g) *R. v. Lindsey*, 14 East, 317.

(h) *R. v. Somerset*, 16 East, 305. Lord Ellenborough, C. J., intimated an opinion,

that if the trustees were dilatory in executing the powers of the Act, the Court of King's Bench, upon application, would lend its aid to expedite their functions.

a case reserved, he contended, that he was not liable: but the Court held clearly that he was; for by the act of his predecessors the bridge was made; they cut, not for public purposes, but for private benefit; and the county could not be called upon, for it could be no advantage to them to have a bridge in lieu of solid ground. (i)

To an indictment against the Isle of Ely, for not repairing a bridge situated within it, the defendants pleaded that the river, over which the bridge was erected, was an artificial cut made across an existing highway by the Adventurers for the purpose of draining the Bedford level, by virtue of certain powers under a commission of sewers; that the said river intersected and rendered wholly impassable the said highway, and that the Adventurers, under the powers aforesaid, erected the said bridge over the said river to enable the public to pass as they otherwise would have done; that the river was made for the benefit of the Adventurers, and was maintained by them until the 15 Car. 2, c. 17, when the property in the river and its banks, and in the bridge, and in the lands benefited by the river, became vested in the corporation of the Conservators of the Fens; and that the river was from that time maintained by the corporation for their own benefit, and that they have continually repaired the said bridge, and still are liable to repair the same: and upon demurrer the Court of Queen's Bench held that this plea disclosed a valid defence. And Patteson, J., in delivering the considered judgment of the Court, said, 'The principle appears to be this, undoubtedly a just one, that where the Act making the bridge necessary, though authorized to be done, interferes with the public rights, and is done primarily for private purposes, and the public use, from which the public benefit is inferred, is to be referred only to the Act, because made necessary by it, the public, indeed, remaining only with the same convenience which it had before, the authority to do the act is conditional only, equally whether the condition be expressed or implied; and the condition also is in both cases continuing so long as the act continues whereby the public right is interfered with. And as the obligation here insisted on, arises from the party's own act, which would be unlawful unless such obligation could be complied with, the case steers clear of any consideration as to the existence of funds: for the party bringing the duty upon himself for his own purpose cannot object the want of funds for the performance of it. It appears to us, that when the Adventurers first cut the drain, and interrupted the public highway, that act, however authorized by commissioners of sewers or other power vested in them, was done for their own use, benefit, and convenience, and could be legal only on the condition of substituting another highway, which could be only by a bridge as convenient for the public as the old highway; (j) that the public were in truth no gainers by the change; they were by this hypothesis merely placed in the same situation as before; and that the condition which was necessary to legalize the first cutting of the drain was and is a continuing one; the instant it is broken, the indefeasible rights of the public revive,

(i) R. v. Kerrison, 3 M. & S. 526.

(j) The words in the report are, 'as the old one,' obviously an error.

and the cut becomes a nuisance. We think, therefore, that the plea is in substance good.' (k)

It has been seen, (l) that by the 22 Hen. 8, c. 5, it is enacted, that such parts of highways as lie next adjoining to the ends of bridges, by the space of three hundred feet, shall be amended as often as need shall require; but it does not say by whom they shall be amended. It proceeds, however, to provide that the justices may inquire and determine and do in everything concerning the same in as ample a manner as they may do for making and repairing bridges by virtue of that Act. (l) As early as the reign of Edw. 3, the judges understood the approaches to a bridge to be, as it were, excrescences of the bridge itself, and that the charge of repairing them was considered as belonging, *primâ facie*, to the party charged with the repair of the bridge itself. To an indictment against an abbot, for the non-repair of a bridge, he pleaded that he was only bound to repair two arches of it, and the jury found that he was bound only to the repair of two arches, and the bridge over the stream of the water, *et non fines ejusdem pontis*. This was pleaded by him to a second indictment, and the record read: yet Knivet, J., said, 'We intend that you are bound to repair the bridge, and the highway applying to the one end and to the other; although the soil be in another, because the easement shall be preserved for the people.' (m) It has been decided, upon the authority of the preceding case, that by the common law, declared and defined by this statute, and other subsequent statutes, (n) the inhabitants of a county liable to the repair of a public bridge are liable also to repair to the extent of *three hundred feet* of the highway at each end of it; and that, if indicted for not repairing such highway, they can only exonerate themselves by pleading specially that some other is bound to repair it by prescription or tenure. (o) And it seems that private persons are equally liable. (p)

It may be considered settled that where the liability to repair a bridge attaches by the general law, the liability to repair the approaches to the bridge for the space of three hundred feet follows the same rule. A corporation, therefore, liable by *prescription*, to repair a bridge, is also, *primâ facie*, liable to repair the highway to the extent of three hundred feet at each end; and such presumption is not rebutted by proof that the corporation have been known only to repair the bridge, and that the only repairs known to have been done to the highway have been performed by commissioners under a turnpike road Act. (q)

But where a new and substantial bridge, of public utility, was built within one county, and adopted by the public, it was held that the inhabitants of that county were bound to repair it, although it was built within three hundred feet of an old bridge, repairable by the inhabitants of another county, who were bound as a matter of

(k) R. v. Ely, 15 Q. B. 827.

(l) *Ante*, p. 860.

(m) The Abbot of Combe's case, 43 Ass. 275, B. pl. 37, as stated in the judgment of the Court in R. v. Sutton, 8 A. & E. 71.

(n) 1 Anne, st. 1, c. 18, ss. 3, 5, 13, and 12 Geo. 2, c. 29.

(o) R. v. West Riding of Yorkshire, 7 East, 588, and the judgment was afterwards affirmed in the House of Lords, 5 Taunt. 284.

(p) 3 Chit. C. L. 589.

(q) R. v. The Mayor of Lincoln, 3 Ad. & Ell. 65, 3 N. & P. 273.

course under the 22 Hen. 8, c. 5, to maintain three hundred feet of road adjoining to their bridge, though it lay in the other county. The Court said, that while the space where the bridge was built continued a road, it was repairable as part of the old bridge; but that when there was a substantial bridge built upon it, such bridge was repairable, as a bridge, by the inhabitants of the county in which it was situated, according to the statute. (*r*)

But now by the 5 & 6 Will. 4. c. 50, s. 21, 'If any bridge shall hereafter (*s*) be built, which bridge shall be liable by law to be repaired by and at the expense of any county or part of any county, then and in such case all highways leading to, passing over, and next adjoining to such bridge shall be from time to time repaired by the parish, person, or body politic or corporate, or trustees of a turnpike road, who were by law before the erection of the said bridge bound to repair the said highways: provided nevertheless, that nothing herein contained shall extend or be construed to extend to exonerate or discharge any county or any part of any county from repairing or keeping in repair the walls, banks, or fences of the raised causeways and raised approaches to any such bridge, or the land arches thereof.' (*t*)

It seems clear that those who are bound to repair public bridges must make them of such height and strength as shall be answerable for the course of the water, whether it continues in the old channel, or makes a new one; and that they are not punishable as trespassers for entering on any adjoining land for such purpose, or for laying on the materials requisite for such repairs. (*u*) The Court of King's Bench once intimated, that if a bridge used for carriages, though formerly adequate to the purpose intended, were not of a sufficient width to meet the present public exigencies, owing to the increased width of carriages, the burthen of widening it must be borne by those who are bound to repair the bridge; (*v*) but in the House of Lords, on error, this point was considered as doubtful. (*w*) And, it has since been held, that the obligation upon a county is only to repair a bridge to the extent to which that bridge has been originally given to the public, and that they are not bound to widen it. (*x*)

The enactment in the 24 & 25 Vict. c. 70, s. 7, which provides that if an owner of a locomotive engine, which, in being driven over a bridge carrying a highway over a stream, damages the bridge so as to render it unsafe for traffic, 'none of the proprietors, undertakers, directors, conservators, trustees, commissioners, or other persons interested in or having the charge of such navigable river, canal, or railway, or other the tolls thereof, or of such bridge or arch, shall be

(*r*) *R. v. Devon*, 14 East, 477.

(*s*) The Act came into operation on the 20th March, 1836.

(*t*) The effect of this section is, in the case of county bridges built subsequently to the Act, to throw the liability for surface repairs to the roadway of the bridge and approaches upon the highway authority. *R. v. Southampton*, 17 Q. B. D. 424, varied on another ground, 19 Q. B. D. 590.

(*u*) 1 Hawk. P. C. c. 77, s. 1. Bac. Abr. *Bridges*. 43 Ass. pl. 37. Br. tit. *Presentment in Courts*, pl. 22, 29. Dalt. c. 14.

(*v*) *R. v. Cumberland*, 6 T. R. 194.

(*w*) *Cumberland v. R.*, 3 B. & P. 354. But the judgment was affirmed upon the ground that, after verdict, it must be presumed that the over-narrowness of the bridge arose from its having been contracted from its ancient width.

(*x*) *R. v. Devon*, 4 B. & C. 670; 7 D. & R. 147. *R. v. Middlesex*, 3 B. & Ad. 201: per Lord Tenterden, C. J. But though their obligation is only to this extent, see, as to the power to widen by an order at sessions, 43 Geo. 3, c. 59, s. 2, *ante*, p. 861.

liable to repair or make good any damage so occasioned, &c.; but every such damage shall be forthwith repaired to the satisfaction of the proprietors, undertakers, directors, conservators, trustees, commissioners, or other person, as aforesaid, respectively interested in or having the charge of such river, &c., by and at the expense of the owner, &c., of such locomotive at the time of the happening of such damage,' does not apply to public bridges repairable by the inhabitants of a county, so as to relieve them from their liability at common law to repair, and render the owner of the locomotive liable to an indictment for the non-repair of such a bridge so damaged by such locomotive. And a conviction of the owner in such a case upon such an indictment was quashed. (y)

The taxing and collecting monies for the repairing of bridges, and the highways at the ends thereof, were first regulated by 22 Hen. 8, c. 5, and afterwards by the 1 Anne, stat. 1, c. 13, by which the justices at their quarter sessions were empowered, upon presentment of any bridge being out of repair, to make assessments upon every town or place within their commissions for the charges of the repairs. The 12 Geo. 2, c. 29, s. 1, for the better collection of such monies, appointed that they should be paid out of the general county rate; but sec. 13 enacted, that no money should be applied to the repair of any bridge, until a *presentment* should be made by the grand jury of its want of reparation. The 43 Geo. 3, c. 59, s. 2, also enacted, that no money should be applied to such purposes until *presentment* made of the insufficiency or want of reparation of such bridges. The 52 Geo. 3, c. 110, and 55 Geo. 3, c. 143, make alterations in this respect, and sec. 5 of the latter Act enacts, that 'it shall and may be lawful to and for the justices of the peace of any county, city, riding, division, town corporate, or liberty, at their general quarter sessions respectively, to contract and agree, or to authorise any other person or persons to contract and agree, with any person or persons, for the maintaining and keeping in repair any county or hundred bridge, and the road over such county or hundred bridge, and so much of the roads at the ends thereof as are by law liable to be repaired at the expense of any such county, hundred, city, riding, division, town corporate, or liberty, or any part of the same; and the said justices are hereby empowered to order such sum or sums of money as may be contracted for and agreed to be paid for the repairing, amending, and supporting such bridges, and the roads over the same, or the ends thereof, to be paid (in cases where the county is liable to the repair thereof) by the treasurer of the county out of the county rate: or (in cases where the hundred is liable to the repair of the same) by the bridge-master (or other public officer charged with the repair of bridges) of the hundred, by which such bridge is liable to be repaired, for any term not exceeding seven years, nor less than one, although no presentment of the insufficiency, decay, or want of repair of the same shall have been made, and although no public notice shall have been given by the said justices, at their respective general or quarter sessions, of their intention to contract for the repair of such bridges, or the roads at the ends thereof, as respectively directed by the said

Act (12 Geo. 2, c. 29): provided nevertheless that, before any such contract shall be made, the said justices shall cause notices to be given in some public paper circulated in such county, city, riding, hundred, division, town corporate, or liberty, of their intention to contract.' By the 4 & 5 Vict. c. 49, the justices in sessions may borrow money for repairing county bridges on the credit of the county rate, and may charge the rate with interest on the money borrowed, and with the payment of such further sum as shall secure the repayment of the money borrowed in fourteen years. By the 13 & 14 Vict. c. 64, provision is made for the repairs and rebuilding of bridges within cities corporate and boroughs, under the control of the councils of such cities and boroughs, and for the borrowing of money for such purposes. By the 22 Hen. 8, c. 5, s. 3, it was provided that where part of a county bridge shall be in one shire, &c., and part in another, the inhabitants of each shire, &c., shall be contributory. (z) It has been questioned whether a borough, which has no bridge within its own limits, be not liable to contribute to the repairs of a county bridge. (a) Where certain townships had enlarged a bridge to a carriage-bridge, which they were before bound to repair as a foot-bridge, it was held that they should still be liable to repair *pro rata*. (b) So where a carriage-bridge had been built before 1119, and certain abbey lands had been ordained for its repair, and the proprietors of those lands had always repaired the bridge so built; and in 1736 the trustees of a turnpike road, with the consent of a certain number of the proprietors of the abbey lands, constructed a wooden bridge along the outside of the parapet of the carriage-bridge, partly connected with it by brickwork and iron pins, and partly resting on the stone work of the bridge; it was held that this foot-bridge was not parcel of the carriage-bridge, which the proprietors of the abbey lands were bound to repair, but that the county was liable to repair it. (c)

The methods of appointing surveyors, &c., for effecting the repairs or rebuilding of bridges, and the powers given to such surveyors, and persons employed under contracts, to procure materials for such purposes, are contained in different Acts of Parliament, the provisions of which do not fall within the object of this work. (d)

Where those upon whom the liability rests of repairing public bridges, neglect their duty, such nonfeasance is a nuisance to the public, punishable by information, presentment, or indictment. An *information* was held to lie in the Court of King's Bench for the non-repair of a bridge in a case where it was considered that the 22 Hen. 8, c. 5, gave only a concurrent, but not an exclusive, jurisdiction to the sessions; (e) but probably it would not be granted, except in some cases of a peculiar nature, in which the Court might be

(z) This provision is alluded to by Lord Mansfield, C. J., in *R. v. Weston*, 4 Burr. 2511, and by counsel *arguendo* in *R. v. Clifton*, 5 T. R. 501, 2. The usual proceeding at this time appears to have been to indict each county separately, for neglecting to repair its own division.

(a) 1 Hawk. P. C. c. 77, s. 25. 1 Keb. 68.

(b) *R. v. The West Riding of Yorkshire*,

2 East, 353, note (a); and see *R. v. Surrey*, 2 Campb. 455.

(c) *R. v. Middlesex*, 3 B. & Ad. 201.

(d) See them collected in Burn's Just., tit. *Bridges* VI.; and see also 55 Geo. 3, c. 143. By the 43 Geo. 3, c. 59, s. 4, inhabitants of counties may sue for damages done to bridges in the name of the surveyor.

(e) *R. v. Norwich*, 1 Str. 177.

satisfied that the purposes of justice would not be effected by an indictment. (f) The more usual course of proceeding is by indictment or presentment. (g)

Although the 5 & 6 Will. 4, c. 50, repeals the 13 Geo. 3, c. 78, which enabled a justice on his own view to present a highway which was out of repair, that enactment is kept alive as to county bridges by the 43 Geo. 3, c. 59, which extended the enactments of the 13 Geo. 3, c. 78, to county bridges so far as applicable thereto, and consequently a single justice may still present a bridge out of repair on his own view. (h)

The 22 Hen. 8, c. 5, s. 1, gave power to the justices of the peace to hear and determine, in their general sessions, all annoyances of bridges broken in the highways, and to make process, &c., as the King's Bench used to do. By sec. 5, where any bridge is in one shire, and the persons or lands which ought to be charged are in another shire; or where the bridge is within a city, or town corporate, and the persons or lands that ought to be charged are out of the said city; the justices of such shire, city, or town corporate, shall have power to hear and determine such annoyances, being within the limits of their commission; and if the annoyance be presented, then to make process into every shire of the realm against such as ought to repair the same, and to do further in every behalf as they might do if the persons or lands chargeable were in the same shire, city, or town corporate where the annoyance is.

Any particular inhabitant or inhabitants of a county, or tenant or tenants of land chargeable with the repairs of a public bridge, may be indicted for not repairing it, and will be liable to pay the whole fine assessed by the Court for the default of such repairs; and will be put to their remedy at law for a contribution from those who are bound to bear a proportionable share in the charge. (i) It is sufficient, in an indictment against a parish, to allege that the inhabitants thereof have, from time whereof, &c., repaired and amended, and have been used and accustomed, &c., without stating any other ground of liability. (j) And so it is against a hundred, although it appears that a township has been annexed to it by statute within time of legal memory, such statute providing that the inhabitants of the township should do everything the same as the inhabitants of the hundred did, or were bound to do. (k) In the case of a corporation, if it were alleged that the mayor, alderman, and burgesses had from time immemorial repaired, and it appeared that there was a period when the corporation was not so constituted, it would be bad. In such a case, the proper way would be, to allege that the corporation had immemorially repaired; and then, however constituted the corporate body might have been at different periods, the allegation would be

(f) See *ante*, p. 809.

(g) 2 Inst. 701. It has been held that an action will not lie by an individual against the inhabitants of a county for an injury sustained from a county bridge being out of repair. *Russell v. The Men of Devon*, 2 T. R. 667. *Gibson v. Preston (Mayor of)*, 39 L. J. Q. B. 131.

(h) *R. v. Brecon*, 15 Q. B. 813; 18 L. J. M. C. 123.

(i) 1 Hawk. P. C. c. 77, s. 3. *Bac. Abr. t. Bridges*.

(j) *R. v. Hendon*, 4 B. & Ad. 628.

(k) *R. v. Oswestry*, 6 M. & S. 361. See *R. v. Norwich*, 1 Str. 177, *ante*, p. 361.

sustained. (l) The indictment ought to show what sort of bridge it is; whether for carts and carriages, or for horses or foot-men only; and if the duty to repair arise by reason of the tenure of certain lands, the indictment must show where those lands lie. (m) An indictment charging an individual with the repair of a bridge, *by reason of his being owner and proprietor of a certain navigation*, is not equivalent to charging him *ratione tenuræ*, but it is erroneous; and it seems that a count, charging an individual by reason of being owner of a navigation under a *private* Act of Parliament, must set forth the Act; and it is not sufficient to state that such party is chargeable, by being owner and proprietor of the property subject to the charge. (n) In presentments by the grand jury, it is said that there is no occasion to show who ought to repair; and that it is sufficient if the defect be shown, and the bridge stated to be public. (o) Where an indictment alleged that the defendant, and those whose estate he had in a certain mill, from time whereof the memory of man runneth not to the contrary, had repaired, and it appeared that the mill did not exist before the time of Hen. 8, it was held that the liability from time out of memory was disproved. (oo)

An indictment alleged that 'from time whereof,' &c., 'there hath been and still is a certain common and public bridge over the river Cherwell,' and that the inhabitants of the township of A. E. had repaired and of right ought to repair the part of the said bridge which lies in the said township. It appeared that the arch of the bridge was down to 1806 only nine feet wide as to breadth of road, but was widened in that year to the breadth of fifteen feet at the expense of the township. The road over it was a carriage road both before and after the widening. The defendants before the trial gave a written admission that the bridge in question was such a bridge as was described in the indictment. It was objected that the addition of six feet in width, the repair of which must devolve on the county, was such an alteration that the prescriptive liability to repair the said part situate in the said township was negatived by the proof; but the Court of Queen's Bench held that there was no misdescription. Either the whole of the bridge, including the added part, was still an ancient bridge, and the liability the same as before; or the new part was severable, so that there was an ancient bridge and something else. And either state of things would support the allegation. (p)

There is no doubt that an indictment will lie against a corporation aggregate for the non-repair or obstruction of a public bridge, (pp) or

(l) Per Holroyd, J. *R. v. Oswestry*, 6 M. & S. 361. See a form there, note (a).

(m) 1 Hawk. P. C. c. 77, s. 5.

(n) *R. v. Kerrison*, 1 M. & S. 435.

(o) 3 Chit. Crim. Law, 592, citing Andr. 285.

(oo) *R. v. Hayman*, Moo. & M. 401, Tindal, C. J.

(p) *R. v. Adderbury East*, 5 Q. B. 187. Lord Denman, C. J., and Patteson, J., seemed to think the township liable to repair the added part.

(pp) *R. v. Birmingham and Gloucester R. Co.*, 3 Q. B. 223. *R. v. Great N. E. R. Co.*, 9 Q. B. 315.¹

AMERICAN NOTE.

¹ The contrary seems to have been held in Maine and Virginia. *S. v. Great Works Milling Co.*, 20 Me. 41, 37 Am. D. 38; *C. v.*

Swift Run Gap Turnpike, 2 Va. Cas. 362. The English doctrine is followed in most of the States, see Bishop i. s. 420.

against any members of such corporation who cause an obstruction to a public bridge. (q)

As the occupier of land charged with the repair of a bridge, is undoubtedly liable to the performance of that duty, it is prudent to prefer the indictment against such occupier, and not against the owner, concerning whose liability doubts have risen. (r) In one case (s) the Court of Queen's Bench said, 'With respect to the liability at common law to the repair of bridges *ratione tenuræ*, the result of the authorities seems to be to throw the charge ultimately upon the owner, though primarily, as far as the public are concerned, the occupier may be the person chargeable by indictment in case of non-repair, (t) and it would seem from those authorities that if the owner of land charged with the repair of a bridge *ratione tenuræ* suffer it to be out of repair, and the occupier of the land be indicted and fined, he would be entitled to look for reimbursement to the owner, who ought to have repaired, and who holds the land by the service of repairing the bridge.'

Where an infant, eleven years old, inherited land charged with the repair of a bridge, and his guardian in socage resided on the land, but the infant did not, except occasionally; it was held, that although the infant was actually seised, yet being so by the possession of his guardian, he was not such an owner or occupier of the land, as to be chargeable by indictment for the non-repair of the bridge, but that the guardian was such an owner and occupier. (u)

It seems that, if there were no other person against whom performance of the repairs of a bridge could be enforced, infancy would not exempt a party, liable in other respects, from an indictment for non-repair. (u)

It is laid down, that it is not sufficient for the defendants in an indictment for not repairing a bridge to excuse themselves by showing either that they are not bound to repair the whole or any part of the bridge, without showing what other person is bound to repair it, and that in such case the whole charge shall be laid upon the defendants by reason of their ill plea. (v) But it is submitted that, from analogy to the case of highways, this doctrine must be understood only of indictments against the county, and not of indictments against individuals, or bodies corporate, who are not of common right bound to repair; because, as it lies on the prosecutor specially to state the grounds on which such persons are liable, they may negative these parts of the charge under the general issue. (w) And it has been holden, upon an information for not repairing a bridge, that the defendants, if not chargeable of common right, may discharge themselves upon the general issue. (x) But it is clear that the inhabitants of a county, in order to exonerate themselves from the burden of repairing a public bridge lying within it, must show by their plea that

(q) *R. v. Betts*, 16 Q. B. 1022. *R. v. Hawk*. P. C. c. 77, s. 3, and the cases there cited.

(r) See *R. v. Sutton*, 3 A. & E. 597.

(s) *Baker v. Greenhill*, 3 Q. B. 148. See this case as to the construction of Acts dealing with certain liabilities to repair bridges *ratione tenuræ*.

(t) *R. v. Bucknell*, 7 Mod. 55, 98. 1

(u) *R. v. Sutton*, 3 A. & E. 597.

(v) 1 Hawk. P. C. c. 77. s. 4. Bac. Abr. tit. *Bridges*. Burn's Just. tit. *Bridges*, V.

(w) 3 Chit. Crim. L. 592.

(x) *R. v. Norwich*, 1 Str. 177, and see *ante*, p. 814.

some other person is liable to repair. (y) It has, however, been decided, that it is competent to the inhabitants of a county, upon the general issue, to give evidence of the bridge having been repaired by private individuals. But this evidence appears to have been considered barely admissible as a medium of proof that the bridge was not a public bridge, which undoubtedly the defendants had a right to prove by every species of evidence; and the Court seemed to think that it would have but little effect; though in order to ascertain whether a bridge be public, the mode of its construction, and the manner of its continuance, may be circumstances which, as they are connected with others, may have much or little weight. (z)

To an indictment for not repairing a bridge described as lying in two parishes, it is no plea that there has been a verdict and judgment against J. S. finding him liable to repair it *ratione tenuræ*, upon a presentment describing it as lying in one of the parishes; for he may be liable to repair only what is in one parish. The information was against the county of Essex for not repairing Dagenham Bridge, in the several parishes of Hornchurch and Dagenham; and the plea was that Knatchbull and Fanshaw had been presented for not repairing it *ratione tenuræ* of lands in Barking, and that a verdict and judgment had passed against Fanshaw; and to this there was a demurrer, because the presentment stated in the plea described the bridge as in Dagenham parish. And the Court said that Fanshaw might be bound to repair what was in Dagenham parish, and the county might be bound to repair the rest; and gave judgment for the King. (a)

It is said that where the defendants plead that an individual ought to repair the bridge mentioned in the indictment, and take a traverse to the charge against themselves, the attorney-general, in this special case, may take a traverse upon a traverse, and insist that the defendants are bound to the repairs, and traverse the charge alleged against the individual; and that an issue ought to be taken of such second traverse; and that the attorney-general may afterwards surmise that the defendants are bound to repair it, and that the whole matter shall be tried by an indifferent jury. (b)

Where to an indictment against a riding for not repairing a public carriage-bridge, the plea alleged that certain townships had *immemorially* used to repair the said bridge, it was held that evidence that the townships had *enlarged* the bridge to a carriage-bridge, which they had before been bound to repair as a foot-bridge, would not support the plea. (c) And, upon the same principle, where it was proved that a particular parish was bound by prescription to repair an old wooden foot-bridge, used by carriages only in times of flood, and that about forty years ago the trustees of a turnpike road built on the same site a much wider bridge of brick, which had been constantly used ever since by all carriages passing that way; it was

(y) *R. v. Wilts*, 1 Salk. 359. 2 Lord Raym. 1174.

(z) *R. v. Northampton*, 2 M. & S. 262. If a bishop, &c., hath once or twice of alms repaired a bridge, this binds not; but yet it is evidence against him, that he ought to repair, unless he proves the contrary, 2 Inst. 700. See *R. v. Sutton*, ante, p. 860.

(a) *R. v. Essex*, T. Raym. 384.

(b) 1 Hawk. P. C. c. 77, s. 5. Bac. Abr. tit. *Bridges*. See ante, p. 816.

(c) *R. v. The West Riding of Yorkshire*, 2 East, 533, note (a). *R. v. Middlessex*, 3 B. & Ad. 201.

held that these facts did not support a plea pleaded by the county that the parish had *immemorially* repaired, and still ought to repair, the said bridge. (*d*) Where the county was indicted for not repairing a bridge, and pleaded that one Marsack was liable to repair *ratione tenuræ*, it was held that this plea was not sustained by evidence that the estate of Marsack was part of a larger estate, which part Marsack purchased of the Lord Cadogan, who had retained the rest in his own hands, and had repaired the bridge as well before as after the purchase. (*e*)

The 1 Anne, st. 1, c. 18, s. 5, enacts, that all matters concerning the repairing and amending of bridges and the highways thereunto adjoining shall be determined in the county where they lie, and not elsewhere: but it seems that objection may be made to the justices where they are all interested, and that in such case the trial shall be had in the next county. (*f*) So where the matter concerns the whole county, a suggestion may be made of any other county's being next adjacent, and the *venire* shall come from thence so that there may be an indifferent trial: (*g*) and if the bridge lies within the county of a city, and the question is, whether the county of the city, or the county at large, ought to repair, on a suggestion of these facts on the record, the *venire* will be awarded into the county adjacent to the larger district. (*h*)

Even before the recent Acts making persons interested competent witnesses, inhabitants of counties might be witnesses in prosecutions against private persons or corporate bodies for not repairing bridges. (1 Anne, stat. 1, c. 18, s. 13.) (*i*) As to persons not now being incompetent as witnesses on the ground of interest, see vol. 3, *Evidence*.

It was said in one case, (*j*) and decided in another, (*k*) that evidence of reputation could not be admitted to establish a liability to repair a bridge *ratione tenuræ*. But it has since been expressly held that such evidence is admissible to prove such a liability; for although the question may involve matter of private right, yet matters of public interest also depend upon it. Where, therefore, to a presentment that a bridge was out of repair the parish pleaded that A. was liable to repair it *ratione tenuræ*, and issue was joined on A.'s liability, it was held that evidence of reputation that A. ought to repair the bridge as alleged in the plea was admissible. (*l*)

On an indictment against a township for non-repair of a bridge, declarations of rateable inhabitants, whether actually rated or not,

(*d*) *R. v. Surrey*, 2 Campb. 455. The facts would not have availed the county if the plea had been framed differently, as the county was clearly liable to the repair of the new bridge. See *ante*, p. 363.

(*e*) *R. v. Oxfordshire*, 16 East, 223.

(*f*) *R. v. Norwich*, 5 Geo. 1, cited in 2 Burr. 859. Burn's Just. tit. *Bridges*, V.

(*g*) *R. v. Wilts*, 6 Mod. 307, and see 1 Salk. 380. 2 Lord Raym. 1174; 1 Hawk. P. C. c. 77, s. 6.

(*h*) *R. v. Norwich*, 1 Str. 177. 3 Chit. Crim. L. 593.

(*i*) See *R. v. Carpenter*, 2 Show. 47. *R. v. Hayman*, Moo. & M. 401, Tindal, C. J.

(*j*) *R. v. Antrobus*, 2 A. & E. 794, per Patteson, J.

(*k*) *R. v. Wavertree*, 2 M. & Rob. 353. Maule, J.

(*l*) *R. v. Bedfordshire*, 4 E. & B. 535. The plea alleged that three arches ought to be repaired by different persons, by reason of their tenure of three different manors, and the question rejected at the trial was whether a witness had heard from his deceased father who ought to repair the second arch.

may be given in evidence for the Crown, such inhabitants being defendants on the record. (m)

As a prosecution for a nuisance to a public bridge has for its object the removal of the obstruction, or the effecting of the necessary reparations, the judgment of the Court upon a conviction will generally be regulated by the same principles as those which have been mentioned in relation to the judgment for a nuisance to a highway. (n) The 1 Anne, stat. 1, c. 18, s. 4, enacts that no fine, issue, penalty, or forfeiture, upon presentments or indictments for not repairing bridges, or the highways at the ends of bridges, shall be returned into the Exchequer, but shall be paid to the treasurer, to be applied towards the repairs. But this seems only to relate to county bridges.

Where upon an indictment for not repairing a bridge the verdict was unsatisfactory, the practice formerly was to grant a rule for staying the judgment upon payment of the costs of the prosecution, in order that another indictment might be tried. (o) But it would seem that the Court would now grant a new trial in such a case. (p)

The 1 Anne, stat. 1, c. 18, s. 5, enacts, that no presentment or indictment for not repairing bridges, or the highways at the ends of bridges, shall be removed by *certiorari* out of the county into any other Court. But it has been decided that, notwithstanding these general words of the statute, an indictment for not repairing a bridge may be removed by *certiorari* at the instance of the prosecutor. (q) And it has been resolved that this clause of the Act extends only to bridges where the county is charged to repair; and that where a private person or parish is charged, and the right will come in question, the 5 Will. & M. c. 11, allowed the granting a *certiorari*. (r)

The 13 Geo. 3, c. 78, s. 64, empowered the Court trying an indictment for non-repair of a highway to award costs to the prosecutor if the defence was frivolous; and the 43 Geo. 3, c. 59, s. 1, enacted that all 'matters and things in the said Act contained relating to highways,' shall, so far as applicable, be extended and applied to county bridges 'as fully and effectually as if the same and every part thereof were herein repeated and re-enacted.' And the Court of Queen's Bench held that the clause as to costs in the 13 Geo. 3, c. 78, was substantively re-enacted in the 43 Geo. 3, c. 59, with reference to county bridges, and therefore was not repealed by the 5 & 6 Will. 4, c. 50, which repeals in general terms the 13 Geo. 3, c. 78, and consequently that the costs of an indictment for the non-repair of a bridge may still be ordered where the defence is frivolous. (s)

The judge, who tries an indictment for the non-repair of a bridge, removed by *certiorari*, may certify after the assizes that the defence

(m) *Ante*, p. 818.

(n) *R. v. Alderbury East (Inhabitants of)*, 5 Q. B. 187.

(o) *R. v. Oxfordshire*, 16 East, 223. *R. v. Sutton*, 5 B. & Ad. 52. 2 Nev. & M. 57.

(p) See *R. v. Russell*, 3 E. & B. 942, *ante*, p. 819.

(q) *R. v. Cumberland*, 6 T. R. 194.

Affirmed in Dom. Proc., 3 Bos. and Pull. 354. And see *ante*, note (e), p. 819.

(r) *R. v. Hamworth*, 2 Str. 900. 1 Barnard, 445. See as to the 5 W. & M., *ante*, p. 819.

(s) *R. v. Merionethshire*, 6 Q. B. 343.

was frivolous, and by such certificate award payment of costs to the prosecutor, which will be enforced by the Court of Queen's Bench. (t)

In highway and bridge indictments and other indictments instituted for the purpose of trying or enforcing a civil right, only the defendant and his or her husband or wife are admissible witnesses and compellable to give evidence. See Vol. III., *Evidence*.

By 51 and 52 Vic. c. 41, which transfers to the County Council all county bridges and roads repairable therewith, a county council has power to purchase or take over on terms to be agreed upon existing bridges not being at present county bridges, and to erect new bridges, and to maintain, repair, and improve any bridges so purchased, taken over, or erected. (tt)

(t) *R. v. Merionethshire*, *supra*; and see *R. v. Pambridge*, 3 Q. B. 901, *ante*, p. 824.

(tt) 51 & 52 Vic. c. 41, § 6.

CHAPTER THE THIRTY-THIRD.

OF OBSTRUCTING PROCESS, AND OF DISOBEDIENCE TO ORDERS OF MAGISTRATES.¹

SEC. I.

Of Obstructing Process.

THE obstructing the execution of lawful process is an offence against public justice of a very high and presumptuous nature; and more particularly so when the obstruction is of an arrest upon criminal process. So that it has been holden that the party opposing an arrest upon criminal process becomes thereby *particeps criminis*: that is, an accessory in felony, and a principal in high treason. (a)

And it should seem that the giving assistance to a person suspected of felony and pursued by the officers of justice, in order to enable such person to avoid being arrested, is an offence of the degree of misdemeanor, as being an obstruction to the course of public justice. (b) Thus, an indictment was preferred against the defendant for a misdemeanor in the obstruction of public justice by rendering assistance to one Olive, who was suspected of forgery and pursued by the officers of justice, in order to enable Olive to avoid being arrested. It appeared in evidence that Olive had committed a forgery, as stated in the indictment; and had afterwards, in a state of desperation, thrown himself from the top of a house, by which he was greatly hurt; and that the defendant, who was a relation and commiserated his wretched condition, conveyed him secretly on board a barge from Gloucester to Bristol, and was actively employed at the latter place in endeavouring to enable him to escape from this country in a West India vessel. Advertisements had been printed and circulated, stating the charge against Olive, and offering a large reward for his apprehension: but it was not proved that any one of these advertisements had come to the knowledge of the defendant, or that the defendant was acquainted with the particular charge against Olive, or knew that he had been guilty of forgery, as alleged

(a) 4 Black. Com. 128. 2 Hawk. P. C. c. 17, s. 1, where *Hawkins* submits that it is reasonable to understand the books which seem to contradict this opinion to intend no more than that it is not felony in the party himself, who is attacked in order to be

arrested, to save himself from the arrest by such resistance.

(b) This position is not warranted by the case; for it states that 'Olive had committed forgery,' and the position ought to be 'a person guilty of felony,' instead of 'suspected of felony.' C. S. G.

AMERICAN NOTE.

¹ See *S. v. Hailey*, 2 Strob. 73. There must, however, be some active opposition to

process in order to constitute the offence *Crumpton v. Newman*, 12 Ala. 199.

in the indictment. Upon this ground the defendant was acquitted: but no other objection was taken to the indictment. (c)

Formerly, one of the greatest obstructions to public justice, both of the civil and criminal kind, was the multitude of pretended privileged places where indigent persons assembled together to shelter themselves from justice (especially in London and Southwark) under the pretence of their having been ancient palaces of the Crown, or the like; (d) and it was found necessary to abolish the supposed privileges and protection of these places by several legislative enactments. See the 8 & 9 Will. 3, c. 27, 9 Geo. 1, c. 28, and 11 Geo. 1, c. 22, now in part repealed by the 30 & 31 Vict. c. 59.

In some proceedings, particularly in those relating to the execution of the revenue laws, (e) the Legislature has made especial provision for the punishment of those who obstruct officers and persons acting under proper authority. But in ordinary cases, where the offence committed is less than felony, the obstruction of officers in the apprehension of the party will be only a misdemeanor, punishable by fine and imprisonment. (f)

A party will not be guilty of the offence of obstructing an officer, or the process which such officer may be about to execute, unless the arrest is lawful. And in an indictment for this offence it must appear that the arrest was made by proper authority. (g)

But where the process is regular, and executed by the proper officer, it will not be competent even for a peace officer to obstruct him, on the ground that the execution of it is attended with an affray and disturbance of the peace; for it is an established principle that if one, having sufficient authority, issue a lawful command, it is not in the power of any other, having an equal authority in the same respect, to issue a contrary command; as that would be to legalize confusion and disorder. (h) The following case upon an indictment for an assault and rescue proceeded upon this principle. Some sheriff's officers having apprehended a man by virtue of a writ against him, a mob collected, and endeavoured by violence to rescue the prisoner. In the course of the scuffle, which was at ten o'clock at night, one of the bailiffs, having been violently assaulted, struck one of the assailants, a woman, and it was thought for some time that he had killed her; whereupon, and before her recovery was ascertained, the constable was sent for, and charged with the custody of the bailiff who had struck the woman. The bailiffs, on the other hand, gave the constable notice of their authority, and represented the violence which had been previously offered to them; notwithstanding which the constable proceeded to take them into custody upon the charge of murder, and at first offered to take care also of their prisoner; but their prisoner was soon rescued from them by the surrounding mob. The next morning, the woman having recovered, the bailiffs were released by the constable. Upon these facts,

(c) *R. v. Buckle*, cor. Garrow, B., Gloucester Spring Ass. 1821.

(d) The White Friars and its environs, the Savoy, and the Mint in Southwark, were of this description.

(e) *Ante*, p. 277, *et seq.*

(f) 2 Chit. Cr. L. 145, note (a).

(g) *R. v. Osmer*, 5 East, 804.

(h) 1 East, P. C. c. 5, s. 71, p. 304.

Heath, J., was clearly of opinion that the constable and his assistants were guilty of the assault and rescue. (*i*)

Where the obstruction of process by the rescue of a party arrested, is accompanied, as is usually the case, with circumstances of violence and assault upon the officer, the offence may be made the subject of a proceeding by indictment; and, as will be shown more fully in a subsequent chapter, (*j*) the rescue, or attempt to rescue a party arrested on a criminal charge is usually punished by that mode of proceeding. And the offence of rescuing a person arrested on mesne process, or in execution after judgment, subjects the offender to a writ of *rescous*, or an action in which damages are recoverable. (*k*) And it has also been the frequent practice of the Courts to grant an attachment against such wrongdoers, it being the highest violence and contempt that can be offered to the process of the Court. (*l*)

The forcibly rescuing goods distrained, and the rescuing cattle by the breach of the pound in which they have been placed, have been considered as offences at common law, and made the subject of indictment. (*m*) In a case where a defendant was indicted for rescuing goods distrained for church-rate, it seems not to have been doubted that such a rescue was an indictable offence. (*n*) It has before been stated, that an indictment will lie for taking goods forcibly, if such taking be proved to be a breach of the peace; (*o*) but, as a mere trespass, without circumstances of violence, is not indictable; (*p*) it has been doubted whether even a pound-breach, which has been considered as a greater offence at common law than a rescue, (*q*) is an indictable offence, if unaccompanied by a breach of the peace. (*r*) But, on the other hand, it has been submitted that, as a pound-breach is an injury and insult to public justice, it is indictable *as such* at common law. (*s*)

Where a hayward had distrained a horse *damage feasant* on an inclosed piece of pasture, and it was rescued from him on the way to the pound, and before it was impounded; it was held that this was not indictable, for till the horse got to the pound the hayward was merely acting as the servant of the owner of the land. (*t*)

(*i*) Anon. Exeter Sum. Ass. 1793. 1 East, P. C. c. 5, s. 71, p. 305.

(*j*) *Post*, ch. xxxvi. p. 904.

(*k*) Bac. Abr. tit. *Rescue* (C.). Com. Dig. tit. *Rescous* (D.).

(*l*) Bac. Abr. *ibid*. Com. Dig. tit. *Rescous* (D.) 6. But, in order to ground an attachment for a rescue, it seems there must be a *return* of it by the sheriff; at least, if it was on an arrest of mesne process. Bac. Abr. *ibid*. 2 Hawk. P. C. c. 22, s. 34. Anon. 6 Mod. 141. And see, as to the return of the rescue by the sheriff, Com. Dig. tit. *Rescous* (D.) 4, (D.) 5. Bac. Abr. tit. *Rescue* (E.). R. v. Belt, 2 Salk. 586. R. v. Elkins, 4 Burr. 2129. Anon. 2 Salk. 586. R. v. Minify, 1 Str. 642. R. v. Ely, 1 Lord Raym. 35. Anon. 1 Salk. 586. 1 Lord Raym. 589. Apparently an indictment would lie against an unqualified person who had practised as a solicitor in a County Court, for contempt; see R. v. Judge of Brompton County Court (1893), 2 Q. B. 195.

(*m*) Cro. Circ. Comp. 198. 2 Starkie's Crim. pl. 617. 2 Chit. Crim. L. 201, precedents of indictments for rescuing goods distrained for rent; and Cro. Circ. Comp. 199. 2 Chit. Crim. L. 204, 206, precedents of indictments for pound-breaches. At the Bedfordshire Quarter Sessions, an indictment for pound-breach was presented and tried, the Court acting on the passage in the text. R. v. Butterfield, 17 Cox, C. C. 598.

(*n*) R. v. Williams, 1 Den. C. C. 529; the point decided was that the distress warrant was unlawful.

(*o*) *Ante*, p. 204. Anon. 3 Salk. 187.

(*p*) *Ante*, p. 204.

(*q*) *Mirror of Justice*, c. 2, s. 26.

(*r*) 2 Chit. Crim. L. 204, note (*b*), referring to 4 Leon. 12.

(*s*) 2 Chit. Crim. L. 204, note (*b*), and the authorities there cited.

(*t*) R. v. Bradshaw, 7 C. & P. 233, Coleridge, J. The learned judge seemed to think that, if the horse had been rescued after it

It has been held in Ireland on an indictment for rescuing property distrained for poor-rate, that it is not necessary to prove the making of the rate, or that there is any sum due at the time of making the distress; but the warrant to collect, if in the form and with the requisites required by the Poor-law Act, will be sufficient *prima facie* evidence of the authority of the collector; and that the section which requires the sum to be collected to be specified in the warrant is satisfied by a reference in the warrant to the collector's book delivered at the time to the collector, and by such reference the book becomes incorporated with the warrant. (u) But where on a similar indictment the warrant was in the same form as in the preceding case, but the occupiers were only described as 'tenants of commons' in the collector's book, it was held that the collector had no authority to distrain on the actual occupier, as the description in the book was insufficient. (v)

The 6 & 7 Vict. c. 30, provides for the summary conviction of any person who releases any cattle distrained on any inclosed land. (w)

The civil remedy, however, given by the 2 Will. & M. c. 5, s. 4, will, in most cases of a pound-breach, or a rescue of goods distrained for rent, be found the most desirable mode of proceeding, where the offenders are responsible persons. That statute enacts that, upon pound-breach, or *rescous* of goods distrained for rent, the person grieved shall, in a special action on the case, recover treble damages and costs against the offenders, or against the owner of the goods, if they come to his use. (x)

It is laid down in the books that, if a rescue be made upon a distress, &c., for the King, an indictment lies against the rescuer. (y) And we have seen that a lessee, resisting with force a distress for rent, or forestalling or rescuing the distress, will be guilty of the offence of a forcible detainer. (z)

SEC. II.

Of Disobedience to Orders of Magistrates.¹

Disobedience to an order of the justices of the peace at their sessions, made by them in the due exercise of the powers of their juris-

had been put in the pound, an indictment might have been maintained for the rescue.

(u) *R. v. Brennan*, 6 Cox, C. C. 381. The warrant was headed, 'General warrant to collect and levy poor-rate, Gorey Union,' and directed the collector 'to levy the several poor-rates, and arrears of poor-rates, in the annexed book set forth, from the several persons therein rated, or other persons liable to pay the said rates and arrears of rates,' and was signed by the chairman of the guardians, two guardians, and the clerk of the union at a meeting of the board.

(v) *R. v. Boyle*, 7 Cox, C. C. 428.

(w) See the 14 & 15 Vict. c. 92, s. 19, as to these offences in Ireland. As to persons impounding cattle, — supplying them with food, see 12 & 13 Vict. c. 92, s. 5, 17 & 18 Vict. c. 60.

(x) See, as to the proceedings upon this statute, *Bradby on Distresses*, 282, *et seq.* *Bac. Abr. tit. Rescue (C.)*. See 5 & 6 Will. 4, c. 50, s. 75, which imposes a penalty on persons breaking the pound to rescue cattle, &c., found trespassing on highways.

(y) *F. N. B.* (102 G.). *Com. Dig. tit. Rescous (D.)*, 3.

(z) *Ante*, p. 724.

AMERICAN NOTE.

¹ Disobedience to orders of magistrates tempt, but it would seem to be indictable, in America is generally dealt with as con- See *Bishop*, i. s. 240.

diction, is an indictable offence. Thus, a party has been holden to be guilty of an indictable offence, in disobeying an order of sessions for the maintenance of his grandchildren. (a) In this case it was moved in arrest of judgment that, as the 43 Eliz. c. 2, s. 7, had annexed a specific penalty, and a particular mode of proceeding, the course prescribed by the Act ought to have been adopted, and that there could be no proceeding by indictment: but, after able argument, and great deliberation, the Court were of opinion that the prosecutor was at liberty to proceed at common law, or in the method prescribed by the statute; and that there could be no doubt but that an indictment would lie at common law for disobedience to an order of sessions. (b)

Upon the same principle it was holden that, where an Act of Parliament gave power to the King in council to make a certain order, and did not annex any specific punishment to the disobeying it, such disobedience was an indictable offence, punishable as a misdemeanor at common law. (c)

Disobeying an order of one or more justices, when duly made, is also a common-law offence, and therefore punishable by indictment. (d) Thus a power to remove a pauper being given to two justices by the 13 & 14 Car. 2, c. 12, the not receiving him is a disobedience of that statute for which an indictment will lie. (e) And, by Foster, J., 'In all cases where a justice has power given him to make an order, and direct it to an inferior ministerial officer, and he disobeys it, if there be no particular remedy prescribed, it is indictable.' (f)

Where an order of justices is a nullity on the face of it, another order may be made, and an indictment will lie for disobeying it. (g)

Where such an order is made, any person mentioned in it, and required to act under it, must, upon its being duly served upon him, lend his aid to carry it into effect. Thus where, upon a complaint made by an excluded member of a friendly society, two persons, A. and B., the then stewards of the society, were summoned, and an order made by two justices that such stewards and the other members of the society should forthwith reinstate the complainant; it was holden, that though this order was not served upon A. and B. until they had ceased to be stewards, yet it was still obligatory upon

(a) *R. v. Robinson*, 2 Burr. 799, 800.

(b) *Id. ibid.* See the principles upon which this decision proceeded, *ante*, p. 192, *et seq.* By the 'Epping Forest Amendment Act, 1872,' sect. 5, the Epping Forest commissioners may make orders prohibiting, until after their final report, any inclosure or waste of land within the forest, subject, in their judgment, to any forestal or common rights. The commissioners made a general order prohibiting all persons from committing waste upon a piece of land described until the final report, or until further order; all persons affected to be at liberty to apply to them as there might be occasion. The defendant applied to the commissioners by counsel as a person affected, but they refused to enter into the question raised. The defendant was convicted upon an indictment moved by *certiorari* for breach of this order. Held, upon a case stated, that the order and

the indictment were good. *R. v. Walker*, 13 Cox, C. C. 94.

(c) *R. v. Harris*, 4 T. R. 202. 2 Leach, 549.

(d) *R. v. Balme*, Cowp. 650. *R. v. Fearnley*, 1 T. R. 316.

(e) *R. v. Davis*, 1 Bott. 361, pl. 378. Say. 163. Burn's Just. tit. *Poor*. Sec. XVII., 2, i.

(f) Burn's Just., *ibid.*

(g) *R. v. Brisby*, 1 Den. C. C. 416; 2 C. & K. 962. *R. v. Marchant*, 1 Cox, C. C. 203. *R. v. Cant*, 2 M. C. C. 271; C. & Mars. 521. In *R. v. Ferrall*, 2 Den. C. C. 51, the question was whether, under a clause in the Annual Mutiny Act, a soldier was freed from an indictment for disobeying a bastardy order; and the Court held that he was not, as it was a 'criminal matter;' but the later Mutiny Acts are in different terms.

them, as members of the society, to attempt to reinstate the complainant; and that their having ceased to be stewards was no justification of entire neglect on their part. (*h*) Lord Ellenborough, C. J., said at the trial, 'The order is not confined to the stewards alone, but is made upon all the members of the society; and the defendants were members of the society independently of their being stewards, and were bound, as members, to see that the order was obeyed: or, at least, to have taken some steps for that purpose. As members, they might have done something; as stewards, indeed, they might, with greater facility, have enforced obedience to the order; but each member had it in his power to lend some aid for the attainment of that object.' And when in the ensuing term a motion was made that a verdict might be entered for the defendants, on the ground that, having ceased to be stewards when the notice was served, they had not been guilty of a criminal default; the Court said, that if the defendants had shown that they did everything in their power to restore the party, in obedience to the order, they might have given it in evidence by way of excuse. (*i*)

There must be personal service of an order on all persons who are charged with a contempt of it; and it was held, upon demurrer, to be a decisive objection to an indictment for a disobedience and contempt of an order of sessions, that it charged a contempt by six persons of an order, which was only stated to have been served on four of them. (*j*)

The entire order of a Court to pay the expenses of a prosecution, under the 7 Geo. 4, c. 64, s. 26, must be served on the treasurer of the county. Where, therefore, an order was made to pay an aggregate sum, the details of which were annexed, and the attorney tore off the details, and served the order for the payment of the aggregate sum alone on the treasurer; it was held, on a case reserved, that he was not indictable for refusing to obey the order. (*k*)

It seems not to be necessary, in an indictment against a public officer for disobedience of orders, to aver that the orders have not been revoked. (*l*) But an indictment for disobeying an order of justices must show explicitly that the order was made; and it is not sufficient to state the order by way of recital. (*m*) It is said to be more safe to aver that the defendant was requested to comply with the terms of the order. (*n*) But if the statement of the order having been served on all the defendants (which, as has been before observed,

(*h*) *R. v. Gash*, 1 Starkie, 41. The Acts relating to Friendly Societies are consolidated and amended by the 38 & 39 Vict. c. 60.

(*i*) *Id. ibid.* The motion was also made on another ground; namely, a defect in the jurisdiction of the magistrates: two magistrates of the county of Middlesex, where the meetings of the society were held, having made the order, though the society had been originally established in London, and its rules enrolled at the sessions for London. But the Court decided that the magistrates of Middlesex had jurisdiction. See 33 Geo. 3, c. 54, and 49 Geo. 3, c. 125, s. 1. *R. v. Wade*, 1 B. & Ad. 861.

(*j*) *R. v. Kingston*, 8 East, 41. *R. v. Gilkes*, 3 C. & P. 52.

(*k*) *R. v. Jones*, 2 Moo. C. C. R. 171; 9 C. & P. 401, S. C.

(*l*) *R. v. Holland*, 5 T. R. 607, 624, a case of an indictment against the defendant for malversations in office while he was one of the council at Madras.

(*m*) *R. v. Crowhurst*, 2 Lord Raym. 1363.

(*n*) 2 Chit. Crim. L. 279, note (*g*), citing 1 T. R. 316, which is the case of *R. v. Fearnley*, where an objection was taken to an indictment that it did not contain such statement; but the Court did not find it necessary to give any opinion upon the point.

is a necessary statement) be omitted, the want of such an allegation will not be supplied by averring that they were all requested to perform the duties required by the order. (*o*)

Where an indictment for refusing to obey an order of justices to pay a church-rate, alleged that the rate 'was duly made as by law in that behalf required, and that the same was afterwards duly allowed as by law in that behalf required,' and that 'the defendant was duly rated' in and by the said rate at the sum of sixteen shillings; it was objected that the facts ought to have been stated which constituted a due making and allowance of the rate and a due rating of the defendant; but it was held, first, that these introductory facts were alleged only to show that the justices had jurisdiction to make the order, and therefore they fell within the description of inducement, in which such a general allegation was allowed. Secondly, that the rest of the count showed that the justices had sufficient authority to make the order, as there was a sufficient information by competent persons to give them jurisdiction. (*p*) The same indictment stated that a church-rate had been duly demanded of the defendant, and that he had refused and neglected to pay the rate to W. A. and J. C., who *then* were the churchwardens; and it was held that, though it did not state that they were churchwardens when the rate was demanded, it was sufficient that they were shown to be so when the rate was neglected and refused to be paid; for that was the offence. (*q*) The same indictment alleged that a justice made his warrant (summons), whereby, 'after reciting as therein recited,' he summoned the defendant, and the indictment did not state to whom the warrant was directed; and it was held that it was sufficient, for enough of the warrant was stated without mentioning the recital, and it was sufficiently averred that it was directed to the defendant. (*q*) The same indictment averred that a summons was issued on the 30th of May to appear on the 6th of June then next, and was 'before the said 6th day of June, to wit, on the 30th of May' personally served on the defendant, who did not appear in pursuance of it; and it was held that it must be assumed that the justices satisfied themselves that it had been served a reasonable time before the day of appearance, otherwise they would have acted unjustly in making the order in the absence of the defendant, and the intendment is always favourable to the validity of an order. (*r*) On the same indictment it was also held that it is not necessary to set out the order according to the tenor; it is enough to set out the substance of it correctly. (*s*) The same indictment did not aver the church-rate to have been in force when the order to pay it was made, but it was held that, as it averred that the rate continued in force at the time of the indictment, it was quite sufficient. (*t*) It was also held that such an indictment need not allege the date of the order, (*u*) as that was immaterial.

An indictment alleged that an appeal was made by the defendants against a rate to the sessions, who dismissed the appeal, and

(*o*) *R. v. Kingston*, 8 East, 41, 53.

(*p*) *R. v. Bidwell*, 1 Den. C. C. 222. The case was decided by Parke, B., alone. See 31 & 32 Vict. c. 109, entitled, 'An Act for the abolition of compulsory church rates.'

(*q*) *Ibid.*

(*r*) *Ibid.*

(*s*) *Ibid.*

(*t*) *Ibid.*

(*u*) *Ibid.*

ordered the defendants 'immediately upon service of the said order, or a true copy thereof,' to pay the churchwardens and overseers a sum for costs of the appeal, and that a true copy of the said order was afterwards personally served upon each of the defendants, and each of them had notice of the said order. Nevertheless, the defendants wilfully neglected and refused to pay. Upon the trial the Clerk of the Peace produced the minutes of the sessions, and read the order, which ordered the defendants 'immediately upon service of this order, or a true copy thereof,' to pay the costs. The Clerk of the Peace stated that 'the costs were not taxed during the actual sitting of the sessions, but between the time of the Court adjourning and its meeting. I reported to the magistrates what I thought fit and proper costs; and the Court adopted it. I made a verbal statement, which the Court adopted. I gave both parties an opportunity of attending. The defendants did not attend. I wrote a letter to their solicitor. The appeal was dismissed for want of due notice.' The defendants' attorney was the person attending the appeal, and was present when the order was made. There were four or five of the magistrates at the adjournment who were at the original sessions. A witness proved that he served each defendant with a paper, which he told them was a true copy of the order, as in fact it was, and at the time of service read to each the contents of a parchment writing, which was also a true copy of the order, and was produced on the trial. It was objected, first, that as notice to produce the copies served had not been given, evidence could not be given that the copy served was a true copy; but it was held that a notice to produce the paper served would have been notice to produce a notice, which is never required; secondly, that an order to pay 'upon service of the said order, or a true copy thereof,' was bad on the face of it; but it was held to be perfectly sufficient,—that an order of sessions in that form was good. And the service was also good, whether the book of the sessions or the parchment was the order; for if the book was the original, it could not be shown at the time of the service, and if the parchment was the original, its contents were read over. (v) And, lastly, that the adjourned sessions had no jurisdiction to fix the amount of costs; but the Court held that it was unnecessary to decide that point. The magistrates must be taken to have ordered in the first instance, in the presence of all the parties, that the defendants should pay such costs as the officer might find to be due; and the result of the evidence being that both parties had an opportunity of attending the taxation, and no objection being made when the amount was stated in Court, a state of things took place which amounted to a consent, and therefore the order was valid. (w)

The 11 Geo. 2, c. 19, s. 16, enables two justices to put a landlord in possession of premises in any case where one year's rent (x) is in arrear, and the tenant deserts the premises and leaves them unculti-

(v) Per Coleridge, J., 'An order of the quarter sessions is not like an order of justices out of sessions. It is the judgment of the Court, and that cannot be carried about: it is sufficient if a copy be shown.'

(w) *R. v. Mortlock*, 7 Q. B. 459.

(x) Extended to one half year's rent by 57 Geo. 3, c. 54.

vated or unoccupied so as no sufficient distress can be had; and sec. 17 empowers the next justice or justices of assize, on the appeal of the tenant, to award restitution to the tenant. Upon an indictment for disobeying the order of the justices of assize to restore possession to the tenant, it seems that it is not necessary to prove the proceedings before the magistrates preliminary to the restitution; and that it is sufficient to put in the record made up by the justices of the peace, in which, after reciting the complaint and other proceedings, they declare that they put the landlord into possession; and it seems unnecessary to prove the complaint of the landlord (y)

Upon the trial of an indictment for not paying a sum of money pursuant to an order of sessions made on an appeal by the defendant against a certificate of two justices, for stopping up, diverting, and turning a part of a public footway, the record of the order of sessions, together with proof of the service of a copy of the order upon the defendant, and a demand of the sum ordered thereby to be paid, to which the defendant only answered that he did not owe anything, is sufficient evidence to go to the jury, and it is not necessary to prove *aliunde* the existence of the certificate or the fact of the appeal. An order of sessions made upon such an appeal need not show the time at which the certificate of the justices was lodged with the clerk of the peace; for the sessions have no duty to inquire into that fact, unless the objection is raised before them. (z)

On the trial of an indictment against the stewards of a friendly society for disobeying an order of justices, which recited that the rules of such society had been enrolled, such recital is not evidence of that fact, and it must be proved by other means, in order to show that the justices had jurisdiction to make the order under the 33 Geo. 3, c. 54, s. 2. (a) Upon the trial of such an indictment, the Court will not enter into the merits of the original case, nor will they hear objections to the order which do not appear upon the face of it. (b) But if it appear on the face of the order that the justices had no jurisdiction to make it, the defendant should be acquitted, without being left to bring a writ of error, though the want of jurisdiction be apparent on the face of the indictment. (c)

(y) *R. v. Sewell*, 8 Q. B. 161. The very ground of the appeal might be that the justices of the peace had acted without any complaint, and therefore the proof of the complaint could not be necessary. The Court held in this case that the order of the justices of assize must be made by them as individual justices, and not as a Court, and therefore a certificate of such an order, signed by the deputy clerk of assize in the same way as an order of Court, is not sufficient. It seems also that the order should be signed by the justices of assize, and that they alone,

and none of the other commissioners, have jurisdiction to make such an order.

(z) *R. v. Thornton*, 2 Cox, C. C. 493.

(a) *R. v. Gilkes*, 8 B. & C. 439. The Acts relating to Friendly Societies are consolidated and amended by the 38 & 39 Vict. c. 60.

(b) *R. v. Mitton*, 3 Esp. R. 200, S. C. Cald. 536. *R. v. Gilkes*, 3 C. & P. 52. Abbott, C. J.

(c) *R. v. Hollis*, 2 Star. N. P. C. 536. Abbott, C. J. *R. v. Soper*, 3 B. & C. 857.

CHAPTER THE THIRTY-FOUR.

OF ESCAPES.¹

AN escape is where one who is arrested gains his liberty before he is delivered by the course of the law. (a) And it may be by the party himself; either without force before he is put in hold, or with force after he is restrained of his liberty; or it may be by others; and this also either without force, by their permission or negligence, or with force, by the rescuing of the party from custody. Where the liberation of the party is effected either by himself or others, without force, it is more properly called an *escape*; where it is effected by the party himself with force, it is called *prison-breaking*; and where it is effected by others, with force, it is commonly called a *rescue*. (b) In the present chapter it is proposed to consider those acts without force, which more properly come under the title of *escape*.

There is little worthy of remark in the books respecting an escape effected by the party himself, without force:² but the general principle appears to be, that, as all persons are bound to submit themselves to the judgment of the law, and to be ready to be justified by it, those who, declining to undergo a legal imprisonment when arrested on criminal process, free themselves from it by any artifice, and elude the vigilance of their keepers, before they are put in hold, are guilty of an offence in the nature of a high contempt, and punishable by fine and imprisonment. (c) And it is also criminal in a prisoner to escape from lawful confinement, though no force or artifice be used on his part to effect such purpose. Thus, if a prisoner go out of his prison without any obstruction, the doors being opened by the consent or negligence of the gaoler, or if he escape in any other manner, without using any kind of force or violence, he will be guilty of a misdemeanor; and if his prison be broken by others, without his procurement or consent, and he escape through the breach so made, he may be indicted for the escape. (d)

(a) *Terms de la Ley*.

(b) 1 Hale, 590. 2 Hawk. P. C. cc. 17, 18, 19, 20, 21.

(c) 2 Hawk. P. C. c. 17, s. 5. 4 Black. Com. 129.

(d) 1 Hale, 611. 2 Inst. 589, 590.

Summ. 108. Staund. P. C. 30, 31. 2 Hawk. P. C. c. 18, ss. 9, 10.

AMERICAN NOTES.

¹ There are statutes in some of the States of America relating to escapes, prison breach and rescue; but generally the law there is the same as the English common law, and the statute, 1 Ed. 2, st. 2, *post*, p. 899, as

to prison breach is common law in America. Bishop, Vol. ii., s. 1106.

² In such a case the court in America will not inflict a punishment greater than that from which the prisoner escaped. *S. v. Doud*, 7 Conn. Rep. 384.

Upon an indictment for an escape from the house of correction, after conviction for a capital offence and conditional pardon, it was held that a certificate of the former conviction by the clerk of assize was not evidence, there being no Act which made it evidence. (e) As to the mode of proving a conviction, see vol. 3, "Evidence," 34 & 35 Vict. c. 112, s. 18. It was decided upon the 56 Geo. 3, c. 27, s. 8 [now repealed], that the certificate of a former conviction, authorised by that statute, should set forth the effect and substance of the conviction; and that stating it to have been for felony only was insufficient. The prisoner was indicted for being at large after a sentence of transportation for seven years; the indictment only stated that he had been convicted of felony, without specifying the nature of that felony; and the certificate to prove the former conviction was in the same form; and the judges thought this case decided by a former case of *R. v. Sutcliffe*, and that both the indictment and certificate were insufficient. (f)

The 11 & 12 Vict. c. 42, ss. 12, 13, 14 and 16, provides for the apprehension of persons charged with indictable offences, who escape into Ireland, the Isles of Man, Guernsey, Jersey, Alderney, or Sark, and Scotland, and for the dealing with such persons after their apprehension; and the Act also provides for the apprehension of persons so charged who escape from these territories into England.

Escapes effected, or, perhaps, more properly, suffered by others than the party himself, without force, by permission or negligence, may be either — I. By officers; or, II. By private persons.

SEC. I.

*Of Escapes suffered by Officers.*¹

An escape of this kind must be from a justifiable imprisonment for a criminal matter, after an actual arrest.

As there must be an *actual arrest*, it has been holden, that if an officer, having a warrant to arrest a man, see him shut up in a house, and challenge him as his prisoner, but never actually have him in his custody, and the party get free, the officer cannot be charged with an escape. (g)

The arrest and imprisonment must be justifiable; for, if a party be arrested for a supposed crime, when no such crime was committed,

(e) *R. v. Smith*, East. T. 1788. MS. Bayley, J. So neither the production of the calendar of the sentences signed by the clerk of assize, and by him delivered to the governor of the prison, nor the evidence of a person who heard sentence passed, is sufficient to prove that a prisoner is in lawful custody under a sentence of imprisonment passed at the assizes; the record itself should be produced; or other proof as provided by statute. *R. v. Bourdon*, 2 C. & K. 366, Maule, J.

(f) *R. v. Watson*, Mich. T. 1821. MS. Bayley, J., and R. & R. 468. The prisoner was remitted to his original sentence. The 56 Geo. 3, c. 27, s. 3, authorised a certificate containing the effect and substance only, omitting the formal part, of every indictment, conviction, &c. See 34 & 35 Vict. c. 112, s. 18, vol. 3, 'Evidence.'

(g) 2 Hawk. P. C. c. 19, s. 1.

and the party neither indicted nor appealed, or for such a slight suspicion of an actual crime and by such an irregular *mittimus* as will neither justify the arrest nor imprisonment, the officer is not guilty of an escape by suffering the prisoner to go at large. (*h*) But it seems as if a warrant of commitment plainly and expressly charge the party with treason or felony, though it be not strictly formal, the gaoler suffering an escape is punishable; and that where commitments are good in substance, the gaoler is as much bound to observe them as if they were made ever so exactly. (*i*) It is stated as a good general rule upon this subject that, whenever an imprisonment is so far irregular that it will be no offence in the prisoner to break from it by force, it can be no offence in the officer to suffer him to escape. (*j*)

The imprisonment must not only be justifiable, but also for some *criminal matter*. But the escape of one committed for petit larceny (*k*) only was criminal; and it seems most agreeable to the general reason of the law that the escape of a person committed for any other crime whatsoever should also be criminal. (*l*) The imprisonment must also be *continuing* at the time of the escape; and its continuance must be grounded on that satisfaction which public justice demands for the crime committed. So that if a prisoner be acquitted, and detained only for his fees, it will not be criminal to suffer him to escape, though the judgment were that he should be discharged, 'paying his fees;' he being in such case detained only as a debtor: but if a person, convicted of a crime, be condemned to imprisonment for a certain time, and also 'until he pays his fees,' it is said, that perhaps an escape of such person, after the time of his imprisonment is elapsed, without paying his fees, may be criminal; as it was part of the punishment that the imprisonment should be continued till the fees should be paid. (*m*)

The next important inquiry upon this subject will be, whether the escape be *voluntary* or *negligent*, as the former is a much more serious offence than the latter.

Whenever an officer, having the custody of a prisoner charged with, and guilty of, a capital offence, knowingly gives him his liberty with an intent to save him either from his trial or execution, such officer is guilty of a *voluntary escape*; and thereby involved in the guilt of the same crime of which the prisoner is guilty, and for which he was in custody. (*n*) Hawkins says, that it seems to be the opinion of Sir M. Hale, (*o*) that in some cases an officer may be adjudged guilty of a voluntary escape who had no such intent to save the prisoner, but meant only to give him a liberty which, by

h) 2 Hawk. P. C. c. 19, s. 2.

(*i*) 2 Hawk. P. C. c. 19, s. 24. A commitment to a *prison*, and not to a *person*, was held good in R. v. Fell, 1 Lord Raym. 424.

j Id. *ibid.* s. 2. And see *post*, chap. xxxvii.

(*k*) The distinction between grand and petit larceny was abolished by the 7 & 8 Geo. 4, c. 29, s. 2, and 24 & 25 Vict. c. 96, s. 2.

(*l*) 2 Hawk. P. C. c. 19, s. 3. 1 Hale, 592.

(*m*) 2 Hawk. P. C. c. 19, s. 4. This seems to be a good reason: but Hawkins says that it is to be intended only where the fees are due to others as well as to the gaoler; for, otherwise, the gaoler would be the only sufferer by the escape; and that it would be hard to punish him for suffering an injury to himself only in the non-payment of a debt in his power to release.

(*n*) Staund. P. C. 33. 2 Hawk. P. C. c. 19, s. 10. 4 Black. Com. 129.

(*o*) Sum. 113, 1 Hale, 596, 597.

law, he had no colour of right to give; as if a gaoler should bail a prisoner who is not bailable: but he withholds his assent to that opinion, on the grounds that it is not sufficiently supported by authorities, and does not seem to accord with the purview of the 5 Edw. 3, c. 8, relating to the improper bailing of persons by the marshals of the King's Bench. He says also, that it seems to be agreed that a person who has power to bail is guilty only of a negligent escape, by bailing one who is not bailable; and that there are some cases wherein an officer seems to have been found to have knowingly given his prisoner more liberty than he ought to have had (as by allowing him to go out of prison on a promise to return; or to go amongst his friends, to find some who would warrant goods to be his own which he is suspected to have stolen), and yet seems to have been only adjudged guilty of a negligent escape. (g) And he concludes by saying, that if, in these cases, the officer were only guilty of a negligent escape, in suffering the prisoner to go out of the limits of the prison, without any security for his return, he could not have been guilty in a higher degree if he had taken bail for his return; and that from thence it seems reasonable to infer that it cannot be in all cases a general rule that an officer is guilty of a voluntary escape by bailing his prisoner, whom he has no power to bail, but that the judgment to be made of all offences of this kind must depend upon the circumstances of the case; such as the heinousness of the crime with which the prisoner is charged, the notoriety of his guilt, the improbability of his returning to render himself to justice, the intention of the officer, and the motives on which he acted. (r)

By the 28 & 29 Vict. c. 126, entitled, An Act to consolidate and amend the law relating to prisons, ss. 63, 64, and 65, prisoners may under certain circumstances be removed from one prison to another and into different jurisdictions.

A *negligent* escape is where the party arrested or imprisoned escapes against the will of him that arrests or imprisons him, and is not freshly pursued and taken again before he has been lost sight of. (s) And, from the instances of this offence mentioned in the books, it seems that where a party so escapes the law will presume negligence in the officer. Thus, if a person in custody on a charge of larceny, suddenly and without the assent of the constable, kill, hang, or drown himself, this is considered as a negligent escape in the constable. (t) And if a prisoner charged with felony break a gaol, it is said that this seems to be a negligent escape; because there wanted either the due strength in the gaol that should have secured him, or the due vigilance in the gaoler or his officers that should have prevented it. (u) But it is submitted that it would be

(g) Hawkins says, however, that it must be confessed that, in these cases, the prisoner was only accused of larceny, and that it does not appear whether he were bailable or not; and that, generally, the old cases concerning this subject are so very briefly reported that it is very difficult to make an exact state of the matter from them.

(r) 2 Hawk. P. C. c. 19, s. 10.

(s) Dalt. c. 159. Burn's Just. tit. *Escape*, IV.

(t) Dalt. c. 159.

(u) 1 Hale, 600, where it is said that 'therefore it is lawful for the gaoler to hamper them with irons, to prevent their escape.' But see the note (a) *ibid.*, where it is said that this liberty can only be intended where the officer has just reason to fear an escape, as where the prisoner is un-

competent to a person charged with a negligent escape under such circumstances to show in his defence that all due vigilance was used, and that the gaol was so constructed as to have been considered by persons of competent judgment a place of perfect security. Undoubtedly an escape happening from defects in these particulars would come within the principle of guilty negligence in those concerned in the proper custody of the criminal; and neglect in not keeping gaols in a proper state of repair, by those who are liable to the burthen of repairing them, appears in many instances to have been treated as an indictable offence, tending to the great hindrance and obstruction of justice. (v)

A person who has power to bail is guilty only of a negligent escape by bailing one who is not bailable. Thus if a justice of peace bails a person not bailable by law, it excuses the gaoler, and is not felony in the justice, but a negligent escape, for which he is finable at common law, and by the justices of gaol delivery. (w) Whoever *de facto* occupies the office of gaoler is liable to answer for a *negligent escape*. (x) But it seems that an indictment for a negligent escape will only lie against those officers upon whom the law casts the obligation of safe custody, and will not lie against the mere servants of such officer. Thus, where the indictment was against one of the yeomen wardens of the Tower and the gentleman gaoler, for permitting Colonel Parker, who was committed for high treason, to escape, it appeared that the constable of the Tower had committed the colonel to their special care: but the Court held that the defendants were not such officers as the law took notice of, and therefore could not be guilty of a negligent escape. (y) It appears, however, that a sheriff is as much liable to answer for an escape suffered by his bailiff as if he had actually suffered it himself; that the Court may charge either the sheriff or bailiff for such an escape; and, that if a deputy gaoler be not sufficient to answer for a negligent escape, his principal must answer for him. (z)

The difference between a voluntary and negligent escape will also require to be attended to in considering the effect of the *retaking* of a prisoner after he has been suffered to escape.

When an officer has *voluntarily* suffered a prisoner to escape, it

ruly, or makes any attempt for that purpose; but that otherwise, notwithstanding the common practice of gaolers, it seems altogether unwarrantable, and contrary to the mildness and humanity of the laws of England, by which gaolers are forbid to put their prisoners to any pain or torment. Co. P. C. 34, 35. *Custodes gaolarum penam sibi commissis non augeant, nec eos torquent vel redimant, sed omni severitā remotā pietateque adhibita judicā debite exequantur.* Fleet. Lib. 1, cap. 26. And the *Mirror of Justices*, ch. 5, s. 1, n. 54, says that it is an abuse that prisoners should be charged with irons, or put to any pain, before they be attainted of felony: and Lord Coke in his comment on the statute of Westm. 2, c. 11, is express, that by the common law it might not be done. 2 Inst. 381.

(v) See the precedents of indictments for

this offence, 4 Wentw. 363, Cro. Circ. Comp. 189. Cro. Circ. Ass. 398. 3 Chit. Crim. L. 668, 669.

(w) At common law, according to 25 Edw. 3, 39 (in the last edition of the year books mispaged 25 Edw. 3, 82 a) and by the justices of gaol delivery, by the 1 & 2 Ph. & M. c. 13. See 1 Hale, 596, and as to escapes by admitting to bail or to improper liberty, *ante*, p. 891.

(x) 2 Hawk. P. C. c. 19, s. 28.

(y) R. v. Hill and Dod, Old Bailey, Jan. 1694. Burn's Just. tit. *Escape*, III. R. v. Rich, Old Bailey, Jan. 1694, MS. Bayley, J.

(z) 2 Hawk. P. C. c. 19, s. 29, and R. v. Fell, 1 Lord Raym. 424. 2 Salk. 272. Hawkins says, 'But if the gaoler who suffers an escape have an estate for life or years in the office, I do not find it agreed how far he in reversion is liable to be punished.'

is said that he can no more justify the retaking him than if he had never had him in custody before; because, by his own free consent, he hath admitted that he hath nothing to do with him: but if the party return, and put himself again under the custody of the officer, it seems that it may probably be argued that the officer may lawfully detain him, and bring him before a justice in pursuance of the warrant. (a)

An officer making fresh pursuit after a prisoner, who has escaped through his *negligence*, may retake him at any time afterwards, whether he find him in the same or a different county: and it is said generally in some books, that an officer, who has negligently suffered a prisoner to escape, may retake him, wherever he finds him, without mentioning any fresh pursuit; and, indeed, since the liberty gained by the prisoner is wholly owing to his own wrong, there seems to be no reason why he should have any manner of advantage from it. (b)¹ If the officer pursue a prisoner, who flies from him, so closely as to retake him without losing sight of him, the law regards the prisoner as being so much in his power all the time as not to adjudge such flight to amount to an escape; but if the officer once lose sight of the prisoner, it seems to be the better opinion that he will be guilty of a negligent escape, though he should retake him immediately afterwards. (c) And if he has been fined for the offence it is clear that he will not avoid the judgment of his fine by retaking the prisoner. (d) And it is also clear that he cannot excuse himself by killing a prisoner in the pursuit, though he could not possibly retake him; but must, in such case, be content to submit to such fine as his negligence shall appear to deserve. (e)

The proceedings against persons charged with having suffered escapes must in general be by presentment or indictment, or they may be by information. (f)

But where persons present in a Court of record are committed to prison by such Court, the keeper of the gaol, as he is bound to have them always ready to produce when called for, if he fail to produce them, will be adjudged guilty of an escape, without further inquiry; unless he have some reasonable matter to allege in his excuse; as that the prison was set on fire, or broken open by enemies, &c., for he will be concluded by the record of the commitment from denying that the prisoners were in his custody. (g) And some have holden, (h) that if a gaoler say nothing in excuse of such an escape, it shall be adjudged voluntary: but it seems difficult to maintain that where it stands indifferent whether an escape be negligent or

(a) 2 Hawk. P. C. c. 19, s. 12; c. 13, s. 9.
Dalt. c. 169. Burn's Just. tit. *Escape*.

(b) 2 Hawk. P. C. c. 19, s. 12.

(c) Staund. P. C. 33. 1 Hale, 602. 2 Hawk. P. C. c. 19, ss. 6, 13.

(d) 2 Hawk. P. C. c. 19, ss. 12, 13.

(e) Staund. P. C. 33. 1 Hawk. P. C. c. 23, ss. 11, 12. 2 Hawk. P. C. c. 19, ss. 6, 13.

(f) R. v. The Gaoler of Shrewsbury, 1 Str. 532, where the Court refused to grant an attachment against the gaoler for a voluntary escape of one in execution for obstructing an excise officer in the execution of his office, but ordered him to show cause why there should not be an information.

(g) 2 Hawk. P. C. c. 19, s. 15.

(h) Staund. P. C. 34. 1 Hale, 599, 603.

AMERICAN NOTE.

¹ See *Pearl v. Rawdin*, 5 Day, 244; *Griffin v. Brown*, 2 Pick. 304.

voluntary, it ought to be adjudged a crime of so high a nature, without a previous trial. (i) With respect to other prisoners not committed in such manner, but in the custody of a gaoler or other person by any other means whatsoever, it seems to be agreed that the person who had them in custody is in no case punishable for an escape, until it be presented. (j) But it is laid down as a rule, that though where an escape is finable, the presentment of it is traversable; yet that where the offence is amerciable only, there the presentment is of itself conclusive; such amerciements being reckoned amongst those *minima de quibus non curat lex*: (k) and this distinction is said to be well warranted by the old books. (l)

It is laid down in the books, that a person who has suffered another to escape cannot be arraigned for such escape as for felony, until the principal be attainted; on the ground that he is only punishable in this degree as an accessory to the felony, and that the general rule is, that no accessory ought to be tried until the principal be attainted; (m) but that he may be indicted and tried for a misprison before any attainder of the principal offender; for, whether such offender were guilty or innocent, it was a high contempt to suffer him to escape. If, however, the commitment were for high treason, and the person committed actually guilty of it, it is said that the escape is immediately punishable as high treason also, whether the party escaping be ever convicted of such crime or not; and the reason given is, that there are no accessories in high treason. (n)

Every indictment for an escape, whether negligent or voluntary, must expressly show that the party was actually in the defendant's custody for some crime, or upon some commitment upon suspicion; (o) and judgment was arrested upon an indictment which stated that the prisoner was in the defendant's custody, and charged with a certain crime, but did not state that he was committed for that crime; for a person in custody may be charged with a crime, and yet not be in custody by reason of such charge. (p) But where a person was committed to the custody of a constable by a watchman, as a loose and disorderly woman and a street-walker, it was holden, upon an indictment against the constable for discharging her, that by an allegation of his being charged with her, '*so being* such loose,' &c., it was sufficiently averred that he was charged with her '*as* such loose,' &c.; and it was also holden not to be necessary to aver that the defendant knew the woman to be a street-walker. (q) And every indict-

(i) 2 Hawk. P. C. c. 19, s. 15.

(j) 2 Hawk. P. C. c. 19, s. 16.

(k) Staund. P. C. c. 32, p. 36.

(l) 2 Hawk. P. C. c. 19, s. 21, and see *post*, p. 897, as to escapes finable or amerciable.

(m) See *ante*, p. 180. But as all accessories may now be tried before their principals this reason fails, and there seems no doubt that a person who has suffered a felon to escape is an accessory after the fact, *R. v. Burridge*, 3 P. Wms. 439, *post*, and therefore a person who suffers or aids the escape of a felon may be tried for a substantive felony as an accessory after the fact; and see *Holloway v. R.*, 17 Q. B. 317.

In *Cro. Circ. Ass.* 338, is an indictment as for a misdemeanor against a gaoler, for wilfully permitting a prisoner to escape who was under sentence of imprisonment for the term of six months, after a conviction of grand larceny; but it seems that it ought to have been laid as a felony. See 2 Starkie, *Crim. Plead.* 600, note (b), referring to *R. v. Burridge*, 3 P. Wms. 497.

(n) 2 Hawk. P. C. c. 19, s. 26.

(o) *Id. ibid.* s. 14.

(p) *R. v. Fell*, 1 Lord Raym. 424. 2 Salk. 272.

(q) *R. v. Bootie*, 2 Burr. 864; and see as to the sufficiency of such averments, *R. v. Boyall*, 2 Burr. 832.

ment should also show that the prisoner went at large; (r)¹ and also the time when the offence was committed for which the party was in custody; not only that it may appear that it was prior to the escape, but also that it was subsequent to the last general pardon. (s) If the indictment be for a voluntary escape, it must allege that the defendant feloniously and voluntarily permitted the prisoner to go at large; (t) and must also show the species of crime for which the party was imprisoned; for it will not be sufficient to say, in general, that he was in custody for felony, &c. (u) But it is questionable whether such certainty, as to the nature of the crime, be necessary in an indictment for a negligent escape; as it is not in such case material whether the person who escaped were guilty or not. (v)

By the statute of Westminster, 3 Edw. 1, c. 3, (w) the proceedings and trial for the offence of an escape were to be had before the justices in eyre; but it was adjudged that the jurisdiction of the Court of King's Bench was not restrained by that statute, that Court being itself the highest Court of eyre. (x) The 31 Edw. 3, c. 14, enacts, that the escape of thieves and felons, and the chattels of felons, &c., from thenceforth to be judged before *any of the King's justices*, shall be levied from time to time, &c., by which it seems to be implied that other justices, as well as those in eyre, may take cognizance of escapes; and it is certain that justices of gaol delivery may punish justices of peace for a negligent escape, in admitting persons to bail who are not bailable. (y)

As to the mode of proving the conviction see *ante*, p. 890.

In considering the punishment for this offence, it will be necessary again to attend to the distinction between a voluntary and negligent escape.

It seems to be generally agreed that a *voluntary escape* amounts to the same kind of crime as the offence of which the party was guilty, and for which he was in custody; whether the person escaping were actually committed to some gaol, or under an arrest only, and not committed; and whether he were attainted, or only accused of such crime, and neither indicted nor appealed. (z) But the voluntary escape of a felon was within the benefit of clergy, though the felony for which the party was in custody were ousted. (a) An escape suffered by one who wrongfully takes upon him the keeping of a gaol seems to be punishable in the same manner as if he were rightfully entitled to the custody; for the crime is in both cases of the same

(r) 2 Hawk. P. C. c. 19, s. 14, where it is said that this is most properly expressed by the words *exivit ad largum*.

(s) 2 Hawk. P. C. c. 19, s. 14. But upon an indictment for an escape the Court will not intend a pardon; it must be shown by the defendant, by way of excuse. *R. v. Fell*, 1 Lord Raym. 424.

(t) *Felonice et Voluntarie A. B. ad largum ire permisit*.

(u) 2 Hawk. P. C. c. 19, s. 14.

(v) *Id. ibid.*

(w) Repealed by 26 & 27 Vict. c. 125.

(x) Staund. P. C. c. 32, p. 35. *Et que*

le banks le roy est un eire, et plus haut que un eire, car si le eire sea in un county, et le banks le roy veigne la, le eire cessera.

(y) 2 Hawk. P. C. c. 19, s. 19, *ante*, p. 893.

(z) 2 Hawk. P. C. c. 19, s. 22. And it is said to be no excuse of such escape that the prisoner had been acquitted on an indictment of death, and only committed till the year and day should be passed, to give the widow or heir an opportunity of bringing their appeal. *Id. ibid.*

(a) 1 Hale, 599.

AMERICAN NOTE.

¹ *S. v. Maberry*, 1 Strobh. 144.

ill consequence to the public. (b) But no one is punishable in this degree for a voluntary escape but the person who is actually guilty of it; therefore, the principal gaoler is only finable for a voluntary escape suffered by his deputy. (c) One voluntary escape is said to amount to a forfeiture of a gaoler's office. (d)

No escape will amount to a capital offence unless the cause for which the party was committed were actually such at the time of the escape; its becoming a capital offence afterwards, as by the death of a party wounded at the time of the escape, but not then dead, will not be sufficient. (e)

Whenever a person is found guilty upon an indictment or presentment of a negligent escape of a criminal actually in his custody, he ought to be condemned in a certain sum, to be paid to the King as a *fine*. (f) And it seems that, by the common law, the penalty for suffering the negligent escape of a person attainted was of course a hundred pounds, and for suffering such escape of a person indicted, and not attainted, five pounds; and that if the person escaping were neither attainted nor indicted, it was left to the discretion of the Court to assess such a reasonable forfeiture as should seem proper. And it seems also, that if the party had escaped twice, these penalties were of course to be doubled; but that the forfeiture was no greater for suffering a prisoner to escape who had been committed on two several accusations, than if he had been committed but on one. (g) It is the better opinion that one negligent escape will not amount to a forfeiture of a gaoler's office: yet if a gaoler suffer many negligent escapes, it is said that he puts it in the power of the Court to oust him of his office at discretion. (h)

A negligent escape may be pardoned by the King before it happens, but a voluntary one cannot be so pardoned. (i) Upon an indictment for an escape a pardon must be shown by the defendant by way of excuse. (j)

SEC. II.

Of Escapes suffered by Private Persons.

The law with respect to escapes suffered by private persons is in general the same as in relation to those suffered by officers: it will be sufficient, therefore, to mention shortly the circumstances under which it is considered that a private person may be guilty of an escape, and the punishment to which he will be liable.

(b) 2 Hawk. P. C. c. 19, s. 23.

(c) R. v. Fell, 1 Lord Raym. 424. 2 Salk. 272. 1 Hale, 597, 598.

(d) 2 Hawk. P. C. c. 19, s. 30.

(e) 2 Hawk. P. C. c. 19, s. 25.

(f) 2 Hawk. P. C. c. 19, s. 31, where the author says, 'It seems most properly to be called a fine. But this does not clearly appear from the old books; for in some of them it seems to be taken as a *fine*, in others as an

amercement; and in others it is spoken of generally as the imposition of a certain sum, and without any mention of either fine or amercement.'

(g) 2 Hawk. P. C. c. 19, s. 33.

(h) Id. *ibid.* s. 30.

(i) 2 Hawk. P. C. c. 19, s. 32; and more fully, *id.* c. 37, s. 28. Such a pardon would be in the nature of an indemnity.

(j) R. v. Fell, 1 Lord Raym. 424.

It seems to be a good general rule, that wherever any person has another lawfully in his custody, whether upon an arrest made by himself or another, he is guilty of an escape if he suffer him to go at large before he has discharged himself, by delivering him over to some other who by law ought to have the custody of him. And if a private person arrest another for suspicion of felony, and deliver him into the custody of another private person, who receives him and suffers him to go at large, it is said that both of them are guilty of an escape; the first, because he should not have parted with him till he had delivered him into the hands of a public officer; the latter, because, having charged himself with the custody of a prisoner, he ought, at his peril, to have taken care of him. (*k*)

But where a private person, having made an arrest for suspicion of felony, delivers over his prisoner to the proper officer, as the sheriff or his bailiff, or a constable, from whose custody the prisoner escapes, he, the private person, will not be chargeable. (*l*)

If an escape suffered by a private person were voluntary, he is punishable as an officer would be for the same offence; (*m*) and if it were negligent, he is punishable by fine and imprisonment, at the discretion of the Court. (*n*)

(*k*) 2 Hawk. P. C. c. 20, ss. 1, 2. 1 Hale, 595. Sum. 112.

(*l*) 2 Hawk. P. C. c. 20, ss. 3, 4. 1 Hale, 594, 595. Staund. P. C. 34. Sum. 112, 114. The proper course for a private person, who has arrested a person on suspicion of felony, to pursue, is to take him as soon as he reasonably can before a magistrate, who will

examine into the case, and either commit, bail, or discharge the party as the circumstances may require. See *Reed v. Cowmeadow*, 7 C. & P. 821, per Parke, B.; and *Edwards v. Ferris*, 7 C. & P. 542, Patteson, J.

(*m*) *Ante*, p. 896.

(*n*) 2 Hawk. P. C. c. 20, s. 6.

CHAPTER THE THIRTY-FIFTH.

OF PRISON BREAKING BY THE PARTY CONFINED.¹

WHERE a party effects his own escape *by force*, the offence is usually called *prison-breaking*; and such breach of prison, or even the conspiring to break it, was felony at the common law, for whatever cause, criminal or civil, the party was lawfully imprisoned; (a) and whether he were actually within the walls of a prison or only in the stocks, or in the custody of any person who had lawfully arrested him. (b) But the severity of the common law is mitigated by the statute *De frangentibus prisonam*, 1 Edw. 2, stat. 2, which enacts, 'That none, from henceforth, that breaketh prison, shall have judgment of life or member for breaking of prison only; except the cause for which he was taken and imprisoned did require such judgment, if he had been convict thereupon, according to the law and custom of the realm.' Thus though to break prison and escape, when lawfully committed for any treason or felony, remains still felony as at common law; to break prison when lawfully confined upon any other inferior charge, is punishable only as a high misdemeanor, by fine and imprisonment. (c)

It will be proper to consider some of the points which have been holden in the construction of this statute.

Any place whatsoever wherein a person, under a lawful arrest for a supposed crime, is restrained of his liberty, whether in the stocks, or the street, or in the common gaol, or the house of a constable or private person, or the prison of the ordinary, is properly a *prison* within the meaning of the statute; for imprisonment is nothing else but a restraint of liberty. (d) The statute, therefore, extends as well to a prison in law as to a prison in deed. (e)

With respect to the regularity of the imprisonment, it is clear, that if a person be taken upon a *capias*, awarded on an indictment or appeal against him for a supposed treason or felony, he is within the statute if he break the prison, whether any such crime were or were not committed by him or any other person; for there is an accusation against him on record, which makes his commitment lawful, however he may be innocent, or the prosecution groundless. And if an inno-

(a) 4 Black. Com. 129. 1 Hale, 607.
Bract. l. 3, c. 9. 2 Inst. 588.

(b) 2 Hawk. P. C. c. 18, s. 1.

(c) 4 Black. Com. 130.

(d) 2 Hawk. P. C. c. 18, s. 4.

(e) 2 Inst. 589.

AMERICAN NOTE.

¹ It has been held in America that a person wrongfully confined who breaks out of prison, and thereby leaves a way for other

prisoners to escape, is not guilty of prison breach. S. v. Leach, 7 Conn. 752.

cent person be committed by a lawful *mittimus*, on such a suspicion of felony, actually done by some other, as will justify his imprisonment, though he be neither indicted nor appealed, he is within the statute if he break the prison; for he was legally in custody, and ought to have submitted to it until he had been discharged by due course of law. (*f*)

But if no felony at all were done, and the party be neither indicted nor appealed, no *mittimus* for such a supposed crime will make him guilty within the statute, by breaking the prison; his imprisonment being unjustifiable. And though a felony were done, yet if there were no just cause of suspicion either to arrest or commit the party, his breaking the prison will not be felony if the *mittimus* be not in such form as the law requires; because the lawfulness of his imprisonment in such case depends wholly on the *mittimus*: but if the party were taken up for such strong causes of suspicion as will be a good justification of his arrest and commitment, it seems that it will be felony in him to break the prison, though he happen to have been committed by an informal warrant. (*g*)

The next inquiry will be as to the nature of the crime for which the party must be imprisoned, in order to make his breaking the prison felony within the meaning of the statute. It is clear that the offence for which the party was imprisoned must be a capital one at the time of his breaking the prison, and not become such by matter subsequent. (*h*) Though an offender breaking prison, while it is uncertain whether his offence will become capital, is highly punishable for his contempt, by fine and imprisonment. (*i*) But it is not material whether the offence for which the party was imprisoned were capital at the time of the passing of the statute, or were made so by subsequent statutes; for, since all breaches of prison were felonies by the common law, which is restrained by the statute only in respect of imprisonment for offences not capital, when an offence becomes capital, it is as much out of the benefit of the statute as if it had always been so. (*j*)

If the crime for which the party is arrested, and with which he is charged in the *mittimus*, do not require judgment of life or member, and the offence be not in fact greater than the *mittimus* supposes it to be, it is clear, from the express words of the statute, that his breaking the prison will not amount to felony. (*k*) And though the offence for which the party is committed be supposed in the *mittimus* to be of such a nature as requires a capital judgment, yet if, in the event, it be found to be of an inferior nature, and not to require such a judgment, it seems difficult to maintain that the breaking of the prison on a commitment for it can be felony; as the words of the statute are, 'except the cause for which he was taken and imprisoned require such a judgment.' (*k*) And on the other hand, if the offence which was the cause of the commitment be in truth of such a nature as requires a capital judgment, but be supposed in the *mittimus* to be

(*f*) 2 Hawk. P. C. c. 18, ss. 5, 6. 2 Inst. 590. Sum. 109. 1 Hale, 610, 611.

(*g*) 2 Hawk. P. C. c. 18, ss. 7, 15; c. 16, s. 13, *et seq.* 2 Inst. 590, 591. Sum. 109. 1 Hale, 610, 611.

(*h*) *Ante*, p. 897.

(*i*) 2 Hawk. P. C. c. 18, s. 14.

(*j*) 2 Hawk. P. C. c. 18, s. 13.

(*k*) See the Statute, *ante*, p. 899.

of an inferior degree, it may probably be argued that the breaking of the prison by the party is felony within the meaning of the statute; for the fact for which he was arrested and committed, does, in truth, require judgment of life, though the nature of it be mistaken in the *mittimus*. (l) It is not material whether the party who breaks his prison were under an accusation only, or actually attainted of the crime charged against him; for persons attainted, breaking prison, are as much within the exception of the statute as any others. (m)

A person committed for high treason becomes guilty of felony only, and not of high treason, by breaking the prison and escaping singly, without letting out any other prisoner: but if other persons, committed also for high treason, escape together with him, and his intention in breaking the prison were to favour their escape as well as his own, he seems to be guilty of high treason in respect of their escape, because there are no accessories in high treason; and such assistance given to persons committed for felony will make him who gives it an accessory to the felony, and by the same reason a principal in the case of high treason. (n)

The breach of the prison within the meaning of the statute must be an *actual breaking*, and not such force and violence only as may be implied by construction of law; therefore if the party go out of a prison without any obstruction, the prison doors being open through the consent or negligence of the gaoler, or if he otherwise escape, without using any kind of force or violence, it is said that he is guilty of a misdemeanor only. (o) But the breaking need not be intentional; as where a prisoner made his escape from a house of correction, by tying two ladders together, and placing them against the wall of the yard, but in getting over threw down some bricks which were placed loose at the top (so as to give way upon being laid hold of), the judges were unanimously of opinion that this was a prison-breach. (p) And such breaking must be either by the prisoner himself, or by others through his procurement, or at least with his privity; for if the prison be broken by others without his procurement or consent, and he escape through the breach so made, it seems to be the better opinion that he cannot be indicted for the breaking, but only for the escape. (q) And the breaking must not be from the necessity of an inevitable accident happening, without the contrivance or fault of the prisoner; as if the prison should be set on fire by accident, and he should break it open to save his life. (r)

(l) 2 Hawk. P. C. c. 18, s. 15. It should be observed, however, that Hawkins, after giving his reasons for these conclusions, says that no express resolution of the points appearing, and the authors who have expounded the statute (see 2 Inst. 590, 591; Sum. 109, 110; 1 Hale, 609) seeming rather to incline to a different opinion, he shall leave these matters to the judgment of the reader.

(m) Staund. P. C. c. 32. 2 Hawk. P. C. c. 18, s. 16.

(n) 2 Hawk. P. C. c. 18, s. 17. Benstead's case, Cro. Car. 583. Limerick's case. Kel. 77.

(o) 1 Hale, 611. 2 Inst. 590.

(p) R. v. Haswell, East. T. 1821. R. & R. 458. Richardson, J., thought that if this had been an escape only, it would not have been felony.

(q) 2 Hawk. P. C. c. 18, s. 10. Pult. de Pac. 1476, pl. 2, where it is said, that if a stranger breaks the prison, in order to help a prisoner committed for felony to escape, who does escape accordingly, this is felony, not only in the stranger who broke the prison, but also in the prisoner that escapes by means of this breach, as he consents to the breach of the prison by taking advantage of it.

(r) 1 Hale, 611. 2 Inst. 590. Sum. 108.

It seems also that no breach of prison will amount to felony, unless the prisoner escape. (s)

A party may be arraigned for prison-breaking before he is convicted of the crime for which he was imprisoned (the proceeding differing in this respect from cases of escape or rescue), on the ground that it is not material whether he be guilty of such crime or not, and that he is punishable as a principal offender in respect of the breach of prison itself. (t) But if the party has been indicted and acquitted of the felony for which he was committed, he is not to be indicted afterwards for the breach of prison; for though, while the principal felony was untried, it was indifferent whether he were guilty of it or not, or rather the breach of prison was a presumption of the guilt of the principal offence, yet, upon its being clear that he was not guilty of the felony, he is in law as a person never committed for felony; and so his breach of prison is no felony. (u)

The indictment for a breach of prison, in order to bring the offender within the intention of the statute, must specially set forth his case in such manner that it may appear that he was lawfully in prison, and for such a crime as requires judgment of life or member; and it is not sufficient to say in general 'that he feloniously broke prison;' (v) as there must be an actual breaking to constitute the offence. (w) It is necessary that such breaking be stated in the indictment. (x)

The offence of prison-breaking and escape, by a party lawfully committed for any treason or felony, is, as we have seen, of the degree of felony, (y) and will of course be punishable as such: (z) but it should be observed, that it was a felony within clergy though the principal felony for which the party was committed were ousted of clergy, as in case of robbery or murder. (a) And in this it differs from the offence of a voluntary escape, which is punishable in the same degree as the offence for which the party suffered to escape was in custody. (b) Where the prison-breaking is by a party lawfully confined upon any inferior charge, it is punishable as a high misprison, by fine and imprisonment. (c)

(s) 2 Hawk. P. C. c. 18, s. 12.

(t) 2 Inst. 592. 1 Hale, 611. 2 Hawk. P. C. c. 18, s. 18.

(u) 1 Hale, 612, where the learned writer also says, that if the party should be first indicted for the breach of prison, and then be acquitted of the principal felony, he may plead that acquittal of the principal felony, in bar to the indictment for the breach of prison. W. was given into custody without a warrant on a charge of felony. He was conveyed before a magistrate, who remanded him in custody without any evidence on oath. W. was removed to a lock-up from which he escaped. The charge of felony made against him was dismissed by the magistrates. Held, per Martin, B., that the dismissal by the magistrates was not equiv-

alent to an acquittal by a jury, that the defendant was legally in custody, although no evidence was taken upon oath to justify his remand, and that these facts were no defence to the indictment for breaking prison.

R. v. Waters, 12 Cox, C. C. 390.

(v) 2 Hawk. P. C. c. 18, s. 20.

(w) *Ante*, p. 901.

(x) R. v. Burrigge, 3 P. Wms. 483. Staund. 31 a. 2 Inst. 589, *et seq.*

(y) *Ante*, p. 899.

(z) As this is a felony, for which no punishment is specially provided, it is punishable under the 7 & 8 Geo. 4, c. 28, ss. 8, 9, and 1 Vict. c. 90, s. 5, *ante*, p. 65.

(a) 1 Hale, 612.

(b) *Ante*, p. 900.

(c) 2 Hawk. P. C. c. 18, s. 21.¹

AMERICAN NOTE.

¹ In New York it is felony. See P. & see C. v. Briggs, 5 Met. 559. C. v. Barber, Duell, 3 Johns. 449; as to Massachusetts, 133 Mass. 399.

The prisoner was found guilty upon an indictment, which charged that he had been convicted of horse-stealing, and sentenced to suffer death; and that his Majesty extended his mercy to him, on condition of being imprisoned and kept to hard labour, in the House of Correction at Brixton Hill, for two years: that he was committed to and confined in the said house of correction; and that he, before the expiration of the two years, did feloniously break the said house of correction, and make his escape out of it, and go at large. The judges were unanimously of opinion that this was punishable as a common-law felony by imprisonment not exceeding a year, to begin from the passing of the sentence; and that, if thought right, the prisoner might be whipped three times in addition to the imprisonment. (d)

The 1 & 2 Vict. c. 82, established a prison for young offenders at Parkhurst in the Isle of Wight; and sec. 12 provides for the punishment of any such offender who breaks prison or escapes from his place of confinement, &c.; and sec. 14 provides for the place of trial and evidence in such cases. (e)

(d) *R. v. Haswell*, East. T. 1821. R. & R. 458. It does not appear that the 31 Geo. 3, c. 46, was alluded to as applicable to this case. The statute, however (except sec. 7), has been repealed by 4 Geo. 4, c. 64.

See note (z), *supra*. The whipping clauses have, however, now been repealed.

(e) There was a similar enactment with regard to the prison at Millbank, but it has been repealed. As to Pentonville, see 5 & 6 Vict. c. 29, ss. 23, 28.

CHAPTER THE THIRTY-SIXTH.

OF RESCUE ; AND OF ACTIVELY AIDING IN AN ESCAPE, OR IN AN ATTEMPT TO ESCAPE.

RESCUE, or the offence of forcibly and knowingly freeing another from arrest or imprisonment, is, in most instances, of the same nature as the offence of *prison-breaking*, which has been treated of in the preceding chapter.

Thus it is laid down, that whatever is such a prison that the party himself would, by the common law, be guilty of felony in breaking from it, in every such case a stranger would be guilty of as high a crime at least in rescuing him from it. But though, upon the principle that wherever the arrest of a felon is lawful the rescue of him is a felony, it will not be material whether the party arrested for felony, or suspicion of felony, be in the custody of a private person or of an officer; yet if he be in the custody of a private person, it seems that the rescuer should be shown to have knowledge of the party being under arrest for felony. (a) In cases where the imprisonment is so far groundless or irregular, or for such a cause, or the breaking of it is occasioned by such a necessity, &c., that the party himself breaking the prison is, either by the common law or by the 1 Edw. 2, st. 2, *De frangentibus prisonam*, saved from the penalty of a capital offender; a stranger who rescues him from such an imprisonment is, in like manner, also excused. (b)

It has been stated in the preceding chapter, that, where a person committed for high treason breaks the prison and escapes, letting out other persons, committed also for high treason, he seems to be guilty of high treason, in case his intention in breaking the prison were to favour the escape of such other persons as well as his own: (c) and it is clear that a stranger who rescues a person committed for and guilty of high treason, knowing him to be so committed, is, in all cases, guilty of high treason. (d) It has been holden also, that he will be thus guilty whether he knew that the party rescued were committed for high treason or not: and that he would, in like manner, be guilty of felony by rescuing a felon, though he knew not that the party was imprisoned for felony. (e)

(a) 1 Hale, 606.

(b) 2 Hawk. P. C. 21, ss. 1, 2. 2 Inst. 589. Staund. P. C. 30, 31. *Ante*, p. 899, *et seq.*

(c) *Ante*, p. 901.

(d) 2 Hawk. P. C. c. 21, s. 7. Staund. P. C. 11, 32. Sum. 109. 1 Hale, 237.

(e) *R. v. Benstead*, Cro. Car. 583, where it is said that it was resolved by ten of the

judges (on a special commission), *seriatim*, that the breaking of a prison where traitors are in durance, and causing them to escape, was treason, although the parties did not know that there were any traitors there; and that, in like manner, to break a prison whereby felons escape, is felony, without knowledge of their being imprisoned for such offence. And see 1 Hale, 606. But Hawk-

As the party himself seems not to be guilty of felony by breaking the prison, unless he *actually* go out of it, (*f*) so the breaking of a prison by a stranger, in order to free the prisoners who are in it, is said not to be felony, unless some prisoner actually by that means get out of prison. (*g*)

The sheriff's return of a rescue is not of itself sufficient to put the party to answer for it as a felony, without indictment or presentment. (*h*) And it is the better opinion that he who rescues one imprisoned for felony cannot be arraigned for such offence as a felony, until the principal offender be first attainted, (*i*) unless the person rescued were imprisoned for high treason, in which case the rescuer may be immediately arraigned; all being principals in high treason. But it is said that he may be immediately proceeded against for a misprison only if the King please: (*j*) and if the principal be discharged, or found guilty only of an offence not capital, such as petit larceny, &c., though the rescuer cannot be charged with felony, yet he may be fined and imprisoned for a misdemeanor. (*k*)

The indictment for a rescue, like that for an escape, (*l*) or for breaking prison, (*m*) must specially set forth the nature and cause of the imprisonment, and the special circumstances of the fact in question. (*n*) And the word *rescussit*, or something equivalent to it, must be used to show that it was forcible and against the will of the officer who had the prisoner in his custody. (*o*)

The rescue of one apprehended for treason is itself treason: and the party rescuing one in custody for felony, or suspicion of felony, will, as we have seen, be guilty of a crime of the same kind; though not in all cases punishable in the same degree; for the rescuer was entitled to his clergy, though the crime of the prisoner rescued were not within clergy. (*p*) Accordingly it was held that rescuing a person under commitment for burglary was not a transportable offence, but was punishable only as a felony, within clergy, at common law. (*q*) The 1 & 2 Geo. 4, c. 88, s. 1, has since enacted, 'that if any person shall rescue, or aid and assist in rescuing, from the lawful custody of any constable, officer, head-borough, or other person whomsoever, any person charged with, or suspected of, or committed for any felony, or on suspicion thereof, then, if the person or persons so offending shall be convicted of felony, and be entitled to the benefit of clergy, and be liable to be imprisoned for any term not exceeding one year, it shall be lawful for the Court, by or before whom any

ins (P. C. c. 21, s. 7) says that this opinion is not proved by the authority of the case (1 Hen. 6, 5) on which it seems to be grounded. It should be mentioned, however, that Benstead's case is spoken of in R. v. Burridge, 3 P. Wms. 468, as having been cited and allowed to be law at an assembly of all the judges of England, except the Chief Justice of the Common Pleas, in Limerick's case, Kel. 77.

(*f*) *Ante*, p. 901.

(*g*) 2 Hawk. P. C. c. 18, s. 12; c. 21, s. 3.

(*h*) 1 Hale, 606.

(*i*) See *ante*, p. 895, note (*m*).

(*j*) 2 Hawk. P. C. c. 21, s. 8.

(*k*) 1 Hale, 598, 599.

(*l*) *Ante*, p. 890.

(*m*) *Ante*, p. 902.

(*n*) 2 Hawk. P. C. c. 21, s. 5. In R. v. Westbury, 8 Mod. 357, it was holden that an indictment for a rescue of goods levied must set forth the *fieri facias* at large; and that setting forth *quod cum virtute brevis, &c., de fieri facias*, and a warrant thereon be levied, &c., and that the defendant rescued them, is not sufficient.

(*o*) R. v. Burridge, 3 P. Wms. 483.

(*p*) 1 Hale, 607.

(*q*) R. v. Stanley, R. & R. 432.

such person or persons shall be convicted, to order and direct, in case it shall think fit, that such person or persons, instead of being so fined and imprisoned as aforesaid, shall be transported (*r*) beyond the seas for seven (*s*) years, or be imprisoned only, or be imprisoned and kept to hard labour in the common gaol, house of correction, or penitentiary house, for any term not less than one (*t*) and not exceeding three years.'

Where the party rescued was in custody for a misdemeanor only, the rescuer will be punishable as for a misdemeanor; for, as those who break prison are punishable for a high misprision, by fine and imprisonment, in those cases wherein they are saved from judgment of death by the 1 Edw. 2, stat. 2, *De frangentibus prisonam*; so also are those who rescue such prisoners, in the like cases, punishable in the same manner. (*u*) Where a prisoner was indicted for a misdemeanor in aiding and assisting in the rescue of a person, who was apprehended and was in custody under the warrant of a justice of peace, which had been granted upon the certificate of the clerk of the peace of the county, reciting that a true bill for a misdemeanor had been found against the party apprehended; and it was objected that the warrant was illegal, as justices of peace had only authority to issue warrants upon oath made of the facts, which authorized the issuing such warrants: it was held that the warrant was legal, and that the prisoner was guilty of a misdemeanor, in assisting in the rescue of the person apprehended under it. (*v*)

It has been held to be a misdemeanor at common law to aid a person to escape from custody, who was confined under the remand of the Commissioners for the Relief of Insolvent Debtors, and not on any criminal charge. (*w*)

The rescue of a prisoner in any of the superior courts, committed by the justices, is a great misprision; for which the party, and the prisoner (if assenting) will be liable to be punished by imprisonment for life, forfeiture of lands for life, and forfeiture of goods and chattels, though no stroke or blow were given. (*x*)

The aiding and assisting a prisoner to escape out of prison, by whatever means it may be effected, is an offence of a mischievous nature, and an obstruction to the course of justice: and the assisting a felon in making an actual escape, is an offence of the degree of felony. (*y*) In a case which underwent elaborate discussion, the Court of King's Bench held, that where a person assisted a prisoner who had been convicted of felony within clergy, and, having been

(*r*) Penal servitude by the 20 & 21 Vict. c. 3, s. 2, *ante*, p. 73.

(*s*) And not less than three years. See *ante*, p. 79.

(*t*) See the 9 & 10 Vict. c. 24, s. 1.

(*u*) 2 Hawk. P. C. c. 21, s. 6. 4 Black. Com. 130.

(*v*) *R. v. Stokes*, Stafford Sum. Ass. 1831,

MSS. C. S. G. S. C., 5 C. & P. 148. J. A. Park and Patteson, JJ.

(*w*) *R. v. Allan*, C. & M. 295. Erskine and Wightman, JJ.¹

(*x*) 1 East, P. C. c. 8, s. 3, pp. 408, 410. Bac. Abr. tit. *Rescue* (C.). 3 Inst. 141. 22 Edw. 3, 13.

(*y*) *R. v. Tilley*, 2 Leach, 671.

AMERICAN NOTE.

¹ The rescue of a prisoner confined under civil process is an indictable misdemeanor (see 2 Hawk. P. C. c. 21, s. 1); but the

escape of a prisoner so confined is not. Mr. Bishop, however (Vol. ii. s. 1073), says that in both cases it should be so deemed.

sentenced to be transported for seven years, was in custody under such sentence, to escape out of prison, the person so assisting was an accessory after the fact to the felony. (z) The Court proceeded upon the ground that one so convicted of felony, within the benefit of clergy, and sentenced to be transported for seven years, continues a felon till actual transportation and service pursuant to the sentence; and that the assistance given in this case amounted, in law, to a receiving, harbouring, or comforting, such felon. (a) But they held the indictment to be defective, in not charging that the defendant knew that the principal was guilty, or convicted, of felony. (b) The offence of aiding a prisoner to escape out of prison appears also to have been considered as an accessorial offence in a case of piracy. (c)

Aiding the escape of a clergyable felon, who had had his clergy and been burnt in the hand, but ordered, under 18 Eliz., to be imprisoned, would not, it should seem, have subjected the party to punishment as for aiding the escape of a felon. (d)

Several statutes, some of which have been already mentioned, and others which will be referred to in the course of the work, especially provide for the punishment of those who rescue or aid in the escape of persons apprehended or committed for the particular offences enumerated in those Acts. There are also some special provisions by statutes upon this subject, which may be noticed shortly in this place.

By the 25 Geo. 2, c. 37, s. 9, (e) 'If any person or persons whatsoever shall by force set at liberty, or rescue, or attempt to rescue or set at liberty, any person, out of prison, who shall be committed for or found guilty of murder; or rescue, or attempt to rescue, any person convicted of murder going to execution, or during execution, every person so offending shall be deemed, taken, and adjudged to be guilty of felony, and shall suffer death without benefit of clergy.' (f)

The 52 Geo. 3, c. 156, s. 1, enacts, that 'every person who shall knowingly and wilfully aid or assist any alien enemy of his Majesty, being a prisoner of war in his Majesty's dominions, whether such prisoner shall be confined as a prisoner of war in any prison or other place of confinement, or shall be suffered to be at large in his

(z) *R. v. Burridge*, 3 P. Wms. 439.

(a) The assistance, as stated in the special verdict in this case, was not particularly specified; the statement was, that the defendant (who was confined in the same gaol with the party whom he assisted to escape) 'did wilfully aid and assist the said W. P., so being in custody as aforesaid, to make his escape out of the said gaol.' But any assistance given to one known to be a felon, in order to hinder his suffering the punishment to which he is condemned, is a sufficient receipt to make a man an accessory after the fact. *Ante*, p. 177.

(b) 3 P. Wms. 492. The prisoner was charged upon a second indictment as an accessory, knowing the principal to have been under sentence of transportation; and was tried upon this second indictment, convicted, and sentenced to be transported, *id.* 499, 503. But such sentence was not war-

ranted by law. See *R. v. Stanley*, R. & R. 432.

(c) *R. v. Scadding*, Yelv. 134. 1 East, P. C. c. 17, s. 14, p. 810.

(d) See the judgment of Treby, C. J., in the *Earl of Warwick's* case, 13 St. Tr. 1018, as to the commitment under this statute being a collateral and new thing.

(e) Repealed by the 9 Geo. 4, c. 31, s. 1, 'except so far as relates to rescues and attempts to rescue.'

(f) This punishment is abolished, and another substituted by the 1 Vict. c. 91, ss. 1, 2, see *ante*, p. 258. 'Principals in the second degree are punishable like principals in the first degree, and as to accessories, see *ante*, p. 161, *et seq.* By the alteration of the mode of the disposal of the bodies of murderers by the 24 & 25 Vict. c. 103, s. 3, Vol. III. *Murder*, sec. 10 of this Act seems to be virtually repealed. C. S. G.

Majesty's dominions or any part thereof, on his parole, to escape from such prison, or other place of confinement, or from his Majesty's dominions, if at large upon parole,' shall, upon conviction, be adjudged guilty of felony, and be liable to be transported for life, or for fourteen or seven years, (g)

Sec. 2. Every person who shall knowingly and wilfully aid or assist any such prisoner at large on parole in quitting any part of his Majesty's dominions where he may be on his parole, although he shall not aid or assist such person in quitting the coast of any part of his Majesty's dominions, shall be deemed guilty of aiding the escape of such person within the Act.

Sec. 3. 'If any person or persons owing allegiance to his Majesty, after any such prisoner as aforesaid hath quitted the coast of any part of his Majesty's dominions, in such his escape as aforesaid, shall, knowingly and wilfully, upon the high seas, aid or assist such prisoner in his escape to or towards any other dominions or place, such persons shall also be adjudged guilty of felony, and be liable to be transported as aforesaid;' and such offences committed upon the high seas, and not within the body of any county, may be tried in any county within the realm. (h) Previously to the passing of this Act, upon an indictment for a misdemeanor in unlawfully aiding and assisting a prisoner at war to escape, where it appeared that such prisoner was acting in concert with those under whose charge he was placed, in order to effect the detection of the defendant, who was supposed to have been instrumental in the escapes of other prisoners, and the prisoner in question neither escaped nor intended to escape: it was held that the offence was not complete, and that a conviction for such offence was therefore wrong. (i)

The mere aiding an attempt of persons confined to make an escape, though no escape should ensue, is made highly penal by the 16 Geo. 2, c. 31, s. 1, (j) which enacts, that 'if any person shall, by

(g) Now penal servitude for life or for not less than three years. The principals in the second degree are punishable like the principals in the first degree; and as to accessories, see *ante*, p. 161, *et seq.*

(h) By sec. 4, the Act is not to prevent offenders from being prosecuted, as they might have been if the Act had not been passed; but no person prosecuted otherwise than under the provisions of the Act is to be liable to be prosecuted for the same offence under the Act; and no person prosecuted under the Act is, for the same offence, to be otherwise prosecuted.

(i) *R. v. Martin*, Trin. T. 1811, R. & R. 196.

(j) This Act is repealed by the 4 Geo. 4, c. 64, s. 1, as far 'as relates to the escape of any prisoner from any gaol or prison to which this Act shall extend;' and by sec. 2 there is to be in every county in England and Wales one common gaol, and in every county not divided into ridings or divisions, and in every riding or division of a county (having distinct commissions of the peace, or distinct rates in the nature of county rates, ap-

plicable to the maintenance of a prison for such division) in England and Wales, at least one house of correction; and one gaol and one house of correction in the several cities, towns, and places mentioned in Schedule A. annexed to the Act, and the provisions of the Act are to extend in the manner thereafter mentioned, to every such gaol and house of correction maintained at the expense of such county, riding, division, city, town, or place, and to the several gaols and houses of correction in the cities of London and Westminster; by sec. 76 and 5 Geo. 4, c. 85, s. 27, the Act does not extend to the hospital of Bethlehem and prison of Bridewell, nor to the King's Bench or Fleet prison, nor to the prison of the Marshalsea or Palace Courts, the Millbank Penitentiary, or Gloucester Penitentiary, nor to any ships or vessels provided for the reception and employment of convicts sentenced to transportation; and by the 5 Geo. 4, c. 85, s. 9, so much of the 4 Geo. 4 as relates to Canterbury, Lichfield, and Lincoln is repealed. It is very difficult, therefore, to say how far the 16 Geo. 2, c. 31, is now repealed. C. S. G.

any means whatsoever, be aiding or assisting to any prisoner to attempt to make his or her escape from any gaol, although no escape be actually made, in case such prisoner then was attainted or convicted of treason, or any felony, except petty larceny, (*k*) or lawfully committed to or detained in any gaol, for treason or any felony, except petty larceny, expressed in the warrant of commitment or detainer; every person so offending shall, on conviction, be adjudged guilty of felony, and be transported for seven years. (*l*) And, 'in case such prisoner then was convicted or committed to or detained in any gaol for petty larceny, (*k*) or any other crime, not being treason or felony, expressed in the warrant of his or her commitment or detainer as aforesaid, or then was in gaol upon any process whatsoever, for any debt, damages, costs, sum or sums of money, amounting in the whole to the sum of one hundred pounds; every person so offending, and being convicted, shall be deemed guilty of 'a misdemeanor, and be liable to a fine and imprisonment.'

Sec. 2. 'If any person shall convey, or cause to be conveyed, into any gaol or prison, any vizard, or other disguise, or any instrument or arms proper to facilitate the escape of prisoners, and the same shall deliver or cause to be delivered to any prisoner in any such gaol, or to any other person there, for the use of any such prisoner, without the consent or privity of the keeper or under-keeper, of any such gaol or prison: every such person, although no escape or attempt to escape be actually made, shall be deemed to have delivered such vizard or other disguise, instrument or arms, with an intent to aid and assist such prisoner to escape, or attempt to escape; and in case such prisoner then was attainted or convicted of treason, or any felony, except petty larceny, or lawfully committed to or detained in any such gaol for treason, or any felony, except petty larceny, expressed in the warrant of commitment or detainer; every person so offending, and being convicted, shall, in like manner be deemed guilty of felony, and be transported for seven years. (*l*) And 'in case the prisoner to whom, or for whose use such vizard or disguise, instrument or arms, shall be so delivered, then was convicted, committed or detained for petty larceny, (*k*) or any other crime not being treason or felony, expressed in the warrant of commitment or detainer, or upon any process whatsoever, for any debt, damages, costs, sum or sums of money, amounting in the whole to the sum of one hundred pounds; every person so offending, and being convicted, shall be deemed guilty of a misdemeanor, and be liable to a fine and imprisonment.'

Sec. 3. 'If any person shall aid or assist any prisoner to attempt to make his or her escape from the custody of any constable, headborough, tithingman, or other officer or person who shall then have the lawful charge of such prisoner, in order to carry him or her to gaol, by virtue of a warrant of commitment for treason, or any felony (except petty larceny), (*k*) expressed in such war-

The 4 Geo. 4, c. 64, and 5 Geo. 4, c. 85, are now repealed by 28 & 29 Vict. c. 126; see *post*, p. 912; but this does not revive enactments repealed by the Acts of Geo. 4.

(*k*) Abolished; see 24 & 25 Vict. c. 96, s. 1, vol. II.

(*l*) Now penal servitude for not less than three years; see *ante*, p. 79. Principals in the second degree are punishable like principals in the first degree; and as to accessories, see *ante*, p. 161, *et seq.*

rant; or if any person shall be aiding or assisting to any felon to attempt to make his escape from on board any boat, ship, or vessel, carrying felons for transportation, or from the contractor for the transportation of such felons, his assigns or agents, or any other person to whom such felon shall have been lawfully delivered, in order for transportation; every person so offending, and being convicted, shall be deemed guilty of felony, and be transported for seven years. (n)

Sec. 4. The prosecution for these offences must be commenced within a year.

The second section of this statute, relating to the conveying of instruments, &c., into any prison, in order to facilitate the escape of prisoners, makes the offender guilty, in cases where the prisoner is committed to or detained in any gaol for treason or felony expressed in the warrant of commitment. (o) This has been holden to mean that the offence should be 'clearly and plainly expressed;' so that a case where the commitment is on suspicion only is not within the Act, for these are two kinds of commitments, which essentially differ from each other; as a prisoner may be admitted to bail on a commitment for suspicion only, but not on a commitment for treason or felony clearly and plainly expressed in the warrant. (p) And this doctrine was recognized and acted upon in a subsequent case of an indictment upon the third section of the statute, which relates to the aiding a prisoner to escape from the custody of a constable having charge of him by virtue of a warrant of commitment for felony 'expressed' in such warrant. The indictment stated that the commitment was on 'suspicion' of burglary, and the warrant produced in evidence at the trial corresponded with this statement: and the judges were unanimously of opinion that a commitment on suspicion was not within the statute. (q)

A majority of the judges decided that the Act does not extend to cases where an actual escape is made, but must be confined to cases of an attempt, without effecting the escape itself. They said, 'The statute purports to be made for the further punishing of those persons who shall aid and assist persons attempting to escape, and makes the offence felony: it creates a new felony: but the offence of assisting a felon in making an actual escape was felony before, and therefore does not seem to fall within the view or intention of the Legislature when they made this statute.' (r)

An indictment charging the defendant with aiding and assisting a prisoner to attempt to make an escape, need not state that the party aided did attempt to make the escape; for he could not have aided if no such attempt had been made. (r) The delivering instruments to a prisoner, to facilitate his escape from prison, is within this statute, though the prisoner have been pardoned for the offence of which he was convicted, on condition of transportation. (s) And a party is within the Act, though there be no evidence

(n) *Ante*, p. 909, note (l).

(o) *Ante*, p. 909.

(p) *R. v. Walker*, 1 Leach, 97; but see the 11 & 12 Vict. c. 42, ss. 1, 23.

(q) *R. v. Greeniff*, 1 Leach, 363; and *R. v. Gibbon*, 1 Leach, 98, note (a), S. P.

(r) *R. v. Tilley*, 2 Leach, 662. See 23 & 29 Vict. c. 126, s. 37, *post*, p. 912.

(s) *R. v. Shaw*, R. & R. 526.

that he knew of what specific offence the person he assisted had been convicted. (*t*)

The record of the conviction of the prisoner, whose escape was to have been effected, having been produced by the proper officer, no evidence is admissible to contradict what it states; or to show that it had never been filed among the records of the county; notwithstanding the indictment refers to it with a *prout patet* as remaining amongst those records. (*u*)

Where a count stated that the gaol thereafter mentioned, situate at the parish of the Holy Trinity, in Coventry, in the county of W., was a gaol to which the provisions of the 4 Geo. 4, c. 64, (now repealed) extended, and that one Thompson was a prisoner in the said gaol, and that the defendant, at the parish aforesaid, feloniously did aid and assist Thompson, then and there being such prisoner, in attempting to escape from the said gaol; it was held on error that the count was good, though it did not allege the means by which the defendant aided Thompson in attempting to escape, and though it did not allege in direct terms that Thompson did attempt to escape. (*v*) Another count stated that Thompson, being a prisoner in the said gaol, so situate as aforesaid, was meditating and endeavouring to effect his escape from the said gaol, otherwise than by due course of law, and in order thereto had procured a key to be made with intent to effect his escape by means thereof, and had made to the defendant, then being a turnkey of the said gaol, overtures to induce him to aid him to escape from the said gaol, and so was endeavouring to procure his escape and to escape from the said gaol; and that the defendant whilst Thompson was such prisoner in the said gaol, at the parish aforesaid, &c., feloniously did procure and receive into his possession the said key, being adapted to and capable of opening divers locks in the said gaol, with intent thereby to enable Thompson to escape from the said gaol, and so the jurors said that the defendant at the parish aforesaid feloniously did aid and assist Thompson in attempting to escape from the said gaol; and it was held that the introductory part of the count stated an attempt to escape and the means used with sufficient particularity, and sufficiently showed an offence within the 4 Geo. 4, c. 64, and that the count was not bad for want of a more particular venue to the acts charged in the introductory part as an attempt by Thompson to escape, and that the count was not double. (*w*) It was also held, that the general averment of the gaol being a gaol to which the provisions of the 4 Geo. 4, c. 64, applied was sufficient, without showing how it came within them, and that it was not necessary to show more particularly that the gaol was a gaol for the county within the 5 & 6 Vict. c. 110, s. 2. (*x*) It was further held, that aiding an escape is a substantive offence under the repealed enactment 4 Geo. 4, c. 64, s. 43, and therefore the count was not bad in charging the accessory without including the principal or alleging that he had been convicted, and at all events

(*t*) *R. v. Shaw, supra*. An indictment at common law for aiding a prisoner's escape should state that the party knew of his offence. *R. v. Young*, Trin. T. 1801, MS. Bayley, J.

(*u*) *R. v. Shaw, supra*.

(*v*) *Holloway v. R.*, 17 Q. B. 317. 2 Den. C. C. 287.

(*w*) *Ibid*.

(*x*) *Ibid*.

such an objection was too late after the trial. (y) It was also held, that it was not necessary to show that the prosecution was commenced within a year after the offence, as was required by the 16 Geo. 2, c. 31, s. 4. (z)

The 1 & 2 Vict. c. 82, established a prison for young offenders at Parkhurst, in the Isle of Wight; and sec. 13 provides for the punishment of persons rescuing or aiding in the rescue of such offenders; and sec. 14 provides for the trial and evidence on the trial in such cases. The 10 & 11 Vict. c. 62, s. 8, an Act for the establishment of naval prisons, provides for the punishment of persons aiding the escape of prisoners from those prisons. The 29 & 30 Vict. c. 109, s. 82, also provides for the punishment of persons aiding prisoners to escape from certain naval prisons.

The 5 Geo. 4, c. 84, which was passed for the purpose of revising and consolidating the laws for regulating the transportation of offenders from Great Britain, and which will be more particularly noticed in the next chapter, by sec. 22, provides, that if any person shall rescue or attempt to rescue, or assist in rescuing or attempting to rescue, any offender sentenced or ordered to be transported or banished, from the custody of the superintendent or overseer, or of any sheriff or gaoler, or other person, conveying, removing, &c., such offender, or shall convey or cause to be conveyed any disguise, instrument for effecting escape, or arms, to such offender, every such offence shall be punishable in the same manner as if such offender had been confined in a gaol or prison in the custody of the sheriff or gaoler, for the crime of which such offender shall have been convicted. (a) .

The two following sections relate to the indictment and the evidence, and will be found in the next chapter.

By the 23 & 24 Vict. c. 75, s. 12, 'any person who rescues any person ordered to be conveyed to any asylum for criminal lunatics during the time of his conveyance thereto or of his confinement therein, and any officer or servant in any asylum for criminal lunatics who through wilful neglect or connivance permits any person confined therein to escape therefrom, or secretes, or abets or connives at the escape of any such person, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for any term not exceeding four years, (b) or to be imprisoned for any term not exceeding two years, with or without hard labour, at the discretion of the Court; and any such officer or servant who carelessly allows any such person to escape as aforesaid shall, on summary conviction before two justices of such offence, forfeit any sum not exceeding twenty pounds nor less than two pounds.

By the 28 & 29 Vict. c. 126 (entitled an Act to consolidate and amend the law relating to prisons), s. 37, 'every person who aids any prisoner in escaping or attempting to escape from any prison, or who,

(y) *Holloway v. R.*, 17 Q. B. 317. 2 Den. C. C. 287.

(z) *Ibid.* It was also held that if one of several counts be good, the Court may, under the 11 & 12 Vict. c. 78, s. 5, pronounce the correct judgment, or direct the

inferior Court to pronounce it, on the good count.

(a) The provisions of this Act are now applicable to prisoners sentenced to penal servitude, see *post*, p. 924.

(b) And not less than three years; see *ante*, p. 79

with intent to facilitate the escape of any prisoner, conveys or causes to be conveyed into any prison any mask, dress, or other disguise, or any letter, or any other article or thing, (c) shall be guilty of felony, and on conviction be sentenced to imprisonment with hard labour for a term not exceeding two years.' (d)

(c) A crowbar is an article or thing within this section. *R. v. Payne*, 35 L. J. M. C. 170; L. R. 1 C. C. R. 27.

(d) This Act does not extend to Scotland or Ireland, and does not apply to the prisons for convicts under the superintendence of the directors of convict prisons, or to any military or naval prisoner (s. 3). 'Prison'

shall mean gaol, house of correction, bridge-wall, or penitentiary; it shall also include the airing grounds, or other grounds or buildings occupied by prison officers, for the use of the prison and contiguous thereto. 'Gaoler' shall mean governor, keeper, or other chief officer of a prison (s. 4).

CHAPTER THE THIRTY-SEVENTH.

OF RETURNING, OR BEING AT LARGE, AFTER SENTENCE OF TRANSPORTATION ; AND OF RESCUING OR AIDING THE ESCAPE OF A PERSON UNDER SUCH SENTENCE.

As *exile* or *transportation* is a species of punishment unknown to the common law of England, and inflicted only under the sanction of enactments of the Legislature, offences committed by not submitting to that punishment are principally dependent upon the provisions of particular statutes. (a) But as a party convicted of felony within benefit of clergy, and sentenced to be transported for seven years, continues a felon, till actual transportation and service, pursuant to the sentence ; and as it is a felony at common law to assist a felon to escape out of lawful custody ; it has been holden that, independently of any statutable enactments, a person assisting such felon convict, being in custody under sentence of transportation, to escape out of prison, is an accessory to the felony after the fact, provided it be such an assistance as in law amounts to a receiving, harbouring, or comforting such felon. (b)

The 5 Geo. 4, c. 84, s. 1, recites, that the several laws in force for regulating the transportation of offenders from Great Britain, would expire at the end of the then present session of Parliament, and that it was expedient that the laws relative to that subject should be revised and consolidated into one Act. (c)

Sec. 2. 'By the unrepealed portion of this section (d) whenever his Majesty shall be pleased to extend mercy to any offender convicted of any crime for which he or she is or shall be excluded from the benefit of clergy, upon condition of transportation beyond the seas, either for the term of life, or any number of years, and such intention of mercy shall be signified by one of his Majesty's principal secretaries of state to the Court before which such offender hath been

(a) In 6 Ev. Col. Stat. Part V. Cl. xxv. (G.) pp. 852, 853, the learned editor says, that the earliest Act which imposed the punishment of transportation was 39 Eliz. c. 4, which enacted that rogues, vagabonds, &c., might, by the justices in sessions, be banished out of the realm, and conveyed at the charges of the county to such parts beyond the seas as should be assigned by the privy council, or otherwise adjudged perpetually to the galleys of this realm ; and any rogue so banished, and returning again into the realm, was to be guilty of felony. And he says that the earliest statute then

subsisting which notices the power of transportation was 22 Car. 2, c. 5.

(b) R. v. Burridge, 3 P. Wms. 439.

(c) By 36 & 37 Vict. c. 91, this Act is in part repealed, namely :—

Section One.

Section Two, to 'under the provisions of this Act ; and'

Section Seventeen, Twenty-five, and Twenty-nine.

Also, so much of the Act as provides for the appointment of the superintendent therein mentioned, or any overseer, or any assistant, or deputy to such superintendent.

(d) See note (c), *supra*.

or shall be convicted, or any subsequent Court with the like authority, such Court shall allow to such offender the benefit of a conditional pardon, and make an order for the immediate transportation of such offender; and in case such intention of mercy shall be so signified to the judge or justice before whom such offender hath been or shall be convicted, or to any judge of his Majesty's Court of King's Bench or Common Pleas, or to any baron of the Exchequer of the degree of the coif in England, such judge, justice, or baron, shall allow to such offender the benefit of a conditional pardon, and make an order for the immediate transportation of such offender, in the same manner as if such intention of mercy had been signified to the Court during the term or session in or at which such offender was convicted; and such allowance and order shall be considered as an allowance and order made by the Court before which such offender was convicted, and shall be entered on the records of the same Court by the proper officer thereof, and shall be as effectual to all intents and purposes, and have the same consequences, as if such allowance and order had been made by the same Court during the continuance thereof: and every such order, and also every order made by the Court of Justiciary in Scotland for the transportation of any offender, whose sentence of death shall be remitted by his Majesty, shall subject the offender to be conveyed beyond the seas, under the provisions of this Act.'

Sec. 3. 'It shall be lawful for his Majesty, by and with the advice of his privy council, from time to time, to appoint any place or places beyond the seas, either within or without his Majesty's dominions, to which felons and other offenders under sentence or order of transportation or banishment shall be conveyed; and that when any offenders shall be about to be transported or banished from Great Britain, one of his Majesty's principal secretaries of state shall give orders for their removal to the ship to be employed for their transportation, and shall authorize and empower some person to make a contract for their effectual transportation to some of the places so appointed, and shall direct security to be given for their effectual transportation, in the manner hereinafter mentioned.' (e)

Secs. 4, 5, 7 provide for the delivery of offenders ordered to be transported to the contractors by the sheriff or gaoler, and for the giving of proper security by the contractors for their effectual transportation (except when such offenders are transported in King's ships). Sec. 6 gives authority to punish such offenders misbehaving themselves upon the voyage; and sec. 8 vests a property in their services during the term of transportation in the governor of the colony, &c., and his assignees. (f)

Sec. 10. 'It shall be lawful for his Majesty from time to time, by warrant under his royal sign manual, to appoint places of confinement within England or Wales, either at land, or on board vessels to be provided by his Majesty in the river Thames, or some other river, or within the limits of some port or harbour of England or Wales, for the confinement of male offenders under sentence or order of trans-

(e) See the 11 Geo. 4 and 1 Will. 4, c. 39, as to the delivery of convicts at one place instead of another, &c.

(f) See 9 Geo. 4, c. 83, s. 9, as to assignment of convicts.

portation, which shall be under the management of a superintendent and overseer, to be appointed by his Majesty; and that it shall be lawful for one of his Majesty's principal secretaries of state to direct the removal of any male offender who shall be under sentence of death, but who shall be reprieved, or whose sentence shall be respited during his Majesty's pleasure, or who shall be under sentence or order of transportation, and who, having been examined by an experienced surgeon or apothecary, shall appear to be free from any putrid or infectious distemper, and fit to be removed from the gaol or prison in which such offender shall be confined, to any of the places of confinement so appointed; and every offender who shall be so removed shall continue in the said place of confinement or be removed to and confined in some other such place or places as aforesaid, as one of his Majesty's principal secretaries of state shall from time to time direct, until such offender shall be transported according to law, or shall become entitled to his liberty, or until one of his Majesty's principal secretaries of state shall direct the return of such offender to the gaol or prison from which he shall have been removed; and the sheriff or gaoler having the custody of any offender whose removal shall be ordered in manner aforesaid, shall with all convenient speed, after the receipt of any such order, convey or cause to be conveyed every such offender to the place appointed, and there deliver him to such superintendent or overseer, together with a true copy, attested by such sheriff or gaoler, of the caption and order of the Court by which such offender was sentenced or ordered for transportation, containing the sentence or order of transportation of each such offender, by virtue whereof he shall be in the custody of such sheriff or gaoler; and also a certificate, specifying concisely the description of his crime, his age, whether married or unmarried, his trade or profession, and an account of his behaviour in prison before and after his trial, and the gaoler's observations on his temper and disposition, and such information concerning his connexions and former course of life as may have come to the gaoler's knowledge; and such superintendent or overseer shall give a receipt in writing to the sheriff or gaoler for the discharge of such sheriff or gaoler.' (g)

Secs. 11, 12 authorized his Majesty to appoint a superintendent, an assistant to the superintendent, and an overseer for such places of confinement; specified the duties of the superintendent; and contained regulations for the cleansing, purifying, and clothing, the offenders brought to such places. (h)

(g) By the 10 & 11 Vict. c. 67, s. 2, 'it shall be lawful for her Majesty, by an order in writing, to be notified in writing by one of her Majesty's principal secretaries of state, to direct that any persons under sentence or order of transportation within Great Britain shall be removed from the prisons in which they are severally confined to any other of her Majesty's prisons or penitentiaries in Great Britain, there to be confined for such time as her Majesty by any such order shall direct, not exceeding the time for which they might have been confined in the prisons from which they shall have been severally removed.' The 16 & 17 Vict. c. 121, re-

cites the 5 Geo. 4, c. 84, 9 & 10 Vict. c. 26, and 13 & 14 Vict. c. 39, and extends all the powers and provisions of sec. 10 of the 5 Geo. 4, c. 84, authorizing the appointment of places of confinement of males to the like places of confinement for females under sentence of transportation, and the removal to or from and the confinement in such places of females, and applies all the provisions of the recited Acts relating to the Government of places appointed under sec. 10 to places appointed under this Act.

(h) The 9 & 10 Vict. c. 26, s. 1, repeals so much of the 5 Geo. 4, c. 84, 'as gives the custody and management of any male offend-

Sec. 13. 'It shall be lawful for his Majesty, by any order or orders in council, to declare his royal will and pleasure, that male offenders convicted in Great Britain, and being under sentence or order of transportation, shall be kept to labour in any part of his Majesty's dominions out of England, to be named in such order or orders in council; and that whenever his Majesty's will and pleasure shall be so declared in council, it shall be lawful for one of his Majesty's principal secretaries of state to direct the removal and confinement of any such male offender either at land or on board any vessel to be provided by his Majesty, within the limits of any port or harbour in that part of his Majesty's dominions which shall be named in such order in council, under the management of the said superintendent, and of an overseer to be appointed by his Majesty for each such vessel or other place of confinement; and that every offender who shall be so removed shall continue on board the vessel or other place of confinement to be so provided, or any similar vessel or other place of confinement to be from time to time provided by his Majesty, until his Majesty shall otherwise direct, or until the offender shall be entitled to his liberty.' (i)

Sec. 15. 'After the removal of any offender under this Act, the superintendent and overseer who shall have the custody of him, shall, during the term of such custody, have the same powers over him as are incident to the office of a sheriff or gaoler, and shall in like manner be answerable for any escape of such offender; and if any offender shall during such custody be guilty of any misbehaviour or disorderly conduct, the superintendent or overseer shall be authorized to inflict or cause to be inflicted on him such moderate punishment or correction as shall be allowed by one of his Majesty's principal secretaries of state; and such superintendent or overseer shall also, during such custody, see every offender fed and clothed according to a scale of diet and clothing to be fixed on and notified in writing by one of his Majesty's principal secretaries of state to the superintendent; and shall keep such offender to labour at such places, and under such regulations, directions, limitations, and restrictions, as by such secretary of state shall from time to time be prescribed; and in case of the absence of any such superintendent or overseer, or of the vacancy of his office, his duties or powers shall be discharged and exercised in all respects by the officer or person on whom the command of the place of confinement shall devolve.'

ers out of England to the superintendent of convicts confined in England under sentence of transportation,' and provides that his powers may be exercised by the governor of the colony. The 22 & 23 Vict. c. 25, s. 1, repeals such parts of the 5 Geo. 4, c. 84, 'as relate to the control and management of offenders sent to be kept to hard labour at places out of England duly appointed for the purpose,' and such parts of the 9 & 10 Vict. 26, 'as relate to the appointment of superintendent, deputy superintendent, and overseer respectively in places out of England;' and makes numerous provisions for the government of convict prisons abroad,

the punishment of escapes and rescues, and the trial of such offences abroad. C. S. G. So much of the Act of 5 Geo. 4, c. 84, as provides for the appointment of the superintendent therein mentioned, or any overseer, or any assistant, or deputy to such superintendent, is repealed by the 36 & 37 Vict. c. 91, *ante*, p. 914, note (c).

(i) This clause is extended to male offenders sentenced in Ireland to be transported by the 10 & 11 Vict. c. 87, s. 1. See the 6 Geo. 4, c. 69, s. 1, for the punishment and trial of persons committing offences out of England whilst kept to hard labour under this section.

By sec. 16, the superintendent is also empowered to act as a justice of the peace.

Sec. 18. It shall be lawful to keep to hard labour every offender under sentence or order of transportation, while he or she shall remain in the common gaol, if his or her health will permit; and if one or more of the visiting justices shall give a written order to that effect; and that it shall be lawful for one of his Majesty's principal secretaries of state, if he shall think fit, to order that any such offender be removed from the common gaol to the house of correction, and there kept to hard labour. By sec. 19, the time during which any offender shall continue in any gaol or house of correction, or in any such place of confinement as aforesaid, under sentence or order of transportation, is to be reckoned in discharge or part discharge of the term of transportation or banishment. (*j*) Secs. 20, 21, provide for the secure removal of offenders through any county to the seaports or places of confinement and for the payment of the expenses of removal by the county in which the conviction took place.

Sec. 22. 'If any offender who shall have been or shall be so sentenced or ordered to be transported or banished, or who shall have agreed or shall agree to transport or banish himself or herself on certain conditions, either for life or any number of years, under the provisions of this or any former Act, shall be afterwards at large within any part of his Majesty's dominions, without some lawful cause, before the expiration of the term for which such offender shall have been sentenced or ordered to be transported or banished, or shall have so agreed to transport or banish himself or herself, every such offender so being at large, being thereof lawfully convicted, shall suffer death, as in cases of felony, without the benefit of clergy; (*jj*) and such offender may be tried either in the county or place where he or she shall be apprehended, or in that from whence he or she was ordered to be transported or banished; and if any person shall rescue, or attempt to rescue, or assist in rescuing or attempting to rescue, any such offender from the custody of such superintendent or overseer, or of any sheriff or gaoler, or other person conveying, removing, transporting, or reconveying him or her, or shall convey, or cause to be conveyed, any disguise, instrument for effecting escape, or arms, to such offender, every such offence shall be punishable in the same manner as if such offender had been confined in a gaol or prison, in the custody of the sheriff or gaoler, for the crime of which such offender shall have been convicted; and whoever shall discover and prosecute to conviction any such offender so being at large within this kingdom, shall be entitled to a reward of twenty pounds for every such offender so convicted.' (*k*)

The 4 & 5 Will. 4, c. 67, recites the preceding section, and enacts that 'so much of the recited Act as inflicts the punishment of death upon persons convicted of any offence therein and hereinbefore specified, shall be, and the same is hereby repealed; and that from and

(*j*) Secs. 18 and 19 are repealed by 53 & 54 Vic. c. 33, and ss. 27 and 28 by 56 & 57 Vic. c. 61.

(*jj*) As to these enactments applying where offenders have been sentenced to penal servitude, see *post*, 922.

(*k*) The judge, before whom a prisoner is tried for returning from transportation, has power to order the county treasurer to pay the prosecutor the reward under the 5 Geo. 4, c. 84, s. 22. *R. v. Emmons*, 2 M. & Rob. 279, Coleridge, J. *R. v. Ambury*, 6 Cox, C. C. 79.

after the passing of this Act, any person convicted of any offence above specified in the said Act of 5 Geo. 4, c. 84, or of aiding or abetting, counselling, or procuring the commission thereof, shall be liable to be transported (*l*) beyond the seas for his or her natural life, and previously to transportation shall be imprisoned with or without hard labour, in any common gaol, house of correction, prison, or penitentiary, for any term not exceeding four years.' (*m*)

Sec. 23 of the 5 Geo. 4, c. 84, 'In any indictment against any offender for being found at large, contrary to the provisions of this or of any other Act now made, or hereafter to be made; and also in any indictment against any person who shall rescue, or attempt to rescue, or assist in rescuing, any such offender from such custody, or who shall convey, or cause to be conveyed, any disguise, instrument for effecting escape, or arms, to any such offender, contrary to the provisions of this or of any other Act now made, or hereafter to be made, whether such offender shall have been tried before any Court or judge, within or without the United Kingdom, or before any naval or military court-martial, it shall be sufficient to charge and allege the order made for the transportation or banishment of such offender, without charging or alleging any indictment, trial, conviction, judgment, or sentence, or any pardon or intention of mercy, or signification thereof, of or against, or in any manner relating to such offender.'

Sec. 24. 'The clerk of the Court or other officer having the custody of the records of the Court where such sentence or order of transportation or banishment shall have been passed or made, shall, at the request of any person on his Majesty's behalf, make out and give a certificate in writing, signed by him, containing the effect and substance only (*n*) (omitting the formal part) of every indictment and conviction of such offender, and of the sentence or order for his or her transportation or banishment (not taking for the same more than six shillings and eightpence), which certificate shall be sufficient evidence of the conviction and sentence, or order for the transportation or banishment of such offender; and every such certificate, if made by the clerk or officer of any Court in Great Britain, shall be received in evidence, upon proof of the signature and official character of the person signing the same; (*o*) and every such certificate, if made by the clerk or officer of any Court out of Great Britain, shall be received in evidence, if verified by the seal of the Court, or by the signature of the judge, or one of the judges of the Court, without further proof.'

Where a certificate under the preceding section stated that the prisoner had been convicted of two larcenies, and sentenced to two several terms of transportation of seven years each for the said larcenies, Patteson, J., held that it sufficiently complied with the requisitions of the statute to be admissible in evidence in support of an indictment against a prisoner for escaping from custody whilst under sentence of transportation. (*p*) Under this section, the certi-

(*l*) Now penal servitude for not less than three years, see *ante*, p. 79. See *R. v. Lamb*, 3 C. & K. 96.

(*m*) Neither the 5 Geo. 4, c. 64, nor the 4 & 5 Will. 4, c. 67, provides for the punish-

ment of accessories after the fact; see, therefore, *ante*, p. 182.

(*n*) See *R. v. Watson*, *post*, p. 925.

(*o*) See 8 & 9 Vict. c. 113, s. 1; 14 & 15 Vict. c. 99, s. 13; Vol. III., *Evidence*.

(*p*) *R. v. Russell*, 1 Cox, C. C. 81.

ificate of conviction and sentence of transportation may be made out and given by the deputy clerk of the peace, acting as such, and having the custody of the records. (q)

The 1 & 2 Vict. c. 82, s. 3, which provides for the establishment of a prison for juvenile offenders at Parkhurst, in the Isle of Wight, enacts that any young offender under sentence of transportation or of imprisonment may be removed to Parkhurst; but that every offender so removed, who shall be under sentence of transportation, shall be within the provisions of the 5 Geo. 4, c. 84, if the secretary of state afterwards orders him to be removed from Parkhurst; and by sec. 5, the secretary may order any offender to be removed from Parkhurst as incorrigible, and in such case the offender is liable to be transported or confined under his original sentence, and is subject to all the consequences thereof in the same manner as if no order had been made to send him to Parkhurst; and by sec. 12, 'if any offender who shall be ordered to be confined in Parkhurst prison shall at any time during the term of such confinement break prison, or escape from the place of his or her confinement, or in his or her conveyance to such place of confinement, or from any lands belonging to the prison, or from the person or persons having the lawful custody of such offender, he or she so breaking prison or escaping shall be punished, if under sentence of imprisonment, by an addition not exceeding two years to the term for which he or she at the time of his or her breach of prison or escape was subject to be confined, and if under sentence of transportation, in such manner as persons under sentence of transportation escaping from or breaking out of any other prison or place of confinement are liable to be punished; and if an offender so punished by such addition to the term of confinement shall afterwards be convicted of a second escape or breach of prison, he or she shall be adjudged guilty of felony; (r) and if any offender who shall be ordered to be confined in the said prison shall, at any time during the term of such confinement, attempt to break prison or escape from the place of his or her confinement, or shall forcibly break out of his or her cell, or shall make any breach therein with intent to escape, he or she so offending being convicted thereof, shall be punished by imprisonment for a term not exceeding twelve calendar months, in addition to the punishment to which he or she at the time of committing any such offence was subject.' (s)

The 5 & 6 Vict. c. 29, s. 14, an Act for establishing a prison at Pentonville, authorizes the removal of male convicts under sentence of transportation to Pentonville; and by sec. 16, every such convict is to continue there until transported, conditionally pardoned, entitled to his freedom, or until the secretary of state directs his removal; but every such convict is to be within the provisions of

(q) *R. v. Parsons*, 10 Cox, C. C. 243. See *post*, p. 925.

(r) As no punishment is specially provided by this Act for this offence, it is punishable under the 7 & 8 Geo. 4, c. 28, ss. 8, 9; and 1 Vict. c. 90, s. 5, *ante*, p. 65; and so are the principals in the second degree and accessories before the fact, *ante*, p. 180;

and as to accessories after the fact, see *ante*, p. 182.

(s) Sec. 13 makes every person rescuing or aiding in the rescue of such offenders guilty of felony; and sec. 14 makes offenders triable where they are apprehended, or where the escape, &c. was, and makes the order of commitment evidence, and provides for the costs of the prosecution.

the 5 Geo. 4, c. 84, if the secretary directs his removal from Pentonville; and by sec. 22, the secretary may order any convict to be removed as incorrigible from Pentonville; and in such case the convict is liable to be transported under his original sentence, in the same manner as if no order had been made to send him to Pentonville; and by sec. 24, 'every convict who shall be ordered to be imprisoned in the Pentonville prison, who at any time during the term of such imprisonment shall break prison, or who, while being conveyed to such prison, shall escape from the person or persons having the lawful custody of such convict, shall be punished by an addition not exceeding three years to the term of his imprisonment, and if afterwards convicted of a second escape or breach of prison shall be adjudged guilty of felony; (t) and every convict in the Pentonville prison who at any time during the term of his imprisonment shall attempt to break prison, or who shall forcibly break out of his cell, or make any breach therein with intent to escape therefrom, shall be punished by an addition not exceeding twelve calendar months to the term of his imprisonment.' (u)

The 16 & 17 Vict. c. 99, an Act to substitute in certain cases other punishment in lieu of transportation, introduced the punishment of penal servitude; and secs. 1, 2, 3, 4, provided for the cases in which that punishment might be awarded; but these sections are repealed by the 20 & 21 Vict. c. 3, s. 1, and by sec. 2, the sentence of transportation is abolished and penal servitude substituted for it; (v) and by s. 1 of the 27 & 28 Vict. c. 47, this Act and the last two mentioned Acts are to be read as one.

By the 16 & 17 Vict. c. 99, s. 5, 'Whenever her Majesty, or the Lord Lieutenant, or other chief-governor or governors of Ireland for the time being, shall be pleased to extend mercy to any offender convicted of any offence for which he may be liable to the punishment of death, upon condition of his being kept to penal servitude for any term of years or for life, such intention of mercy shall have the same effect and may be signified in the same manner, and all Courts, justices, and others shall give effect thereto and to the condition of the pardon in like manner, as in the cases where her Majesty or the Lord Lieutenant or other chief governor or governors of Ireland for the time, is or are now pleased to extend mercy upon condition of transportation beyond seas; the order for the execution of such punishment as her Majesty, or the Lord Lieutenant, or other chief governor or governors of Ireland for the time being, may have made the condition of her, his, or their mercy being substituted for the order for transportation.'

Sec. 6. 'Every person who under this Act shall be sentenced or ordered to be kept in penal servitude may, during the term of the sentence or order, be confined in any such prison or place of confinement in any part of the United Kingdom, or in any river, port, or harbour of the United Kingdom, in which persons under sentence or order of transportation may now by law be confined, or in any other

(t) See note (r), p. 920.

(u) Sec. 25 provides for the punishment of persons rescuing or aiding the rescue of convicts; and sec. 28 makes offenders triable

at the Central Criminal Court, or where they are taken, and makes a copy of the order of commitment evidence.

(v) See sec. 2, *ante*, p. 74.

prison in the United Kingdom, or in any part of her Majesty's dominions beyond the seas, or in any port or harbour thereof, as one of her Majesty's principal secretaries of state may from time to time direct; and such person may during such term be kept to hard labour and otherwise dealt with in all respects as persons sentenced to transportation may now by law be dealt with while so confined.'

Sec. 7. 'All Acts and provisions of Acts now applicable with respect to persons under sentence or order of transportation shall, so far as may be consistent with the express provisions of this Act, be construed to extend and be applicable to persons under any sentence or order of penal servitude under this Act; and all the powers and provisions contained in the Act of the 5 Geo. 4, c. 84, authorising the appointment by her Majesty from time to time of places of confinement as therein mentioned for male offenders under sentence or order of transportation, and authorising her Majesty to order male offenders convicted in Great Britain and under sentence or order of transportation to be kept to hard labour in any part of her Majesty's dominions out of England, shall extend and be applicable to and for the appointment by her Majesty of like places of confinement in any part of the United Kingdom for offenders (whether male or female) sentenced under this Act in any part of the United Kingdom, and to and for the ordering of such offenders to be kept to hard labour in any part of her Majesty's dominions out of England; and all the provisions of the said Act concerning the removal to or from and confinement in the places of confinement in or out of England, appointed under the said Act, of the offenders therein-mentioned, and all Acts and provisions of Acts now in force concerning or relating to the regulation and government of such places of confinement, and the custody, treatment, management, and control of or otherwise in relation to the offenders confined therein, shall, so far as the same may be consistent with the express provisions of the Act, extend and be applicable to and for the removal to and from and confinement in the places of confinement appointed under this Act of the offenders sentenced in any part of the United Kingdom, and otherwise be applicable to and in respect of such places of confinement and the offenders to be confined therein.' (w)

Sec. 9. 'It shall be lawful for her Majesty, by an order in writing under the hand and seal of one of her Majesty's principal secretaries of state, to grant to any convict now under sentence of transportation, or who may hereafter be sentenced to transportation, or to any punishment substituted for transportation by this Act, a licence to be at large in the United Kingdom and the Channel Islands, or in such part thereof respectively as in such licence shall be expressed, during such portion of his or her term of transportation or imprisonment, and upon such conditions in all respects as to her Majesty shall seem fit; and it shall be lawful for her Majesty to revoke or alter such licence by a like order at her Majesty's pleasure.'

Sec. 10. 'So long as such licence shall continue in force and unrevoked, such convict shall not be liable to be imprisoned or trans-

(w) Sec. 8. All powers of a secretary of state are in Ireland to be exercised by the Lord Lieutenant.

ported by reason of his or her sentence, but shall remain at large according to the term of such sentence.

Sec. 11. 'If it shall please her Majesty to revoke a licence granted by warrant under his hand, and the seal of the police magistrate of the metropolis that such licence be revoked, and may require such magistrate to issue a warrant for the apprehension of the convict, and the magistrate shall issue the warrant accordingly, and the warrant shall be extendible to whom it shall be delivered for that purpose, in the United Kingdom, or in Jersey, Guernsey, Alderney, or the Channel Islands, the convict when apprehended shall be brought before the magistrate who issued the warrant, or some other magistrate of the same rank, and he shall thereupon make out his warrant for the recommitment of the convict [to the prison from which he was removed], and such convict shall be recommitted accordingly 'as if he had not been remitted to his or her original sentence, and the term of his or her sentence shall be the residue thereof as if no such licence had been granted.'

The 20 & 21 Vict. c. 3, s. 3, reciting that the provisions of the Act of King George the Fourth, relating to the transportation of persons under sentence of penal servitude only when they are conveyed to any place of confinement appointed under the 5 Geo. 4, c. 84, are expedient to extend the provisions, enacts that 'any person hereafter under sentence or order of penal servitude, or any term of the sentence or order, be conveyed to any place beyond the seas to which offenders under sentence of penal servitude may be conveyed, or to any place or place of confinement which may be hereafter appointed as herein mentioned, and the provisions now applicable to and for the removal of offenders under sentence or order of transportation from any places beyond the seas, and concerning the management, and control, and the property in their persons, and the punishment of such offenders if at large without the expiration of their sentence, and all other provisions applicable to and in the case of persons under sentence of transportation, shall apply to and in the case of persons under sentence or order of penal servitude, as if they were persons under sentence or order of transportation.'

Sec. 4. 'The provisions and powers of the said Act of King George the Fourth, authorizing the appointment of places beyond the seas to which felons and other persons under sentence or order of transportation shall be conveyed, and the powers of her Majesty, or the Lord Lieutenant, or the Governor of Ireland, for the like purpose, shall extend to and for the appointment of any place or place of confinement beyond the seas to which offenders under sentence or order of transportation may be conveyed, as herein provided.'

Sec. 5, reciting sec. 11 of the 16 & 17 Vict. c. 99, enacts that 'any convict who shall be released from prison, or from any place of confinement, shall be recommitted by the magistrate who issued the warrant, or some other magistrate of the same rank, and he shall thereupon make out his warrant for the recommitment of the convict [to the prison from which he was removed], and such convict shall be recommitted accordingly 'as if he had not been remitted to his or her original sentence, and the term of his or her sentence shall be the residue thereof as if no such licence had been granted.'

(x) Sec. 15. For the purposes of the Act the term 'transportation' includes banishment beyond the seas.

(a) The part within the brackets is inserted by 37 & 38 Vict. c. 60.

warrant in that behalf, either to the prison from which he was released by virtue of his licence, or to any other prison in which convicts under sentence of penal servitude may be lawfully confined.'

Sec. 6. 'Where in any enactment now in force the expression "any crime punishable with transportation," or "any crime punishable by law with transportation," or any expression of the like import, is used, the enactment shall be construed and take effect as applicable also to any crime punishable with penal servitude.' (b)

The Army Act 1881 (c) which is continued by the annual mutiny Acts, regulates the discipline and punishment of persons subject to military law, and by s. 58, when a person subject to military law is convicted by court martial and sentenced to penal servitude, such conviction and sentence shall have the same effect as if such person had been convicted in the United Kingdom of an offence punishable by penal servitude and sentenced to penal servitude by a competent civil court, and 'all enactments relating to a person sentenced to penal servitude by a competent civil court shall so far as circumstances admit apply accordingly.' By the Naval Discipline Act 1884 (d) s. 3, a similar provision is enacted with regard to persons subject to naval discipline.

It may be useful to mention some of the points decided upon the statutes which formerly related to the offences treated of in this chapter.

Where an indictment alleged that the prisoner 'was at large without any lawful excuse within her Majesty's dominions, before the expiration of the time' for which he had been transported; Patteson, J., held the indictment bad for omitting the word 'feloniously'; for the statute, by enacting that the offender 'shall suffer death as in cases of felony,' clearly made the offence felony. (e)

Where a capital convict had a conditional pardon and escaped, and the indictment against him stated that the King's pleasure was notified to the Court, and the Court thereupon ordered, &c., according to the terms of the pardon, and the notification was to the judge after the assizes were over, and he made the order; the judges were unanimous that the notification to the judge, and the order by him, was not a notification to the Court, or any order by the Court, and that the indictment was not proved. (f) But the 5 Geo. 4, c. 84, enacts that it shall be sufficient to allege in the indictment the order for transportation, without alleging any indictment, trial, &c., or any pardon or intention of mercy, or signification thereof. (g) The statute, however, requires that the certificate to be given in evidence shall contain the effect and substance of the indictment and conviction; and in a case which arose upon the 6 Geo. 1, c. 23 (now repealed), which required that the certificate should contain the effect and tenor of the indictment and conviction, and of the order and contract for transportation, and also upon the 24 Geo. 3, c. 56, s. 5 (now repealed), which required a certificate containing the effect and substance only,

(b) See the enactments as to penal servitude, *ante*, p. 73 *et seq.*

(c) 44 & 45 Vict. c. 58.

(d) 47 & 48 Vict. c. 39.

(e) *R. v. Horne*, 4 Cox, C. C. 263.

(f) *R. v. Treadwell*, Mich. Term, 1781, MS. Bayley, J.

(g) Sec. 23, *ante*, p. 919; and see also *ante*, p. 914.

omitting the formal part of the indictment and conviction, the indictment stated that the prisoner was convicted of grand larceny within benefit of clergy, and the certificate was in the same form; and the judges, upon the point being reserved, held that both were insufficient. (*h*) So also in another case, upon the 56 Geo. 3, c. 27, s. 8, which required the certificate to contain the effect and substance only (omitting the formal part) of the indictment and conviction, and order for transportation, it was held that an indictment which stated that the prisoner had been convicted of felony, without stating the nature of that felony, and a certificate which stated only that the prisoner had been convicted of felony, were insufficient; and the prisoner was remitted to his former sentence. (*i*) But where on an indictment for returning from transportation, the certificate put in alleged that the prisoner had been convicted of two larcenies, and sentenced to two several terms of transportation for seven years each for the said larcenies; Patteson, J., held that the certificate was sufficient. (*j*) So where on a similar indictment the certificate put in alleged that the prisoner was 'in due form of law convicted of feloniously and burglariously breaking and entering the dwelling-house of T. D., and feloniously and burglariously stealing therein one piece of the current gold coin, &c., and 'was thereupon ordered to be transported beyond the seas for the term of his natural life;' Williams, J., held that the certificate sufficiently stated the sentence of transportation. (*k*) So where on a similar indictment the certificate put in stated that 'at the general quarter sessions of the peace of our Lady the Queen,' holden at M. in the county of K., the prisoner was in due form of law tried and convicted; Patteson, J., held that the certificate sufficiently described the Court by which the prisoner had been tried. (*l*) The prisoner was indicted under the 5 Geo. 4, c. 84, s. 22, for being at large before the expiration of the term for which he was transported. A certificate of the clerk of the peace was put in to prove the conviction and sentence, and it appeared therefrom that the prisoner had been convicted of larceny at the sessions, and sentenced to be transported for fourteen years. It was objected that the sessions had no jurisdiction to pass that sentence for simple larceny, and therefore that the judgment was a nullity: but it was held that the judgment was valid until it was reversed, and that was enough. (*m*)

Where an indictment stated the condition upon which the royal mercy was extended to the prisoner to have been his being transported for life to some parts beyond the seas, and it appeared in evidence that the condition was that he should be transported to New South Wales or some of the islands adjacent, the variance was held to be fatal. (*n*)

The prisoner was indicted under the 5 Geo. 4, c. 84, s. 22, for being at large before the expiration of the term for which he had been transported. A certificate of the previous conviction and sentence was produced, in the following form: 'I, John Gorst, deputy clerk

(*h*) *R. v. Sutcliffe*, MS. Bayley, J. R. & R. 469, 914.

(*i*) *R. v. Watson*, R. & R. 468.

(*j*) *R. v. Russell*, 1 Cox, C. C. 81.

(*k*) *R. v. Ambury*, 6 Cox, C. C. 79.

(*l*) *R. v. Horne*, 4 Cox, C. C. 263.

(*m*) *R. v. Finney*, 2 C. & K. 774, Alderson, B., who consulted several of the judges.

(*n*) *R. v. Fitzpatrick*, R. & R. 512.

of the peace for the county palatine of Lancaster, and clerk of the Courts of general quarter sessions of the peace, holden in and for the said county, and having the custody of the records of general quarter sessions of the peace holden in and for the said county, do hereby certify that at the general quarter sessions of the peace, holden at Salford, in the said county,' &c. This document was signed by J. Gorst, who acted as clerk of the peace for the said county. R. J. Harpur was the clerk of the peace for the county, but he never discharged the duties of the office but by deputy, and he had three deputies, E. Gorst, J. Gorst, and T. Burchall, who were attorneys and partners. Sometimes one and sometimes another of them attended the sessions and acted as clerk of the peace: at some sessions both E. and J. Gorst attended; there was no clerk of the Court of sessions except the clerk of the peace. The sessions records for forty years past had been kept at the office of the three, at Preston. It was submitted that the certificate did not conform to the provisions of the statute, as Harpur was the clerk of the Court, and had the legal custody of the records, and this certificate was only by his deputy; but Coltman, J., overruled the objection. (o)

Where the prisoner had received a pardon on condition of transporting himself beyond the seas, within fourteen days from the day of his discharge, and it was incumbent on the prosecutor to prove the precise day on which the prisoner was discharged, it was holden that the daily book of the prison, containing entries of the names of the criminals brought to the prison, and the times when they were discharged, though generally made from the information of the turnkeys, or from their endorsements on the backs of the warrants, was good evidence to prove the time of the prisoner's discharge. (p) And it was held that though, if a convict on his trial for returning from transportation before his time was expired, should confess the fact, and acknowledge that he is the man, the Court would record such confession; yet, no such confession being made, it was necessary to produce the record of conviction, and give evidence of the prisoner's identity. (q)

Where a convict was sentenced to transportation for seven years, and received a sign manual, promising him a pardon, 'on condition of his giving a security to transport himself for that period within fourteen days,' and upon his giving such security was discharged from prison, but neglected to transport himself within the fourteen days: it was holden that he could not be indicted for being unlawfully found at large before the term for which he had received sentence of transportation had expired, on the ground that such sign manual, and the recognizance entered into in consequence of it, were good evidence that he was lawfully, at large; although he had not substantially performed the condition on which the promise of pardon was granted. (r)

(o) *R. v. Jones*, 2 C. & K. 524. See *ante*, p. 919.

(p) *Aickle's case*, 1 Leach, 391, 339.

(q) 1 Hawk. P. C. c. 47, tit. *Return from Transportation*, s. 21. The 5 Geo. 4, c. 84, s. 24, makes a certificate of the conviction, &c., sufficient evidence. *Ante*, p. 919.

(r) *Miller's case*, 1 Hawk. P. C. c. 47, tit. *Return from Transportation*, s. 22, Cas. C. L. 69. 1 Leach, 74. 2 Black. R. 797. It appears that the judges considered that the sign manual was improperly worded by mistake of the officer: that it should have been 'upon condition of the said Miller

In the last case, the prisoner was referred to his original sentence of transportation, as not having performed the condition upon which his pardon was to be granted; that is, he was pardoned on condition of transporting himself within fourteen days. (s) And in another case it was holden, that a prisoner convicted of a capital crime, whose sentence was respited during the King's pleasure, and who, having received a pardon on condition of transportation for life, was afterwards found at large in Great Britain without lawful cause, should be referred to his original sentence. (t) In a subsequent case, where the prisoner, having been convicted of simple grand larceny, had received judgment of transportation to America for seven years, but had afterwards been pardoned, 'on condition of transporting himself beyond the seas for the same term of years, within fourteen days from the day of his discharge, and of giving security so to do,' and, upon giving the security required, had been discharged, but had not complied with the other part of the condition, by transporting himself, it was doubted whether he could be convicted of a capital felony in being found at large, without any lawful cause, before the expiration of the term, or whether he ought to be remitted to his former sentence. The former cases were cited as authorities that the prisoner's discharge was a lawful cause for his being at large, notwithstanding he had forfeited the recognizance of himself and his bail, by breaking the other part of the condition, in not transporting himself within the fourteen days; but one of the judges thought that, as the prisoner had not complied with the terms on which he was pardoned, he must be considered as having been at large without lawful authority, as soon as the fourteen days had expired. Another judge considered it as a doubtful question whether the non-performance of the condition had not rendered the whole pardon null and void; and he also

transporting himself, &c., and of his giving security to the satisfaction,' &c., and not merely 'upon condition of his giving security,' &c., and that though the King might revoke his intended grace on account of this apparent fraud, yet, as he had not in fact revoked it, and as the prisoner had *literally* complied with the condition, he ought not to have been convicted upon an indictment for being found at large, *without any lawful excuse*, before the expiration of his term. With respect, however, to a condition being considered *precedent* or *subsequent*, it has been holden that no precise technical words are requisite for that purpose; that it does not depend upon its being *prior* or *posterior* in the deed, but that it depends upon the nature of the contract, and the acts to be performed by the parties. *Robinson v. Comyns*, Cas. temp. Talb. 166. *Hotham v. The East India Co.*, 1 T. R. 645.

(s) *Miller's case*, 1 Leach, 76.

(t) *Madan's case*, Old Bailey, 1780. 1 Leach, 223. In 1 Hawk. P. C. c. 47, tit. *Return from Transportation*, s. 23 (referring to Cas. C. L. 197), this case is cited as having decided that the prisoner was so referred back to his original sentence, on his being indicted for returning from transportation, and ac-

quitted. But in the report in Leach, it is said that no indictment was ever preferred against the prisoner for the new felony; but that, being in custody, a notice was served upon him to show cause why execution should not be awarded against him on his former sentence: that after this notice he was put to the bar, and his identity and the record of his former conviction proved; and he not being prepared to prove the truth of certain facts alleged in his defence, the Court gave their opinion that, as he had broken the condition of the pardon, he remained in the same state in which he was at the time the pardon was granted, namely, under sentence of death, with a respite of that sentence during his Majesty's pleasure. The report further states that afterwards it was submitted to the judges, whether the prisoner would not have been liable to suffer death without benefit of clergy, if he had been indicted and convicted under the 8 Geo. 3, c. 15, or whether he had been properly referred to his original sentence. No opinion of the judges is stated; but it appears that at the Old Bailey, April Sess. 1782, the prisoner was informed by the Court that it was his Majesty's pleasure that he should be transported to Africa for life.

thought that the offence with which the prisoner was charged was not within the 16 Geo. 2, c. 15, because he had not agreed to transport himself to America; and that it was not within the 19 Geo. 3, c. 74, because that Act related only to pardons granted to offenders who had been convicted of felonies by which they were excluded from clergy. (u)

In this last case, one point was agreed upon, namely, that as the prisoner had, at the time of his discharge, a real intention to quit the kingdom within the time, but had been prevented from carrying it into execution by the distress of poverty and ill-health, these impediments amounted to a lawful cause. (v)

(u) Aickle's case, Old Bailey, 1785, *cor.* Gould, J., Hotham, B., and Adair, Recorder. The Recorder thought that the indictment was perfectly supported under the clause of the 16 Geo. 2, c. 15, adopted by 19 Geo. 3, c. 74, which made it a capital felony to be found at large in Great Britain within the term for which a convict, who was liable to be transported to America, had received sentence to be transported beyond the seas.

But he thought that when the condition of the King's pardon was broken, the pardon was gone. There being, however, a difference of opinion, it was intended to have submitted the case to the opinion of the twelve judges, if the prisoner had been found guilty.

(v) Aickle's case, 1 Leach, 396; and see Thorpe's case, *id.* *ibid.* note (a).

CHAPTER THE THIRTY-EIGHTH.

OF GAMING.

It seems that by the common law, the playing at cards, dice, &c., when practised innocently and as a recreation, the better to fit a person for business, is not at all unlawful, nor punishable as any sort of offence; but a person guilty of cheating, as by playing with false cards, dice, &c., may be indicted for it at common law, and fined and imprisoned according to the circumstances of the case and heinousness of the offence. (a) We have seen that common gaming-houses are considered as nuisances in the eye of the law; (b) and that lotteries have been declared to be public nuisances, except as they may have been authorized by Parliament, (c) and that betting or gaming in a public place is forbidden. (d)

The 5 & 6 Will. 4, c. 41, s. 1, repealed so much of the 16 Car. 2, c. 7, 10 Will. 3 (I.), 9 Anne, c. 14, 11 Anne (I.), 12 Anne, stat. 2, c. 16, 5 Geo. 2 (I.), 11 & 12 Geo. 3 (I.), 45 Geo. 3, c. 72, and 6 Geo. 4, c. 16, as enacted that 'any note, bill, or mortgage shall be absolutely void.' (e) The 8 & 9 Vict. c. 109, s. 15, repeals 'so much of' the 16 Car. 2, c. 7, 10 Will. 3 (I.), 9 Anne, c. 14, and 11 Anne (I.), 'as was not altered by the 5 & 6 Will. 4, c. 41.' It seems, therefore, that, as far as the subject of this chapter is concerned, the whole of these four last-mentioned Acts are repealed. The 8 & 9 Vict. c. 109, s. 15, also repeals 'so much of' the 18 Geo. 2, c. 34, 'as relates to' the 9 Anne, c. 14, 'or as renders any person liable to be indicted and punished for winning or losing, at play or by betting, at any one time, the sum or value of ten pounds, or within the space of twenty-four hours the sum or value of twenty pounds.' This seems to repeal secs. 3 and 8 of the 18 Geo. 3, c. 34. The 8 & 9 Vict. c. 109, s. 1, also repeals parts of the 33 Hen. 8, c. 9.

To constitute unlawful gaming it is not necessary that the games played shall be unlawful games, it is enough that the playing takes place in a common gaming-house.

There appear to be two classes of unlawful games within the meaning of the statutes. First, those which are absolutely forbidden by name; and second, those which are not declared to be altogether illegal, but which have been styled unlawful by the legislature because the keeping of houses for playing them and the playing them therein was made illegal.

'The unlawful games now are ace of hearts, pharaoh, basset, hazard, passage, roulette, every game of dice except backgammon, and

(a) Bac. Abr. tit. *Gaming* (A.), 2 Roll. Abr. 78.

(b) *Ante*, pp. 741, 745. As to 'resorting' to betting houses. See *R. v. Brown* 1895), 1 Q. B. 119.

(c) *Ante*, p. 754.

(d) *Ante*, p. 754.

(e) The clause recites the 58 Geo. 3, c. 93, also, but it is omitted in the repeal.

every game of cards which is not a game of mere skill, and any other game of mere chance.' (f) Baccarat has been held to be within this category. (g)

Excessive gaming is not in itself a legal offence, but the fact that it is habitually carried on in a gaming-house is strong evidence that the house is a common gaming-house so as to make the keeper of it liable to be indicted for a nuisance. (h)

By the 8 & 9 Vict. c. 109, s. 17, 'every person who shall, by any fraud or unlawful device or ill practice in playing at or with cards, dice, tables, or other game, or in bearing a part in the stakes, wagers, or adventures, or in betting on the sides or hands of them that do play, or in wagering on the event of any game, sport, pastime, or exercise, win from any other person to himself, or any other or others, any sum of money or valuable thing, shall be deemed guilty of obtaining such money or valuable thing from such other person by a false pretence, with intent to cheat or defraud such person of the same, and, being convicted thereof, shall be punished accordingly.'

This section comprises several distinct branches : —

I. Any fraud or unlawful device or ill-practice in playing at or with cards, dice, tables, or other games; and under this clause the offence consists in the fraud, unlawful device, or ill-practice, and it seems perfectly immaterial whether the game be or be not lawful.

II. Any fraud or unlawful device or ill-practice in bearing a part in the stakes, wagers, or adventures on the sides or hands of them that do play; and here, too, the offence consists in the fraud, and not in the nature of the game.

III. Any fraud or unlawful device or ill-practice in betting on the sides or hands of them that do play; and here, also, the same remark applies.

IV. Any fraud or unlawful device or ill-practice in wagering on the event of any game, sport, pastime, or exercise; and here, also, the same remark applies. On the whole, therefore, the gist of every offence created by this section appears to be the fraud, unlawful device, or ill-practice; and therefore it seems unnecessary to cite the numerous civil cases decided on the following section.

Tossing with coins for wagers is a pastime within the meaning of the section. (i)

An indictment alleged that the prisoner by fraud, unlawful device, and ill-practice in playing at and with cards, unlawfully did win from one H. F. Bernard to a certain person unknown a certain sum of money, with intent to cheat the said H. F. Bernard of the same, and it was moved, in arrest of judgment, that the indictment was bad for not alleging the ownership of the money won; but upon a case reserved, it was held that the indictment was sufficient, as it described the offence in the words of the statute. (j)

In the preceding case some of the judges intimated an opinion that

(f) Per Hawkins, J., *Jenks v. Turpin*, *infra*. Games of skill played for money would appear to be 'gaming.' See Dyson v. Mason, 22 Q. B. D. 351.

(g) *Jenks v. Turpin*, *infra*.

(h) *Jenks v. Turpin*, 13 Q. B. D. 505. See *ante*, p. 747.

(i) *R. v. O'Connor*, 15 Cox, C. C. 3.

(j) *R. v. Moss*, D. & B. C. C. 104, 26 L. J. M. C. 9.

the offence might be committed, although no money were actually paid; as the word 'win' might be construed in the sense of obtaining a title to a sum of money by becoming the winner of a stake; but such a construction is plainly inconsistent with the latter part of the clause, for how can a person, who merely obtains a title to a thing, 'be deemed guilty of obtaining such money or valuable thing from such other person'? If, however, a case were to occur where every other ingredient of the offence were proved except the payment of the money, the party might be convicted of an attempt to commit the offence under the 14 & 15 Vict. c. 100, s. 9.

Where on an indictment under the 8 & 9 Vict. c. 109, s. 17, it appeared that the prisoners began to play at skittles in the prosecutor's presence; and B., one of them, appeared to be very drunk, and played so badly that he lost every game; and the others then persuaded the prosecutor to play with B., and stake large sums upon the game, for he was sure of winning; and the prosecutor accordingly did play with B. several games for large sums, every one of which he lost; and the prisoners, having got all the prosecutor's money, ran away; it was contended that there must be fraud in the act of playing, and here the fraud was before the game commenced; and the Recorder held, that the fraud relied on must be a fraud put in practice during the game itself. (*k*)

Where the three prisoners being at a public-house with the prosecutor, one of them, in concert with the others, placed a pen-case on the table and left the room, and whilst he was absent one of the others took the pen out of the case, and put a pin in its place, and the two prisoners induced the prosecutor to bet with the third prisoner when he returned that there was no pen in the case, and the prosecutor staked fifty shillings, and on the pen-case being turned up another pen fell into the prosecutor's hand, and the prisoners took the money; it seems to have been considered clear that this case did not come within the 8 & 9 Vict. c. 109, s. 17. (*l*)

Inciting Infants to bet or borrow money.

By the Betting and Loans (Infants) Act, 1892, (55 Vict. c. 4.) a new offence is created.

By sec. 1. — (1.) 'If any one, for the purpose of earning commission, reward, or other profit, sends or causes to be sent to a person whom he knows to be an infant any circular, notice, advertisement, letter, telegram, or other document which invites or may reasonably be implied to invite the person receiving it to make any bet or wager, or to enter into or take any share or interest in any betting or

(*k*) *R. v. Bailey*, 4 Cox, C. C. 390. The prisoners were convicted of a conspiracy to cheat. It was also contended that the game of skittles was not within the first clause of the section; that the words 'other game' must be confined to the same sort of game as those previously specified, which were all games of chance; and that the

game of skittles was more reasonably included within the latter branch of the clause; but no opinion was expressed on this point.

(*l*) *R. v. Hudson, Bell*, C. C. 263, 29 L. J. M. C. 145. The prisoners were convicted of a conspiracy to cheat.

wagering transaction, or to apply to any person or at any place, with a view to obtaining information or advice for the purpose of any bet or wager, or for information as to any race, fight, game, sport, or other contingency upon which betting or wagering is generally carried on, he shall be guilty of a misdemeanor, and shall be liable, if convicted on indictment, to imprisonment, with or without hard labour, for a term not exceeding three months, or to a fine not exceeding one hundred pounds, or to both imprisonment and fine, and if convicted on summary conviction, to imprisonment, with or without hard labour, for a term not exceeding one month, or to a fine not exceeding twenty pounds, or to both imprisonment and fine.

(2.) If any such circular, notice, advertisement, letter, telegram, or other document as in this section mentioned, names or refers to any one as a person to whom any payment may be made, or from whom information may be obtained, for the purpose of or in relation to betting or wagering, the person so named or referred to shall be deemed to have sent or caused to be sent such document as aforesaid, unless he proves that he had not consented to be so named, and that he was not in any way a party to, and was wholly ignorant of, the sending of such document.'

Sec. 2. — (1) 'If any one, for the purpose of earning interest, commission, reward, or other profit, sends or causes to be sent to a person whom he knows to be an infant any circular, notice, advertisement, letter, telegram, or other document which invites or may reasonably be implied to invite the person receiving it to borrow money, or to enter into any transaction involving the borrowing of money, or to apply to any person or at any place with a view to obtaining information or advice as to borrowing money, he shall be guilty of a misdemeanor, and shall be liable, if convicted on indictment, to imprisonment, with or without hard labour, for a term not exceeding three months, or to a fine not exceeding one hundred pounds, or to both imprisonment and fine, and if convicted on summary conviction, to imprisonment, with or without hard labour, for a term not exceeding one month, or to a fine not exceeding twenty pounds, or to both imprisonment and fine.

(2.) If any such document as above in this section mentioned sent to an infant purports to issue from any address named therein, or indicates any address as the place at which application is to be made with reference to the subject-matter of the document, and at that place there is carried on any business connected with loans, whether making or procuring loans or otherwise, every person who attends at such place for the purpose of taking part in or who takes part in or assists in the carrying on of such business shall be deemed to have sent or caused to be sent such document as aforesaid, unless he proves that he was not in any way a party to and was wholly ignorant of the sending of such document.'

Sec. 3. 'If any such circular, notice, advertisement, letter, telegram, or other document as in the preceding sections or either of them mentioned is sent to any person at any university, college, school, or other place of education, and such person is an infant, the person sending or causing the same to be sent shall be deemed to have

known that such person was an infant, unless he proves that he had reasonable ground for believing such person to be of full age.'

Sec. 4. 'If any one, except under the authority of any court, solicits an infant to make an affidavit or statutory declaration for the purpose of or in connexion with any loan, he shall be liable, if convicted on summary conviction, to imprisonment, with or without hard labour, for a term not exceeding one month, or to a fine not exceeding twenty pounds, or to both imprisonment and fine, and if convicted on indictment, to imprisonment, with or without hard labour, for a term not exceeding three months, or to a fine not exceeding one hundred pounds.'

Sec. 5. 'If any infant, who has contracted a loan which is void in law, agrees after he comes of age to pay any money which in whole or in part represents or is agreed to be paid in respect of any such loan, and is not a new advance, such agreement, and any instrument, negotiable or other, given in pursuance of or for carrying into effect such agreement, or otherwise in relation to the payment of money representing or in respect of such loan, shall, so far as it relates to money which represents or is payable in respect of such loan, and is not a new advance, be void absolutely as against all persons whomsoever.

For the purposes of this section any interest, commission, or other payment in respect of such loan shall be deemed to be a part of such loan.'

Sec. 6. 'In any proceeding against any person for an offence under this Act such person and his wife or husband, as the case may be, may if such person thinks fit, be called, sworn, examined, and cross-examined as an ordinary witness in the case.'

CHAPTER THE THIRTY-NINTH.

OF OFFENCES RELATING TO DEAD BODIES.

Removing dead bodies. — It is an indictable offence to take up a dead body, even for the purpose of dissection. Upon an indictment for this offence it was moved in arrest of judgment, that if it were any crime, it was one of ecclesiastical cognizance only; that it was not made penal by any statute; and that the silence of Stamford, Hale, and Hawkins, upon this subject, afforded a very strong argument to show that there was no such offence cognizable in the criminal courts. But the Court said, 'that common decency required that the practice should be put a stop to; that the offence was cognizable in a criminal Court, as being highly indecent, and *contra bonos mores*; at the bare idea alone of which nature revolted. That the purpose of taking up the body for dissection did not make it less an indictable offence: and that, as it had been the regular practice of the Old Bailey, in modern times, to try charges of this nature, many of which had induced punishment, the circumstance of no writ of error having been brought to reverse any of these judgments was a strong proof of the universal opinion of the profession upon this subject; and they, therefore, refused even to grant a rule to show cause, lest that alone should convey to the public an idea that they entertained a doubt respecting the crime alleged. (a) To sell the dead body of a capital convict for the purposes of dissection, where dissection is no part of the sentence, is a misdemeanor, and indictable at common law. (b)¹ To expose the naked dead body of a child in a public highway is, as we have seen, an indictable misdemeanor. (c)

It is an offence against decency to take a person's dead body, with intent to sell or dispose of it for gain and profit. An indictment charged (*inter alia*) that the prisoner a certain dead body of a person unknown lately before deceased wilfully, unlawfully, and indecently did take and carry away, with intent to sell and dispose of the same for gain and profit; and it being evident that the prisoner had taken the body from some burial ground, though from what particular place was uncertain, he was found guilty upon this count. And it

(a) *R. v. Lynn*, 2 T. Rep. 733. 1 Leach, 497. 2 East, P. C. c. 16, s. 89, p. 652. In 4 Black. Com. 236, 237, stealing a corpse is mentioned as a matter of great indecency; and the law of the Franks is mentioned (as in Montesqu. Sp. L. b. 30, ch. 19), which directed that a person who had dug a corpse out of the ground in order

to strip it, should be banished from society, and no one suffered to relieve his wants till the relations of the deceased consented to his readmission.

(b) *R. v. Cundick*, D. & R. N. P. C. 13, Graham, B.

(c) *R. v. Clark*, 15 Cox C. C. 169. *Ante*, p. 748.

AMERICAN NOTE.

¹ See *C. v. Loring*, 8 Pick. 370.

was considered that this was so clearly an indictable offence no case was reserved. (cc)

It is a misdemeanor at common law to remove without authority a corpse from a grave in a burying-ground of a congregation of Protestant dissenters; and it is no defence to such a charge that the motive for removing the corpse was pious and laudable. The indictment charged the defendant with unlawfully entering a burying-ground belonging to a congregation of Protestants dissenting from the Church of England, and unlawfully and indecently removing the grave of Louisa Sharpe, and unlawfully and indecently carrying away her body. The defendant's mother and some other persons had been buried in one grave in the burying-ground of a congregation of dissenters at Hitchin, with the consent of those that were interred there. The defendant's father had recently died, and the defendant prevailed on the wife of the person who had the key of the burying-ground to allow him to cause the said grave to be opened, upon the pretext that he wished to bury his father in that grave, and intended to examine whether the size of the grave would admit his father's coffin. He caused the coffins of his stepmother and two other persons to be taken out, and so came to the coffin of his mother, which was under theirs, and was much decomposed, and caused the removal of this coffin, with the corpse therein to be placed in a shell and carried to a cart and driven some miles away towards a churchyard where he intended to bury his father's corpse with the remains of his mother. These acts were done without the consent of the congregation or the trustees having the legal estate in the ground; and the jury found that the statement of the defendant that he intended to bury his father there was only a pretext, and that his real intention from the beginning was to remove his mother's corpse; but that he acted throughout without intentional disrespect to any one, being actuated by motives of affection to his mother and of religious duty. Upon a case reserved, Erle, J., delivered judgment: 'We are of opinion that the conviction ought to be affirmed. The defendant was wrongfully in the burial-ground, and wrongfully opened the grave, and took out several corpses, and carried away one of them. It is true that he says he did this wrongfully, that is to say, by trespass; for the licence which he obtained to enter and open from the person who had the care of the place, was not given or intended for the purpose to which he applied it, and was, as to that purpose, no licence at all. The evidence for the prosecution proved the misdemeanor, unless the defendant was a defence. We have considered the grounds relied on in his behalf, and, although we are fully sensible of the estimable motives which the defendant acted, namely, filial affection and religious duty, still neither authority nor principle would justify the position that the wrongful removal of a corpse was no misdemeanor if the removal for the act deserved approbation. A purpose of anatomical dissection would fall within that category. Neither does our law recognize the right of any one child to the corpse of its parent as claimed by the defendant. Our law recognizes no property in a corpse, and

(cc) *R. v. Gilles, Bayley, J. MS. Bayley, J., R. & R. 366, note (b).* And see *Duffin, R. & R. 365.*

protection of the grave at common law, as contradistinguished from ecclesiastical protection to consecrated ground, depends upon this form of indictment, and there is no authority for saying that relationship will justify the taking a corpse away from the grave where it has been buried.' (*d*)

Neglect or refusal to bury dead body.— 'A man is bound to give Christian burial to his deceased child, if he has the means of doing so; but he is not liable to be indicted for a nuisance for not burying his child, if he has not the means of providing burial for it. He cannot sell the body, put it into a hole, or throw it into a river; but unless he has the means of giving the body Christian burial, he is not liable to be indicted, even though a nuisance may be occasioned by leaving the body unburied, for which the parish officer would probably be liable.' (*e*) The prisoner was indicted for having neglected and refused to bury the body of his deceased child, whereby a nuisance was created. The prisoner, at the time of the death of his child, was a pauper receiving parochial relief from a parish in the Leicester union, and soon after the death of the child he applied to the relieving officer of that parish for assistance to bury the child. The relieving officer required the prisoner to sign an undertaking, on demand, to repay the guardians of the union the sum advanced by way of loan in payment for the coffin and ground for the child. (*f*) This was refused by the prisoner, and the relieving officer refused to render him any assistance in the burial of the child, and the body in consequence remained unburied and occasioned a nuisance. The jury were directed that the prisoner was bound to provide for the burial of his deceased child, if he could by any lawful way procure the means of doing so; and that as the prisoner had been offered relief by way of loan for the purpose of burial, he was bound to receive it, and that consequently he was not excused from his liability to provide for the interment of the deceased, and was liable to be convicted for the nuisance. But, upon a case reserved, the judges were unanimously of opinion that this direction was wrong; for although it was perfectly true that the prisoner, if he had the means, was bound to provide for the burial of his child, yet he was not bound to incur a debt for that purpose, and consequently he was not bound to accept the loan on the terms proposed to him. (*g*)

But to burn a dead body instead of burying it is not indictable unless it is so done as to amount to a public nuisance. (*h*) To burn a body in order to prevent an inquest being held upon it where such an inquest ought to be held would be a misdemeanor. (*i*)

The refusal or neglect to bury dead bodies by those whose duty it is

(*d*) *R. v. Sharpe*, D. & B. C. C. 160. See also *R. v. Jacobson*, 14 Cox, C. C. 522, where the removal of bodies from a disused burial ground was held indictable.

(*e*) Lord Campbell, C. J., in *R. v. Vann*, 2 Den. C. C. 325. The 7 & 8 Vict. c. 101, s. 31, enacts that it shall be lawful for guardians, or where there are no guardians for the overseers, to bury the body of any poor person which may be within their parish or union respectively, and to charge the expense thereof to any parish under

their control, to which such person may have been chargeable, or in which he may have died, or otherwise in which such body may be.

(*f*) This was done under an order of the poor law commissioners and an order of the guardians.

(*g*) *R. v. Vann*, *supra*.

(*h*) See a very learned charge to a jury by Stephen, J., reported as *R. v. Price*, 12 Q. B. D. 247. The prisoner was acquitted.

(*i*) See *post*, p. 943.

to perform the office, appears also to have been considered as a misdemeanor. Thus, Abney, J., in delivering the opinion of the Court in *Common Pleas*, said, 'The burial of the dead is (as I apprehend) a duty of every parochial priest and minister; and if he neglect or refuse to perform the office, he may, by the express words of Canon 23, be suspended by the Ordinary for three months. And if any great inconvenience arise, as a nuisance, from the neglect of the interment of the dead corpse, he is punishable also by the temporal Courts, by indictment or information.' (j)

It was held, after elaborate argument, that a child who has received the outward and visible form of baptism by a dissenting minister being a lawful minister of the Church of England, nor episcopally ordained, is to be considered as baptized, and is entitled to have burial service read at its interment by the clergyman of the parish in which it dies; and that the refusal to read the service over a child baptized brings the party so refusing within the provisions of Canon 23, 86, and the Court is bound to pronounce that the party is subject to suspension for three months, and also to the costs of the proceeding.

The right of sepulture in the parish churchyard is a common right; but the mode of burial is a subject of ecclesiastical cognizance alone. (l) If therefore a clergyman were absolutely to refuse to bury the body of a dead person brought for interment in the usual way, it seems that the Court of Queen's Bench would grant a *mandamus* to compel him to inter the body; but that Court will not grant a *mandamus* to compel a clergyman to bury a body in an unusual and extraordinary manner, e.g. in an iron coffin. (m)

Every person dying in this country and not within certain exceptions laid down by the ecclesiastical law, has a right to Christian burial; and that implies the right to be carried from the place where his body lies to the parish cemetery. (n) The common law casts upon some one the duty of carrying to the grave, decently covered, the dead body of any person dying in such a state of indigence as to have no funds for that purpose. (o) It should seem that the person under whose roof a poor person dies is bound to carry the body, decently covered, to the place of burial; he cannot keep him unburied, nor anything which prevents Christian burial: he cannot therefore, remove him out, so as to expose the body to violation, or to offend the feelings, or endanger the health of the living; and, for the same reason, he cannot carry him uncovered to the grave. It will probably

(j) *Andrews v. Cawthorne*, Willes, 537 note (a). Abney, J., cited a case, H. 7 G. 1, B. R. where that Court made a rule upon the Rector of Daventry, in Northamptonshire, to show cause why an information should not be filed, because he neglected to bury a poor parishioner who died in that parish. See this case as stated in *Mastin v. Escott*, reported by Dr. Curteis, p. 268, and the affidavits used in it, in the Appendix to that case, p. 291, *et seq.*

(k) *Mastin v. Escott*, decided in the Archdeaconry Court of Canterbury, May 8, 1841, by Sir H. Jenner, and reported by Dr. Curteis. The ground of this decision was that a child baptized by a layman was validly baptized,

and a Wesleyan minister by whom the child was baptized could be considered, with reference to this question, in no other light than as a layman. In *Kemp v. Wickes*, 3 P. W. Rep. 264, a similar decision had been given with reference to a person baptized by a minister of the Calvinistic Independents.

(l) The 43 & 44 Vic. c. 41, makes provision for the burial of persons in churchyards and graveyards without the rites of the Church of England, on notice being given to the clergyman.

(m) *R. v. Coleridge*, 2 B. & Ald. 806

(n) Per Lord Denman, C. J. *R. v. St. John*, 12 A. & E. 773.

(o) Per Lord Denman, C. J., *ibid.*

found, therefore, that where a pauper dies in any parish house, poor-house, or union house, that circumstance casts on the parish or union, as the case may be, to bury the body; not by virtue of the statute of Elizabeth, but on the principles of the common law. (*p*) But the duty is not cast upon the overseers, where the death does not take place under the roof of any parish house, or that which, under the circumstances, may be considered as such. A married woman residing with her husband in a parish was admitted as an inpatient in a hospital in that parish, and died in it, and the husband was unable from poverty to take the body away and bury it; he was receiving weekly relief from the parish, and he believed that he was settled in it. The parish officers had been requested to bury the body, but had refused. The Court of Queen's Bench held that the burial of a pauper receiving relief, but not dying in any parish house, was not within the objects of the 43 Eliz. c. 2, expressed or implied; and, after laying down the principles above stated, held that those principles would rather cast the burden on the hospital than on the parish, and formed an additional, though not a necessary reason for holding that the parish was not bound to bury the body. (*q*)

The 7 & 8 Vict. c. 101, s. 31, makes it lawful for guardians, or where there are no guardians for overseers, to bury the body of any poor person which may be within their parish or union, and to charge the expense to any parish within their control to which such person may have been chargeable, or in which he may have died, or otherwise in which such body may be; and unless the guardians, in compliance with the desire of such person expressed in his lifetime, or by any of his relations, or for any other cause, direct the body to be buried in the churchyard or burial-ground of the parish to which such person has been chargeable (which they are authorised to do), every dead body which the guardians or any of their officers duly authorised shall direct to be buried at the expense of the poor-rates shall (unless the deceased person or the husband or wife or next of kin of such deceased person have otherwise desired) be buried in the churchyard or other consecrated burial-ground in or belonging to the parish, division of parish, chapelry or place in which the death may have occurred; (*r*) and, after providing for the burial fees, the clause forbids any officer connected with the relief of the poor to receive any money for the burial of the body of any poor person, or to act as undertaker for personal gain or reward, or to receive any money from any dissecting school or school of anatomy or hospital or from any person to whom any such body may be delivered, or to derive any personal emolument for or in respect of the burial or disposal of any such body, under a penalty recoverable before two justices of the peace. (*s*)

Licence for anatomical examination of dead bodies.—The 2 & 3 Will. 4, c. 75, 'An Act for regulating Schools of Anatomy,' author-

(*p*) Ibid.

(*q*) *R. v. Stewart, supra.*

(*r*) It may, if wished, be buried without the rites of the Church of England. See 43 & 44 Vict. c. 41, s. 2.

(*s*) The 18 & 19 Vict. c. 79, s. 1, where the burial ground of a parish is closed or

overcrowded, empowers the guardians or overseers to bury the poor in a neighbouring parish; and sec. 2 empowers them to enter into agreement with cemetery companies and burial boards for the burial of the poor. See 12 & 13 Vict. c. 103, s. 16.

ises the Secretary of State for the Home Department to grant 'a licence to practise anatomy to any fellow or member of any college of physicians or surgeons, or to any graduate or licentiate in medicine, or to any person lawfully qualified to practise medicine in any part of the United Kingdom, or to any professor or teacher of anatomy, medicine, or surgery, or to any student attending any school of anatomy, on application from such party for such purpose, countersigned by two of his Majesty's justices of the peace acting for the county, city, borough, or place wherein such party resides, certifying that, to their knowledge or belief, such party so applying is about to carry on the practice of anatomy.'

By sec. 2, the secretary of state may appoint inspectors of places where anatomy is carried on; and by sec. 3, may direct what district such inspectors shall superintend. By sec. 4, every inspector is to make a quarterly return to the secretary of state of every body that, during the preceding quarter, has been removed for examination to every separate place in his district where anatomy is carried on, distinguishing the sex, and, as far as is known at the time, the name and age of each person whose body was so removed.

By sec. 5 inspectors may visit and inspect, at any time, any place, within their district, notice of which place has been given, that it is therein intended to practise anatomy.

Sec. 7. 'It shall be lawful for any executor or other party having lawful possession of the body of any deceased person, and not being an undertaker or other party intrusted with the body for the purpose only of interment, to permit the body of such deceased person to undergo anatomical examination, unless, to the knowledge of such executor or other party, such person shall have expressed his desire, either in writing at any time during his life, or verbally in the presence of two or more witnesses during the illness whereof he died, that his body after death might not undergo such examination, or unless the surviving husband or wife, or any known relative of the deceased person, shall require the body to be interred without such examination.'

Sec. 8. 'If any person, either in writing at any time during his life, or verbally in the presence of two or more witnesses during the illness whereof he died, shall direct that his body after death be examined anatomically, or shall nominate any party by this Act authorized to examine bodies anatomically to make such examination, and if, before the burial of the body of such person, such direction or nomination shall be made known to the party having lawful possession of the dead body, then such last-mentioned party shall direct such examination to be made, and, in case of any such nomination as aforesaid, shall request and permit any party so authorized and nominated as aforesaid to make such examination, unless the deceased person's surviving husband or wife, or nearest known relative, or any one or more of such person's nearest known relatives, being of kin in the same degree, shall require the body to be interred without such examination.'

By sec. 9, no body is to be removed for anatomical examination from the place where such person died until after forty-eight hours from the death, nor unless a certificate, stating in what manner such per-

son came by his death, shall have been given by the medical man who attended such person, or who examined the body after death.

Sec. 10. 'It shall be lawful for any member or fellow of any college of physicians or surgeons, or any graduate or licentiate in medicine, or any person lawfully qualified to practise medicine in any part of the United Kingdom, or any professor, teacher, or student of anatomy, medicine, or surgery, having a licence from his Majesty's principal secretary of state or chief secretary as aforesaid, to receive or possess for anatomical examination, or to examine anatomically, the body of any person deceased, if permitted or directed so to do by a party who had at the time of giving such permission or direction lawful possession of the body, and who had power, in pursuance of the provisions of this Act, to permit or cause the body to be so examined, and provided such certificate as aforesaid were delivered by such party together with the body.'

By sec. 11, such persons are to receive a certificate with the body, and transmit it and a return of the time the body was received, and other matters, to the inspector of the district; and by sec. 12, notice is to be given to the secretary of state of places where anatomy is intended to be practised.

By sec. 13, bodies are to be removed in a decent coffin or shell, and after undergoing anatomical examination are to be decently interred in consecrated ground, or in some public burial-ground, in use for persons of that religious persuasion to which the person whose body was so removed belonged.

Sec. 14. 'No member or fellow of any college of physicians or surgeons, nor any graduate or licentiate in medicine, nor any person lawfully qualified to practise medicine in any part of the United Kingdom, nor any professor, teacher, or student of anatomy, medicine, or surgery, having a licence from his Majesty's principal secretary of state or chief secretary as aforesaid, shall be liable to any prosecution, penalty, forfeiture, or punishment for receiving or having in his possession for anatomical examination, or for examining anatomically, any dead human body, according to the provisions of this Act.'

By sec. 15, the Act is not to prohibit any *post mortem* examination directed by competent authority.

Sec. 18. 'Any person offending against the provisions of this Act in England or Ireland shall be deemed and taken to be guilty of a misdemeanor, and, being duly convicted thereof, shall be punished by imprisonment for a term not exceeding three months, or by a fine not exceeding fifty pounds, at the discretion of the Court before which he shall be tried; and any person offending against the provisions of this Act in Scotland shall, upon being duly convicted of such offence, be punished by imprisonment for a term not exceeding three months, or by a fine not exceeding fifty pounds, at the discretion of the Court before which he shall be tried.'

The prisoner, the master of a workhouse, was indicted for disposing of the dead bodies of some of the paupers who died in the workhouse, for the purpose of dissection, and for gain and profit to himself. He had in collusion with an undertaker caused the bodies of several paupers to be shown to their relatives in coffins, and every

appearance of regular funerals to be gone through, and the relatives followed to the cemetery what they supposed to be the body of the deceased, when in reality just before the funeral left the workhouse, other coffins were substituted for those the relatives had seen, and the bodies were in the evening taken to Guy's Hospital for dissection, all the necessary formalities required by the 2 & 3 Will. 4, c. 75, having been duly complied with. In no case did the relatives of the deceased persons in terms require that their bodies should be buried without anatomical examination; and indeed they appeared to have believed that the bodies were buried without any such examination. It did not appear that the prisoner made any regular charge to the hospital or surgeons in respect of the bodies supplied to them; but in 1856 he received £19 10s., and in 1857, £26 from Guy's Hospital, as gratuities for his trouble in going through the formalities, giving the notices, and obtaining the certificates required by the Anatomy Act, and the amount paid him was in proportion to the number of bodies supplied. These payments were in contravention of the 7 & 8 Vict. c. 101, s. 31. The jury found that the prisoner caused the dead bodies of four paupers to be delivered to the undertaker, and that he delayed the burial of them for an unreasonable length of time, in order that they might be dissected in the mean time, and that he did so for gain and profit for himself; and that he caused the appearance of a funeral of dead bodies to be gone through, with a view to prevent their relatives requiring the bodies to be interred without being subject to anatomical examination, and that, but for such supposed funeral, the relatives would have required the bodies to be buried without anatomical examination. It was objected that the prisoner having lawful possession of the bodies as master of the workhouse, might lawfully do what he had done, as no relative had required the bodies to be buried without anatomical examination; and upon a case reserved it was held that this objection was valid, as all that was done by the prisoner was done according to law, for he had legal possession of the bodies, and he did with them that which the law authorised him to do. And though he fraudulently prevented the relatives from requiring the bodies to be buried without anatomical examination, yet that did not take away the protection given to him by the statute. (*t*)

Bodies cast ashore. — Provision has been made by statute for the suitable interment of such dead bodies as may be cast on shore from the sea. The 48 Geo. 3, c. 75, enacts, that the churchwardens and overseers of parishes in England, in which any dead body shall be found thrown in, or cast on shore from the sea, shall upon notice

(*t*) *R. v. Feist*, D. & B. C. C. 590, 27 L. J. M. C. 164. This decision seems clearly wrong, as the master of a workhouse is plainly merely the servant of the guardians or parish officers, and the possession of the workhouse is in them. *Governors of the poor of Bristol v. Wait*, 5 A. & E. 1. And the master of a workhouse has no more possession of the things in the workhouse than any servant of the things in his master's house. The dealing with the dead

bodies by the prisoner was, therefore, a wholly illegal act. The Court intimated that possibly the prisoner and undertaker might have been indicted for a conspiracy to prevent the relatives making the requisition; or that the prisoner might be indicted for preventing the requisition being made. *Quære*, whether an indictment would have lain for causing the funeral service to be performed over the empty coffins? C. S. G.

of the body lying within their parishes, cause the same to be forthwith removed to some convenient place; and with all convenient speed to be decently interred in the churchyard or burial-ground of such parishes; and if the body be thrown in, or cast on shore in any extra-parochial place, where there is no churchwarden or overseer, a similar duty is imposed upon the constable or headborough of such place. (u)

It is further enacted, that every minister, parish clerk, and sexton, of the respective parishes, shall perform their duties as is customary in other funerals, and admit of such dead body being interred, without any improper loss of time, receiving such sums as in cases of burials made at the expense of the parishes. (v) The statute provides also as to the expenses of such burials, and the raising of money to defray them; gives a reward of five shillings to the persons first giving notice to the parish officers, or to the constable or headborough of an extra-parochial place, of any dead body being cast on shore; and imposes a penalty of five pounds on persons finding dead bodies and not giving notice, and on parish officers neglecting to execute the Act. (w) An appeal to the quarter sessions is also given to any person thinking himself aggrieved by anything done in pursuance of the Act. (x)

Preventing burial. — The preventing a dead body from being interred has been considered as an indictable offence. Thus, the master of a workhouse, a surgeon, and another person, were indicted for a conspiracy to prevent the burial of a person who had died in a workhouse. (y) And though Hyde, C. J., upon a question how far the forbearance to sue one who fears to be sued, is a good consideration for a promise, (z) cited a case where a woman who feared that the dead body of her son would be arrested for debt was holden liable, upon a promise to pay in consideration of forbearance, though she was neither executrix nor administratrix; (a) yet the other judges are said to have doubted of this; (b) and in one case, Lord Ellenborough, C. J., said it would be impossible to contend that such a forbearance could be a good consideration for an assumpsit. (c) Lord Ellenborough, C. J., continued, 'to seize a dead body upon any such pretence would be *contra bonos mores*, and an extortion upon the relatives.' And in a subsequent part of the case, his Lordship said, 'As to the case cited by Hyde, C. J., of a mother who promised to pay on forbearance of the plaintiff to arrest the dead body of her son, which she feared he was about to do, it is contrary to every principle of law and moral feeling: such an act is revolting to humanity, and illegal.'

A gaoler has no right to detain the body of a person who died in prison for any debts due to himself. (d) If he does so he may be indicted. (e)

An indictment will lie for wilfully obstructing and interrupting a

(u) 48 Geo. 3, c. 75, s. 1.

(v) Id. *ibid.* s. 2.

(w) *Ibid.* ss. 1, 3, 4, 5, 6, 7, 8, 12, 13, 14.

(x) Id. s. 10.

(y) *R. v. Young*, cited in *R. v. Lynn*, 2 T. R. 734.

(z) *Quick v. Coppleton*, 1 Vent. 161.

(a) The name of the case is not men-

tioned; but it is said that Hyde, C. J., cited it as a case that occurred in the Court of Common Pleas when he sat there.

(b) *Quick v. Coppleton*, 1 Vent. 161.

(c) *Jones v. Ashburnham*, 4 East, 460.

(d) *R. v. Fox*, 2 Q. B. 247.

(e) *R. v. Scott*, 2 Q. B. 248.

clergyman in reading the burial service, and interring a corpse; but such an indictment must allege that the person obstructed was a clergyman, and that he was in the execution of his office, and lawfully burying the corpse; and it must also show how the party was obstructed, as by setting out the threats and menaces used. And it is not sufficient to allege that the party did unlawfully, by threats and menaces, prevent the burial. (f)

Preventing coroner's inquest. — There is one case in which the too speedy interment of a dead body may be an indictable offence; namely, where it is the body of a person who has died a violent death. In such case, by Holt, C. J., the coroner need not go *ex officio* to take the inquest, but ought to be sent for, and that when the body is fresh; and to bury the body before he is sent for, or without sending for him, is a misdemeanor. (g) It is also laid down that if a dead body in prison, or other place, whereupon an inquest ought to be taken, be interred or suffered to lie so long that it putrefy before the coroner has viewed it, the gaoler or township shall be amerced. (h) It is a misdemeanor to burn or otherwise dispose of a dead body with intent thereby to prevent the holding upon such body of an intended coroner's inquest in a case where the coroner has jurisdiction to hold an inquest. A coroner has jurisdiction to hold an inquest if he honestly believes information which has been given to him to be true, which if true, would make it his duty to hold such inquest. (i)

(f) R. v. Cheere, 4 B. & C. 902. 7 D. & R. 461. See R. v. How, 2 Str. 699. See the 24 & 25 Vict. c. 100, s. 36, and the 43 & 44 Vict. c. 41, s. 7, *ante*, p. 655.

(g) R. v. Clark, 1 Salk. 377. Anon., 7 Mod. 10. 2 Hawk. P. C. c. 9, s. 23, note 4.

(h) 2 Hawk. P. C. c. 9, s. 23. And see an indictment against a township for a misdemeanor, in burying a body without notice to the coroner, 2 Chit. Cr. L. 256.

(i) R. v. Stephenson, 13 Q. B. D. 331.

CHAPTER THE FORTIETH.

OF GOING ARMED IN THE NIGHT-TIME FOR THE DESTRUCTION OF GAME AND OF ASSAULTING GAMEKEEPERS.

BEFORE proceeding to the proper subject of this chapter, it may be well to say a few words as to the property in game. The law of England has never recognised the doctrine of the Roman law, that any trespasser had a right to the game that he caught or killed on any man's land. (a) By the Constitutions of Canute concerning forests, every freeman was entitled to take and dispose of the game on his own land, and no one had a right to enter on the lands of another for such a purpose. (b) And by the common law the owner of land had a possessory property in the game upon his land, so long as it continued upon that land, and he might maintain an action of trespass against any one who entered upon the land, and killed or took any game thereon and carried it away, and recover damages as well for the trespass as for the value of the game. (c) The property in living game was called possessory, because it depended on the possession of the game by reason of the possession of the land whereon it was, and as soon as it quitted the land of its own free will the possessory property ceased. The owner of land has a property in the game started and killed upon it. (d)

The 9 Geo. 4, c. 69, s. 1, reciting the 57 Geo. 3, c. 90, and that 'the practice of going out by night for the purpose of destroying game has nevertheless very much increased of late years, and has in very many instances led to the commission of murder, and of other grievous offences; and it is expedient to repeal the said recited Act, and to

(a) Just. Inst. L. II. tit. 1, 12.

(b) The law on this subject is stated in different terms in different authors in consequence of different translations having been made of the original Saxon. 4 Inst. 320. The law may be found, Spelm. Glos. tit. *Foresta*, p. 242. No. 30. Edit. 1687. 4 Inst. 320. 2 Blac. Com. 414, who cites it as chapter 77, and says that it was the ancient law of the Scandinavian continent, citing Stiernhook de jure Sweon. l. 2, c. 8. Deac. G. L. 40, citing also a licence of Canute to the same effect. In 2 Black. Com. 414, a similar law of Edward the Confessor, chapter 36, is cited. In 4 Inst. 293, a charter of the Empress Maud is cited containing a similar law. From a comparison of these several authorities, the following seems to be substantially correct: *Sû quilibet liber homo dignus venatione sua in silva et in agris sibi propriis et in domino suo, sed abstineat*

omnis homo a venariis regis. The following is the statement of Brooke, J., in 12 Hen. 8, 10: 'If I let my falcon fly in my own land at a pheasant, and he kills the pheasant in your land, you do not gain any property in the pheasant; but I can take the pheasant, and shall not be punished except for the entry into your land; for it was by my industry and labour, and when my falcon had caught it, it was in my possession.' And see Sutton v. Moody, 12 Mod. 145, per Holt, C. J.; Churchward v. Studdy, 14 East, 249.

(c) See Osborne v. Meadows, 12 C. B. (N. S.) 10; Read v. Edwards, 17 C. B. (N. S.) 245.

(d) Lonsdale v. Rigg, 11 Exch. R. 654; 1 H. & N. 923. Blades v. Higgs, 12 C. B. (N. S.) 501. Kenyon v. Hart, 11 Law T. 738, 13 C. B. (N. S.) 844, affirmed in the House of Lords, 12 L. T. 615.

make more effectual provisions than now by law exist for repressing such practice,' enacts ['that the said recited Act shall be, and the same is hereby repealed, except so far as the same repeals any other Acts]; and if any person shall [after the passing of this Act], by night, unlawfully take or destroy any game or rabbits in any land, whether open (e) or inclosed (f) or shall by night unlawfully enter or be in any land, whether open or inclosed, (g) with any gun, net, engine, or other instrument, for the purpose of taking or destroying game, (h) such offender shall, upon conviction thereof before two justices of the peace, be committed for the first offence to the common gaol or house of correction for any period not exceeding three calendar months, there to be kept to hard labour, and at the expiration of such period shall find sureties by recognizance, or in Scotland by bond of caution, himself in ten pounds, and two sureties in five pounds each, or one surety in ten pounds, for his not so offending again for the space of one year next following; and in case of not finding such sureties, shall be further imprisoned and kept to hard labour for the space of six calendar months, unless such sureties are sooner found; and in case such person shall so offend a second time, and shall be thereof convicted before two justices of the peace, he shall be committed to the common gaol or house of correction for any period not exceeding six calendar months, there to be kept to hard labour, and at the expiration of such period shall find sureties by recognizance, or bond as aforesaid, himself in twenty pounds, and two sureties in ten pounds each, or one surety in twenty pounds, for his not so (i) offending again for the space of two years next following; and in case of not finding such sureties, shall be further imprisoned and kept to hard labour for the space of one year, unless such sureties are sooner found; and in case such person shall so offend a third time, he shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported (j) beyond seas for seven (k) years, or to be imprisoned and kept to hard labour in the common gaol, or house of correction, for any term not exceeding two years; and in Scotland, if any person shall so offend a first, second, or third time he shall be liable to be punished in like manner as is hereby provided in each case.' (l)

Sec. 2. 'Where any person shall be found upon any land committing any such offence as is hereinbefore mentioned, it shall be lawful for the owner or occupier of such land, or for any person having a

(e) See *R. v. Harris*, 12 L. T. 303. The words in brackets are repealed by 51 & 52 Vict. c. 57.

(f) Perhaps this section is in part repealed by 24 & 25 Vict. c. 96, s. 17; see *post*, p. 947.

(g) See *Tapsell v. Croeskey*, 7 M. & W. 441, as to this word in the Turnpike Act, 3 Geo. 4, c. 126.

(h) It is to be observed that the word 'rabbits' is here omitted; so that if poachers enter for the purpose of taking rabbits, but have not either taken or destroyed any, they have committed no offence within sec. 1, and therefore sec. 2 gives no authority to apprehend them. Section 9 extends to

poachers entering with intent to take both game and rabbits, and is, therefore, in this respect, more extensive than sec. 1. See *R. v. Ball*, R. & M. C. C. R. 330, *post*, p. 951.

(i) See *In re Reynolds*, 1 Sess. C. 51, that a conviction that the defendant should enter into recognizances that he should not offend again, omitting the word 'so,' is bad.

(j) Now penal servitude; *ante*, p. 73.

(k) And not less than three years.

(l) Where a person is indicted under this section for night poaching, after two previous convictions, the previous convictions should not be proved until the jury find a verdict on the other facts of the case. *R. v. Woodfield*, 16 Cox, C. C. 314.

right or reputed right of free warren or free chase thereon, or for the lord of the manor or reputed manor wherein such land may be situate, and also for any gamekeeper or servant of any of the persons herein mentioned, or any person assisting such gamekeeper or servant, to seize and apprehend such offender upon such land, or in case of pursuit being made, in any other place to which he may have escaped therefrom, and to deliver him as soon as may be into the custody of a peace officer, in order to his being conveyed before two justices of the peace; and in case such offender shall assault or offer any violence with any gun, crossbow, firearms, bludgeon, stick, club, or any other offensive weapon whatsoever, towards any person hereby authorized to seize and apprehend him, he shall, whether it be his first, second, or any other offence, be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond seas for seven years, or to be imprisoned and kept to hard labour in the common gaol or house of correction for any term not exceeding two years; and in Scotland, whenever any person shall so offend, he shall be liable to be punished in like manner.' (m)

Sec. 4. ['The prosecution for every offence punishable upon summary conviction by virtue of this Act shall be commenced within six calendar months after the commission of the offence]; and the prosecution for every offence punishable upon indictment, or otherwise than upon summary conviction, by virtue of this Act, shall be commenced within twelve calendar months after the commission of such offence.' (n)

Sec. 8. 'On every conviction under this Act for a first or second offence the convicting justices shall return the same to the next quarter sessions for the county, riding, division, city, or place wherein such offence shall have been committed; and the record of such conviction, or any copy thereof, shall be evidence in any prosecution to be instituted against the party thereby convicted for a second or third offence; and the clerk of the peace shall immediately on such return make or cause to be made a memorandum of such conviction in a register to be kept by him of the names and places of abode of the persons so convicted, and shall state whether such conviction be the first or second conviction of the offending party.'

Sec. 9. 'If any persons, to the number of three or more together, shall by night unlawfully enter or be in any land, whether open or inclosed, for the purpose of taking or destroying game or rabbits, any of such persons being armed with any gun, crossbow, firearms, bludgeon, or other offensive weapon, each and every of such persons shall be guilty of a misdemeanor, and being convicted thereof before the justices of gaol delivery, or of the Court of great sessions of the county or place in which the offence shall be committed, shall be liable at the discretion of the Court to be transported (o) beyond seas for any term not exceeding fourteen (p) years, nor less than seven years, or to be

(m) By sec. 3 a justice may issue his warrant to apprehend any person charged on the oath of any credible witness with any offence punishable under the Act upon summary conviction.

(n) The words in brackets are repeated by 47 & 48 Vic. c. 43. Sec. 5 gives the form of conviction for offences under the Act; as

to which see *R. v. Mellor*, 2 Dowl. P. R. 173. Sec. 6 gives an appeal to any person aggrieved by any summary conviction; and sec. 7 takes away the *certiorari*. See *R. v. Mellor*, *supra*, and *R. v. Hester*, 4 Dowl. P. R. 589.

(o) Now penal servitude, *ante*, p. 73.

(p) And not less than three years.

imprisoned and kept to hard labour for any term not exceeding three years.'

Sec. 12. 'For the purposes of this Act the night shall be considered, and is hereby declared to commence at the expiration of the first hour after sunset, and to conclude at the beginning of the last hour before sunrise.'

Sec. 13. 'For the purposes of this Act the word "game" shall be deemed to include hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards.'

The 7 & 8 Vict. c. 29, reciting the 9 Geo. 4, c. 69, ss. 1, 2, and that 'the provisions of the said Act have of late years been evaded and defeated, by the destruction by armed persons at night of game or rabbits, not upon open or enclosed lands, as described in the said Act, but upon public roads and highways, and other roads and paths leading through such lands, and also at the gates, outlets, and openings between such lands, and roads, highways, and paths, so that not only has the destruction of game or rabbits not been prevented, but the risk of murder and other grievous offences contemplated by the said Act has been increased, and great danger and alarm occasioned to persons using such roads, highways and paths; and that it is expedient that the remedies provided by the said Act against such offences as hereinbefore mentioned should be extended and applied to the like offences committed upon such roads, highways, and paths,' enacts, 'that from and after the passing of this Act, all the pains, punishments, and forfeitures imposed by the said Act upon persons by night unlawfully taking or destroying any game or rabbits in any land, open or enclosed, as therein set forth, shall be applicable to and imposed upon any person by night unlawfully taking or destroying any game or rabbits on any public road, highway, or path, or the sides thereof, or at the openings, outlets, or gates from any such land into any such public road, highway, or path, in the like manner as upon any such land, open or inclosed; and it shall be lawful for the owner or occupier of any land adjoining either side of that part of such road, highway, or path where the offender shall be, and the gamekeeper or servant of such owner or occupier, and any person assisting such gamekeeper or servant, and for all the persons authorized by the said Act to apprehend any offender against the provisions thereof, to seize and apprehend any person offending against the said Act or this Act; and the said Act, and all the powers, provisions, authorities, and jurisdictions therein or thereby contained or given, shall be as applicable for carrying this Act into execution as if the same had been herein specially set forth.' (q)

By the 24 & 25 Vict. c. 96, s. 17, 'whosoever shall unlawfully and wilfully, between the expiration of the first hour after sunset and the beginning of the last hour before sunrise, take or kill any hare or rabbit, in any warren or ground lawfully used for the breeding or keeping of hares or rabbits, whether the same be inclosed or not, shall be guilty of a misdemeanor.' (r)

(q) This Act seems to have been a mistake in legislation, for the 9 Geo. 4, c. 69, included all highways. See *R. v. Pratt*, 4 E. & B. 860. *Mayhew v. Wardley*, 14 C. B. (N. S.) 550.

(r) See this section, vol. II. *R. v. Garret*, 6 C. & P. 369. Perhaps this section in part repeals the 9 Geo. 4, c. 69, s. 1, *ante*, p. 945, i. e., so much of it as relates to taking, or killing any hare or rabbit in any warren

In consequence of the easy manner in which poachers escaped detection and apprehension by the power to apprehend them being confined to cases where they were found upon the land committing the offence, the 25 & 26 Vict. c. 114, was passed. Sec. 1 defines game to include one or more hares, pheasants, partridges, eggs of pheasants and partridges, woodcocks, snipes, rabbits, grouse, black or moor game, and eggs of grouse, black or moor game; and sec. 2 makes it lawful for 'any constable or peace officer in any county, borough, or place in Great Britain and Ireland in any highway, street, or public place, to search (s) any person whom he may have good cause (t) to suspect of coming from any land where he shall have been unlawfully in search or pursuit of game, or any person aiding or abetting such person, and having in his possession any game unlawfully obtained, or any gun, part of a gun, or nets or engines used for the killing or taking game, and also to stop and search any cart or other conveyance in or upon which such constable or peace officer shall have good cause to suspect that any such game or any such article or thing is being carried by any such person, and should there be found any game or any such article or thing as aforesaid upon such person, cart, or other conveyance, to seize and detain such game, article, or thing;' and the constable or peace officer is in such case to apply for a summons citing such person to appear before two justices in petty sessions, as provided by the 18 & 19 Vict. c. 106, s. 9, in England and Ireland, and before a sheriff or any two justices in Scotland, and 'if such person shall have obtained such game by unlawfully going on any land in search or pursuit of game, (u) or shall have used any such article or thing as aforesaid for unlawfully killing or taking game, or shall have been accessory thereto, such person shall on being convicted thereof forfeit and pay any sum not exceeding five pounds,' and shall forfeit the game, guns, parts of guns, nets and engines, and the justices are to direct them to be sold or destroyed, and the proceeds of the sale and penalty to be paid to the treasurer of the county or borough; and if no conviction takes place, the game, article, or thing, or the value thereof, shall be restored to the person from whom it was seized. (v)

or ground lawfully used for the breeding or keeping of hares or rabbits. See also the Ground Game Act, 1880 (43 & 44 Vict. c. 47).

(s) If a constable see game or rabbits upon a person, it is not necessary that there should be a search to authorise a proceeding under the 25 & 26 Vict. c. 114, s. 2, for it cannot be intended that if a man is seen coming out of a plantation with game or rabbits in his possession it should be necessary to go through the process of searching him. *Hall v. Knox*, 4 B. & S. 515.

(t) See *R. v. Spencer*, 3 F. & F. 854, 857. In this case the prisoners were indicted for assaulting the policeman who endeavoured to apprehend the prisoners in the execution of his duty, and it was proposed to give evidence that the prisoners were habitual poachers, for the purpose of showing

what was passing in the policeman's mind at the time of the endeavour to apprehend, but *Martin, B.*, held that such evidence could not be given. *Mr. Greaves* doubts the correctness of this. See vol. III. *Evidence*.

(u) It is not necessary under this clause to prove from what particular land the game was taken. The only question is, whether it was unlawfully taken from any land. See *Brown v. Turner*, 13 C. B. (N. S.) 485; *Evans v. Bottrill*, 3 B. & S. 787.

(v) In order to give the magistrates jurisdiction, the game, &c. must be seen by the constable on the person of the accused on the highway, &c. So where a policeman saw a man on a highway with rabbits on his back, who ran across a meadow and threw the rabbits away, and they were then and there taken by the policeman, it was held that the conviction was valid. *Lloyd v. Lloyd*, 14 Q.

Limitation of time for taking proceedings. — Upon an indictment for night-poaching under the 9 Geo. 4, c. 69, laying an information before a magistrate is the commencement of the prosecution. The offence was committed on the 4th of December, 1845. The information before the magistrates and warrant were on the 19th of the same month. One prisoner was apprehended and committed on the 5th of September, 1846; the other on the 21st of October in the same year; the indictment was preferred on the 5th of April, 1847; and, upon a case reserved, the judges were unanimously of opinion that the prosecution was commenced in time. (w)

Parker and Smith were indicted for night-poaching on the 26th of January, 1861, and a warrant, dated the 5th of February, 1861, was proved to be under the hand of a magistrate, and this warrant recited that information had that day been given of the offence, but no information was given in evidence. Smith was apprehended under this warrant on the 27th of November, 1862, and Parker on the 14th of January, 1864; and, upon a case reserved, it was held that, for the purpose of showing that the prosecution was commenced in due time, the information ought to have been given in evidence. (x)

On the trial of an indictment for night-poaching, it appeared that the offence was committed on the 12th of January, 1844; the indictment was found at the assizes held on the 1st of March, 1845; but the warrant by which the defendant was committed on the present charge was on the 11th of December, 1844; and Pollock, C. B., held that the warrant of commitment showed that the prosecution was commenced within twelve calendar months after the commission of the offence. (y)

Where a bill of indictment had been preferred within a year after the commission of an offence under the 9 Geo. 4, c. 69, against the prisoner and Robins, and ignored as to the prisoner, but found against Robins, who was convicted, and four years afterwards a fresh bill was found against the prisoner; it was considered to be clear that preferring the first bill was the commencement of a prosecution, but it was doubted whether the condition in sec. 4, requiring a prosecution by indictment to be commenced within twelve calendar months, had been complied with by preferring the bill which was ignored. (z)

Tame pheasants. — On an indictment for night-poaching it appeared

B. D. 725, commenting on *Clarke v. Crowder*, 38 L. J. M. C. 118; L. R. 4 C. P. 638; *Turner v. Morgan*, 44 L. J. M. C. 161; L. R. 10 C. P. 587. Sec. 3, any penalty in England is recoverable under the 1 & 2 Will. 4, c. 32; in Scotland under the 2 & 3 Will. 4, c. 68; and in Ireland under the Petty Sessions Ireland Act, 1851. Sec. 4 extends the provisions of the 11 & 12 Vict. c. 43, to proceedings under this Act. Sec. 5 takes away the *certiorari*, &c.; and sec. 6 gives an appeal against any conviction under the Act.

(w) *R. v. Brooks*, 1 Den. C. C. 217; 2 C. & K. 402. See *R. v. Wallace*, 1 East, P. C. 186. *R. v. Hull*, 2 F. & F. 186.

(x) *R. v. Parker*, L. & C. 459, 33 L. J.

M. C. 135. This case was only argued for the prisoners. *Quære*, whether the warrant was not evidence that the prosecution was pending at its date; under that warrant the prisoners had been apprehended, examined, and committed.

(y) *R. v. Austin*, 1 C. & K. 621. See *R. v. Phillips*, R. & R. 369. *R. v. Casbolt*, 11 Cox, C. C. 385, where Byles, J., allowed the prisoner to withdraw his plea of guilty, in order to raise the point that the prosecution was not commenced in time.

(z) *R. v. Killminster*, 7 C. & P. 228, Coleridge, J. The prisoner was acquitted, otherwise the point would have been reserved for the opinion of the judges.

that some tame pheasants were in coops about 150 yards from a house; but they were not shut up, and could run about, and on this night they were roosting in trees close by. Common hens were in the coops, having been used for rearing the pheasants. The prisoners went to the coops, and one said, 'There is nothing here but an old hen;' they were looking in other coops when they were apprehended. It was held that these birds could not be considered game within the meaning of the statute. As long as they were under the charge of the hen, as long as she was their guardian, and while they were about her, and running about with her, he who took them was guilty of larceny. (a)

Allegation of previous convictions. — An indictment alleged that the prisoner was duly convicted before three justices, for that he by night after the expiration of the first hour after sunset, and before the beginning of the first hour before sunrise, did by night unlawfully enter a certain close, &c., describing it, with a gun for the purpose of then and there taking and destroying game; and the prisoner was thereupon adjudged for his said offence, the same being his first offence, to be imprisoned, &c.; and that the prisoner afterwards was duly convicted before two justices, for that he by night unlawfully did enter and be in certain inclosed land, &c., describing it, 'with certain instruments for the purpose of killing, taking, and destroying game thereon, this being his second offence;' and was thereupon adjudged, &c. It was objected on error: 1. That the second conviction alleged was not valid, because the first conviction did not appear to have been set out in it; but it was held that all that was necessary in such an indictment in order to give the Court jurisdiction was to show that there had been two former convictions under the statute, and that was shown here. 2. It was objected, that the second conviction only said that the prisoner entered 'with certain instruments,' not specifying what they were, or even that they were used for the purpose of killing game; but it was held that, as it was alleged that the offence was committed by night in the land with instruments for the purpose of taking and destroying game, the latter words being applicable to the instruments as well as to the presence of the party, got rid of all the difficulty. 3. It was objected, that the second conviction did not allege that the prisoner entered for the purpose of taking game 'by night,' and that the first conviction did not allege that the act was done by night on the particular close; but it was held that the expression 'by night' preceding the whole clause quite cured the difficulty as to time. Lastly, it was objected, that the first conviction was 'the first hour before sunrise,' instead of 'last hour before sunrise,' and that this was impossible; but the objection was overruled. (b)

(a) *R. v. Garnham*, 8 Cox, C. C. 451. Pollock, C. B., and Williams, J. Pollock, C. B., also said, 'I take it if a man go into a London market, and buy pheasants' eggs, and hatch them under a common hen, when the birds became free from control they would come under the game laws.'

(b) *Cureton v. R.*, 1 B. & S. 208. 30 L. J. M. C. 149. In *Fletcher v. Calthrop*, 6 Q. B. 880, a conviction which alleged that

the defendant entered certain enclosed land by night 'with a net for the purpose of taking game, to wit, partridges and pheasants,' was held bad, because it did not state the intent to take the game there. In *Cureton v. R.*, Cockburn, C. J., and Hill, J., expressed their doubts as to the correctness of this decision. See *R. v. Western*, 37 L. J. M. C. 81; 1 L. R. C. C. R. 122.

An indictment under the 9 Geo. 4, c. 69, s. 1, for a third offence set out the previous convictions, one of which alleged that the prisoner 'entered into certain inclosed land in the parish of A. B. for the purpose of taking and destroying game in the night,' and Maule, J., held that the indictment was bad for not alleging the entry by night. (c)

Authority to apprehend.—Although three or more poachers are out by night armed, and are guilty of an offence within sec. 9, still they are liable to be apprehended under sec. 2, as they are guilty of an offence under sec. 1, as well as under sec. 9. (d) If persons are found actually in the commission of an offence against sec. 1, they may be apprehended by the persons authorised to apprehend by sec. 2, although no notice be given to them of the cause for which they are apprehended; for the circumstances constitute sufficient notice. (e) And it is not necessary that there should be a written authority; it is sufficient if the party were employed as a watcher of game preserves by the lord of the manor. (f) And although the persons mentioned in sec. 2 have not authority to apprehend unless the poachers are found upon the manor or land of the persons therein specified; (g) yet if a poacher be found on the manor by a servant of the lord, and run off it, but being pursued return upon it again, the servant may apprehend him, for it is the same as if he had never been off the manor. (h) Where a wood was neither the property of the master of an assistant gamekeeper, nor in his occupation, nor within any manor which belonged to him, and he had only the permission of the owner to preserve the game there, it was held that the assistant gamekeeper had no authority to apprehend poachers in the wood. (i) So the gamekeeper of a person who rents the shooting over land has no right to apprehend a poacher; for a person who rents the shooting is neither the owner nor the occupier of the land. (j) Unless a poacher be found in pursuit of game between the expiration of the first hour after sunset and the beginning of the last hour before sunrise, there is no power to apprehend him under sec. 2. (k)

(c) *R. v. Merry*, MSS. C. S. G.; 2 Cox, C. C. 240.

(d) *R. v. Ball*, R. & M. C. C. R. 330. See note (h), *ante*, p. 945.

(e) *R. v. Payne*, R. & M. C. C. R. 378. *R. v. Davis*, 7 C. & P. 785, Parke, B. *R. v. Taylor*, 7 C. & P. 266, Vaughan, B. See these and other similar cases, Vol. III. *Murder and Manslaughter, Resisting Officers*.

(f) *R. v. Price*, 7 C. & P. 178, J. A. Park, and Coleridge, JJ.

(g) *R. v. Addis*, 6 C. & P. 388, Patteson, J. *R. v. Davis*, 7 C. & P. 785, Parke, B.

(h) *R. v. Price*, *supra*. The authority given by sec. 2 to apprehend 'in case of pursuit in any other place to which he may have escaped,' seems not to have been adverted to in this case.

(i) *R. v. Addis*, *supra*.

(j) *R. v. Price*, 5 Cox, C. C. 277. *Patteson and Talfourd*, JJ. *R. v. Wood*, 1 F. & F. 470, Martin, B. S. P., where the gamekeeper's master 'had the right of shooting over' the land. *R. v. Wesley*, 1 F. & F.

528, Lord Campbell, C. J., S. P., where the gamekeeper's master had 'permission by parol to shoot over the land.'

(k) *R. v. Tomlinson*, 7 C. & P. 183, Coleridge, J. See the case, Vol. III., *Manslaughter, Resisting Officers*. By the 24 & 25 Vict. c. 96, s. 17 (which will be found in Vol. II.), whosoever shall unlawfully and wilfully between the beginning of the last hour before sunrise and the expiration of the first hour after sunset, take or kill any hare or rabbit in any warren, or ground lawfully used for the breeding or keeping of hares or rabbits, or shall at any time set or use therein any snare or engine for the taking of hares or rabbits, is subjected to a penalty not exceeding £5; and by sec. 103 may, if found committing the offence, be immediately apprehended without a warrant by any peace officer, or by the owner of the property on or with respect to which the offence is committed, or by his servant, or any person authorized by him. This power only applies to hares and rabbits, and to the places speci-

In consequence of the many cases which had occurred in which questions had arisen as to the right to apprehend persons committing offences in the night, and especially in poaching cases, (l) the 14 & 15 Vict. c. 19, s. 11, was framed. (m) It recites that 'doubts have been entertained as to the authority to apprehend persons found committing indictable offences in the night,' and enacts that 'it shall be lawful for any person whatsoever (n) to apprehend any person, who shall be found committing any indictable offence in the night, and to convey him or deliver him to some constable or other peace officer, in order to his being conveyed, as soon as conveniently may be, before a justice of the peace, to be dealt with according to law.'

It is to be observed that this clause only applies to the apprehension of persons committing *indictable* offences; whilst, therefore, it authorises the apprehension of any persons committing an offence under sec. 9, it does not authorise the apprehension of any person committing an offence under sec. 1: for that section only creates summary offences, except indeed in the case of a third offence after two previous convictions.

It is proper also to add, that 'night,' as used in sec. 11 of the 14 & 15 Vict. c. 19, is not defined by sec. 13 of that Act; for that section only defines 'the time at which the night shall commence and conclude in any offence against the provisions of this Act;' and sec. 11 does not create any offence, but simply authorises the apprehension for any indictable offence committed in the night, whether that offence be an offence at common law or created by statute.

A count alleged that the defendants by night did unlawfully enter certain land armed with guns for the purpose of taking game, and that they 'were then and there in the said land by night as aforesaid by one W. R., the servant of Earl B., found, and that the defendants with the guns aforesaid did then and there assault, &c., the said W. R., the said W. R. being then and there authorised to apprehend the defendants;' it was objected that the count was bad, as it neither stated, in the words of the Act, that the defendants were found committing the offence, nor sufficiently referred to the previous averments to incorporate them in the latter part of it, and the judgment was arrested upon this objection. (o)

fied. By the Game Act, 1 & 2 Will. 4, c. 32, s. 31, any person found on any land, &c., in search or pursuit of game, woodcocks, snipes, quails, landrails, or rabbits, may be required by any person having the right of killing game upon such land, or by the occupier or gamekeeper, or servant of either of them, or by the warden, &c., of any forest, &c., forthwith to quit the land whereon he is found, and to tell his Christian and surname, and place of abode; and if such person, after being so required, refuse to tell his real name or place of abode, or give such a general description of his place of abode as shall be illusory for the purpose of discovery, or wilfully continue or return upon the land, he may be apprehended by the party so requiring, or by any person acting by his order and in his aid, and conveyed as soon as conveniently may be before a magistrate. In order to justify the apprehension of an of-

fender under this section he must have been required both to quit the land, and also to tell his name; and the return must be upon the same land as the party was found upon, and for the same purpose, that is, in search or pursuit of game, &c. *R. v. Long*, 7 C. & P. 314, Williams, J. *R. v. Lawrence*, Gloucester Spring Assizes 1843. MSS. C. S. G. S. P. by Wightman, J. But in *R. v. Prestney*, 3 Cox, C. C. 505, Parke, B., held that the prosecutor was not bound both to require the prisoner to quit the land and also to tell his name and place of abode, but that he was at liberty to require either of those three matters of the prisoner, and that he was bound to comply with whichever the prosecutor demanded.

(l) See *post*, Vol. III.

(m) It was my clause. C. S. G.

(n) See *R. v. Sanderson*, 1 F. & F. 598.

(o) *R. v. Curnock*, 9 C. & P. 730. Gur-

Where a count alleged that three entered a close by night with guns for the purpose of taking game, and were found by a servant of the owner of the said close, and that they assaulted him with the said guns; it was objected that this count intended to allege that the prisoners had committed an offence under sec. 9, and therefore the count was bad for not alleging that the prisoners were armed; Patteson, J., asked what answer there was to the objection, and the counsel for the prosecution admitted the force of the objection, and abandoned the count. (*p*)

Upon an indictment for wounding with intent to murder a gamekeeper of a nobleman, it appeared that a turnpike-road ran through his estate upon which the game was extensively preserved; but other proprietors preserved game upon lands which were not more than half a mile distant from the place where the wound was given. The keepers swore that they heard shots fired at night in the preserves in quick succession, as if two or more persons were shooting, and suspecting that the parties would shortly pass along the turnpike-road, the keepers went and secreted themselves at the road-side. Shortly afterwards, six men came along the road; they had gun-barrels, which they took from their pockets; and an affray took place, in which the keeper was wounded. Several pheasants were found on the road after the affray was over. Wightman, J., told the jury that the keepers were not justified in endeavouring to apprehend the poachers; as they were not found upon any land committing any offence against the game laws, nor was any pursuit made. (*q*)

Where on an indictment under 9 Geo. 4, c. 69, s. 2 for assaulting a gamekeeper, the prisoners were proved to have been on land in pursuit of game in the night, and on seeing the keepers made off into a highway, and sat down under a tree, and the keepers went up to them, and were violently assaulted, but the keepers said that they had not followed them with intent to apprehend them; it was held that the assault must be committed at the time when the keepers are attempting to apprehend the poachers, in order to bring the case within the above section. (*r*)

Upon an indictment for wounding with intent to prevent their lawful apprehension, it appeared that the two prisoners were seized while poaching in the night on a preserve which had belonged to the Earl of Lichfield, and was then in the possession of his trustees, and the head-keeper had been appointed by Lord Lichfield twenty years before, and regularly paid by Lord Lichfield's agent to the time in

ney, B., after taking time to consider, and, I believe, consulting Coleridge, J. Two other objections were intended to be made: first, that the assault was not alleged to have been upon the land where the defendants were found; secondly, that there was no averment to show that the keeper was in the execution of his duty when the assault was committed, and unless that were the case the assault was not within this Act. See *R. v. Cheere*, 4 B. & C. 902. C. S. G.

(*p*) *R. v. May*, 5 Cox, C. C. 176, yet it is perfectly clear that there was nothing in the objection. The indictment was on the second section, and that only requires the

offenders to be found on the close 'committing any such offence,' as is mentioned in the first section, *i. e.*, entering 'with any gun,' &c. It is clear that the count would have been bad if it had alleged the offence in the terms of the ninth section, unless those terms were equivalent to those creating the offence in the first section; and as the count alleged the offence in the terms of the first section, it was clearly good. C. S. G.

(*q*) *R. v. Meadham*, 2 C. & K. 633.

(*r*) *R. v. Doddridge*, 8 Cox, C. C. 335, Channell, B.

question, but had never had any direct communication with the trustees, and a watcher appointed by the head-keeper, had been wounded by the prisoners whilst apprehending them, and it was held that the evidence of authority was sufficient. (s)

So where a covert was the property of Sir John Acton, an infant, and Lord Granville had married Sir John's mother, and had exercised the right of killing and preserving game on Sir John Acton's property for seven years, and had appointed a gamekeeper; it was held that this was sufficient *prima facie* evidence of his right under the 1 & 2 Will. 4, c. 32, s. 36, to demand and take game from a person found in the covert. (t)

Being armed.—The ninth section creates two distinct offences, namely, first, *entering* on land, one of the party being armed; and, secondly, *being* on the land armed. (u)

By sec. 9, if several are together, and any one of them is armed, all of them are liable to be convicted. (v) But it was held, on the repealed statute (57 Geo. 3, c. 90), that if several were out together, and one had arms without the knowledge of the others, the others were not liable to be convicted. (w)

Where an indictment for night-poaching charged eight prisoners with 'being respectively armed with guns and other offensive weapons,' and the jury found that two of the prisoners were armed with guns, and the rest with bludgeons; it was objected, that a merely constructive arming was not sufficient under the 9 Geo. 4, c. 69, s. 9, and that every prisoner not armed with a gun was entitled to be acquitted, and that no reliance could be placed on the words, 'and other offensive weapons,' for that the statute enumerating by name gun, cross-bow, firearms, and bludgeons, and adding 'or any other offensive weapons,' the indictment ought to have specified the offensive weapon in any case, and particularly where the weapon was one of those named in the statute; Coleridge, J., overruled the objection, and upon a case reserved, the judges were of opinion that the conviction was right. (x)

The defendants had brought with them from a distance some large heavy smooth stones, and had thrown them at a gamekeeper and his assistants, whereby they had been struck and knocked down; it was left to the jury to say whether the stones had been brought by the defendants to the place or found upon the spot; whether they were of such a description as to be capable of occasioning serious injury to the person if used offensively; and whether they were brought and used for that purpose; for that, if they were satisfied of the affirmative of all those questions, these stones were offensive weapons

(s) *R. v. Fielding*, 2 C. & K. 621, Cresswell and Patteson, JJ.

(t) *R. v. Wall*, 2 Cox, C. C. 288, Coleridge, J.

(u) Per Coleridge, J., *R. v. Kendrick*, 7 C. & P. 184, and MSS. C. S. G. See also *Davies v. R.*, 10 B. & C. 89, *post*, p. 962. In *R. v. Mellor*, 2 D. P. C. 173, Taunton, J., held that the words, 'entering and being,' in the 1 & 2 Will. 4, c. 32, s. 30, only constituted one offence; *sed. qu.*, for

persons may enter land with an innocent intent, and afterwards begin poaching.

(v) See *R. v. Smith*, MSS. Bayley, J., and *R. & R. 368*, decided on the repealed Act.

(w) *R. v. Southern*, MS. Bayley, J., and *R. & R. 444*.

(x) *R. v. Goodfellow*, 1 Den. C. C. 81; 1 C. & K. 724. *R. v. Andrews*, 1 Cox, C. C. 144. S. P. See *R. v. Davis*, 8 C. & P. 759, Patteson, J.

within the statute. (y) The prisoner had taken with him when poaching a thick stick, large enough to be called a bludgeon, but which, being lame, he was in the habit of using as a crutch; it was held to be a question for the jury whether he took it out with intent to use it as an offensive weapon, or merely for the purpose to which he usually applied it. (z) So where the only weapons proved to have been used by the prisoners were sticks, and one, with which a game-keeper had been knocked down, when produced, proved to be a very small one, fairly answering the description of a common walking-stick; and on its being objected that this stick could not be considered an offensive weapon, it was answered that the use made of it by the prisoner showed his intention, and the nature of the stick; Gurney, B., said, that if a man went out with a common walking-stick, and there were circumstances to show that he intended to use it for purposes of offence, it might perhaps be called an offensive weapon within the statute; but if he had it in the ordinary way, and upon some unexpected attack or collision he was provoked to use it in his own defence, it would be carrying the statute somewhat too far to say it was an offensive weapon within the meaning of the Act. (a) Where the prisoners were found in a field with nets, hares, and dogs, and putting the hares on sticks walked off, and the sticks were about four feet and a half long, and about one and a half inch in diameter, one of them being weighted with an iron ferule, and another had a large knot at the thick end; Rolfe, B., directed the jury that if the prisoners brought the sticks merely and exclusively for the purpose of carrying hares, then they were not armed within the Act, though it was possible that the sticks might have been very effectively used as offensive weapons in any affray with the keepers. But if the jury thought that the prisoners took the sticks for the double purpose of staking the nets or carrying away the game, and also of attacking the keepers, if occasion should arise for such a purpose, then they would be armed within the Act. (b) So where an indictment on the 9 Geo. 4, c. 69, s. 9, alleged that the prisoners were armed with bludgeons and other offensive weapons; and it was proved that all of them had sticks, and that one of them used his stick against a keeper, *R. v. Johnson* (c) was cited to show that a stick used for offensive purposes was an offensive weapon; and Maule, J., observed that in that case the stick was capable of being an offensive weapon; but here there was no evidence as to the size or length; and left it to the jury to determine whether this stick was an 'offensive weapon.' (d)

It is a question for the jury in each case whether the defendants were armed with offensive weapons. (e)

A keeper heard a gun fired in a wood, and called to his man to watch; the persons in the wood immediately abandoned their guns, and had crept away two hundred yards from them, when the keeper and his man discovered and seized them. A case was reserved upon

(y) *R. v. Grice*, 7 C. & P. 803. Ludlow, Serjt., after consulting Parke and Bolland, BB.

(z) *R. v. Palmer*, 1 M. & Rob. 70. Taunton, J.

(a) *R. v. Fry*, 2 M. & Rob. 42.

(b) *R. v. Turner*, 3 Cox, C. C. 304.

(c) *R. & R.* 492.

(d) *R. v. Merry*, MSS. C. S. G. 2 Cox, C. C. 240.

(e) *R. v. Sutton*, 13 Cox, C. C. 648. *R. v. Williams*, 14 Cox, C. C. 59.

the question, whether they could be considered as found armed when they had got to so great a distance from their guns before they were discovered: and the judges (eleven) held that they were, and that they were rightly convicted. (*f*)

Upon an indictment under the repealed statute, which charged the prisoner in every count with having entered a wood, called Kingshoe Spinney, it was proved that a gamekeeper heard nine reports, and saw three flashes in the wood: the prisoner was not seen in the wood, but was soon afterwards seen in a close which adjoined the wood: upon this evidence it was left to the jury to say, whether the prisoner was one of the party in the wood; and they having found that he was, the judges, upon a case reserved, held that, as there was evidence to satisfy the jury that he had been in the wood armed, or was one of a party who had been so, it was sufficient. (*g*)

Entering. — So it is not necessary under the 9 Geo. 4, c. 69, that the defendants should be actually seen in the close laid in the indictment; it is sufficient if there be evidence to satisfy the jury that they were in fact in the close for the purpose alleged. Thus where the prisoners had been seen in a close which lay between two woods, going in a direction from one of the woods, in which shots had been previously heard, towards the other wood, it was left to the jury to say whether they had not been in the wood in which the shots had been heard. (*h*)

In *R. v. Higgs*, 10 Cox, C. C. 527, Willes, J., is reported to have said, 'I have always held that if people are out at night in pursuit of game, intending to take it when they can find any, they are in pursuit of game in every field that they pass over. If they are out with a general intent to take game, I should say that was an intent to take it in any field they may pass through where game may be found.' (*i*)

Where an accomplice proved that all the four defendants went to a preserve called Norton Hill Wood for the purpose of killing pheasants, and that all of them, except himself and Meadows, went into the wood, they remaining outside; and on the approach of the gamekeepers the witness and Meadows went into the wood, and informed the others of it, when they all ran away together; Alderson, B., said, 'the entering on the land by one is to be considered as the entering of all, if the others are at the place and assisting, — exactly in the same way that would fix them in a case of burglary; there all are guilty, as well those who actually enter the house as those who are close at hand on the outside of it, waiting to watch or to carry off the property; it is enough if all these persons were at the place, each of them acting his part, and conducing to one common intent, although some only of the party were bodily in the wood.' (*j*) And in another case, where one or two out of four poachers were not actually in the wood laid in the indictment, but were waiting outside to watch, the same learned Judge said, 'If two persons were in the wood, and the other two outside were of the same party, and there for the same

(*f*) *R. v. Nash*, MS. Bayley, J., and R. & R. 386, decided under the repealed statute.

(*g*) *R. v. Worker*, R. & M. C. C. R. 165.

(*h*) *R. v. Capewell*, 5 C. & P. 549. MSS. C. S. G. Parke, B.

(*i*) See *R. v. Davies*, *post*, p. 960.

(*j*) *R. v. Passey*, 7 C. & P. 282. See *R. v. Scotton*, 5 Q. B. 493. *Stacey v. Whitehurst*, 18 C. B. (N. S.) 344.

purpose, it would be an offence within the Act. Suppose that some of the party were to go down one side of the hedge, and some down the other, beating the same fence, that would be no offence within the statute, according to *R. v. Dowsell*; (k) and the same consequence would follow if two went into the wood, and a number of others surrounded the outside: surely the statute meant to include such cases: I have a strong opinion on the point; but out of respect for my brother Patteson's opinion, if the question arises, I will reserve the point.' (l)

Three defendants went out for the purpose of night-poaching: Powell and Owen were seen setting nets in the hedge-row of the yew tree piece, they being on the other side in a turnpike-road, and Nickless went into another field; Powell and Owen sent a dog into the yew tree piece, which drove a hare into one of the nets; it was held that the case was not within the statute, as Nickless was independently engaged in poaching in the field, he having left the others poaching in the road. (m)

Upon an indictment against six prisoners for night-poaching in Ratcliffe's field, it appeared that the prisoners were in company in a lane adjoining the field in question setting nets between the ditch and the hedge of the field to take game. One of them remained with the nets, and the rest divided into two parties, and went round the field. Three or four of the prisoners armed with bludgeons were seen at one time beating in the field, with two dogs, for game. A witness stated that he saw all the prisoners come out of the field, and go together to the nets and take them up. The prisoners were all associated and engaged in the common purpose of taking game in the field in question. The prisoners were pursued and apprehended, and four of them had sticks or bludgeons, and two of them drew knives from their pockets, and threatened to stab the takers. It was objected that the evidence did not sufficiently prove that all the prisoners had been in the field, and that none could be properly convicted who had not been in the field, and as those who had been in the field could not be identified, all must be acquitted. Wilde, C. J., did not think the evidence sufficiently certain that all had been in the field, and directed the jury to consider whether all the prisoners were at the time associated and engaged in the common purpose of taking game by some of them going armed into the field, and there beating for game, while others rendered their aid by remaining outside the hedge; and directed the jury that if they were satisfied that all the prisoners were so engaged, they were all liable to be found guilty, although the witness could not identify which of the prisoners entered the field. The case was left to the jury on the assumption that some of the prisoners never entered the field. The jury found the prisoners guilty, and upon a case reserved the conviction was held right. The judges in this case did not think it necessary to decide, whether it would be an offence within the statute if a party of three or more together, one being armed, entered

(k) 6 C. & P. 398.

(l) *R. v. Lockett*, 7 C. & P. 300, Alderson, B. The jury having found that all the defendants had entered the wood, the ques-

tion was not reserved. See *R. v. Andrews*, 2 M. & Rob. 37, Gurney, B.

(m) *R. v. Nickless*, 8 C. & P. 757. Patteson, J.

and were in land consisting of two or more enclosures in the same or different occupations, because here the indictment made it essential to prove that the offence was committed in the field occupied by Ratcliffe. Five of the judges (*n*) were of opinion that to constitute the statutable misdemeanor the party must enter into and be bodily in the close, and that if three were in the close and three out the latter were not guilty; and as the three who entered in this case could not be ascertained, all were entitled to be acquitted. Seven of the judges (*o*) thought that if three were in the close, one being armed, they were guilty; and that all others who were together with them aiding and assisting were guilty of the same misdemeanor, though they were not in the field. (*p*)

On an indictment on sec. 9, it appeared that three persons went out together armed with guns in the night to destroy game, and were together in one of the closes mentioned in the indictment, called Thirteen Acres, but not for the purpose of killing game in that close (for there was none there), nor in one adjoining close by shooting from it. They were passing along it to another place. One at least of the three was in a close mentioned in the indictment, called The Spring, which had pheasants in it, for the purpose of destroying game in that close, but the whole three were not; they were all, however, at that time of the same company, and with that common purpose. The fourth count stated that the prisoners were in enclosed land occupied by C. White. The Spring and the Thirteen Acres were both enclosed and contiguous, being only separated by a fence, and both in the occupation of C. White. There was a question whether this could make any difference; Parke, B., therefore respited the judgment, and reserved the case for the opinion of the judges, and the following judgments were given: Lord Campbell, C. J., 'The fourth count of the indictment alleges that the prisoners were in enclosed land occupied by C. White; and on that count at all events I think the conviction was right and ought to be affirmed. Some confusion seems to have arisen on this matter from not attending sufficiently to the provisions of the Act. It has been treated as though the word "close" occurred in the Act, whereas it only specifies any land open or enclosed; a practice has consequently prevailed of naming a certain close in the indictment, which is quite needless. It would certainly be requisite to designate some land, and give it some description; but if that land comprehended fifty closes, and the offence was committed on any part of such land, it would be within the statute. If therefore A., B., and C. all belonged to one party with one common intent, A. might be in Blackacre, B. in Whiteacre, and C. in Greenacre, and all guilty under this statute.' Parke, B.: 'I am of the same opinion; though, at one time, I felt some doubt whether there could be a conviction on any count, I now think there may be on the fourth. If the three are all of one party, one or more being armed with an offensive weapon, and with the common object of destroying game in

(*n*) Parke, B., Patteason, J., Cresswell, J., Platt, B., and Williams, J.

(*o*) Denman, C. J., Wilde, C. J., Pollock, C. B., Rolfe, B., Coltman, J., Wightman, J., and Erle, J.

(*p*) *R. v. Whittaker*, 1 Den. C. C. 310;

2 C. & K. 636. Mr. Greaves considers this case was wrongly decided. See note (*s*) to p. 657, and note (*o*) to p. 655, in 4th edition of this work; and see *R. v. May*, 5 Cox, C. C. 176, *sed quære*.

the night, it is immaterial whether they are in the same or in different closes or enclosures. It is necessary to describe the land correctly in the indictment, for the purpose of identifying it; but if the three are on the land so described together under the circumstances I have mentioned, it is sufficient to bring them within the statute, whether the land be open or enclosed, or in one or more enclosures or in one or several occupations. In Mr. Greaves' very able note (g) the reasoning appears to me to be founded on the assumption that the statute provided only for the case of three being together in one and the same piece of enclosed land, if the land was enclosed, or one and the same piece of open land, if it was open, whereas the statute contains no such provision.' Alderson, B.: 'The indictment charges the prisoners with entering, &c., certain land, &c.; it is, therefore, necessary to describe the land, the entering which constitutes the offence charged. The land may consist of different closes, and be in different occupations; but whatever be the number of closes, or of occupations, the land in question must be rightly described in the indictment.' (r)

As to what constitutes an entry within the meaning of this statute, it has been held that if persons standing in a road hang nets on the twigs of a hedge within a close, it is an entry into such close within sec. 9. Some poachers standing in a lane spread their nets upon the twigs of a hedge, which separated the lane from the close; Alderson, B., said, 'I shall tell the jury that if they are satisfied that, in effecting a common purpose by all the defendants, the nets were hung upon the twigs of the hedge so as to be within the field, it was an entry. Lord Ellenborough, C. J., in *Pickering v. Rudd*, (s) stated that he had once held that firing a gun loaded with shot into a field was a breaking of the close, and I am of opinion that if these defendants so placed the nets within the field it was an entry by them all.' (t) Poachers were seen setting nets in the hedge-row of a field, they being on the other side of the hedge in a turnpike-road; they also sent a dog into the field, which drove a hare into one of the nets; it was contended that the sending of the dog into the field to drive the hares into the nets was, in point of law, an entering into the field; but Patteson, J., held that it was not. (u)

Where on an indictment on sec. 9 against three for entering Mount Coppice, it appeared that two of them were seen together running out of the coppice, and the third was almost immediately afterwards seen coming out of it alone, having a gun and a pheasant, and one of the others had a gun; Maule, J., said, 'The three prisoners

(g) Note (o), vol. 1, p. 665, 4th edit.

(r) *R. v. Uzzell*, 2 Den. C. C. 274. Tal-
fourd, J., and Platt, B., concurred. This
case was not argued, 20 L. J. M. C. 192.
Mr. Greaves thinks this decision erroneous.
See note (v), vol. 1, p. 659, 4th edition;
sed quære.

(s) 1 Stark. N. P. C. 56. 4 Camp. 219.
Lord Ellenborough, C. J., held that sending
dogs into a plantation to beat for game was
a trespass in the plantation. Lord Berkeley
v. Wathen, *ex relatione* Mr. Bloxsome, who
was attorney in the cause. And see *R. v.*
Pratt, 4 E. & B. 860, where Lord Campbell,

C. J., and Crompton, J., expressed similar
opinions. *Osbond v. Meadows*, 12 C. B.
(N. S.) 18.

(t) *Athea's case*, 2 Lewin, 191.

(u) *R. v. Nickless*, 8 C. & P. 757, Patte-
son, J. *Quære*, might not the poachers have
been convicted for being on the turnpike
road in pursuit of game? See *ante*, p. 947.
See *R. v. Pratt*, 4 E. & B. 860, per Lord
Campbell, C. J., and Crompton, J., as to the
meaning of the words 'commit any trespass
by entering or being upon any land,' in 1 &
2 Will. 4, c. 32, s. 30.

must be shown to have acted together and in concert. It is not sufficient to show that all were in the close at the same time; there must be some proof of an association together. This is often done by showing that the parties were seen together previously, the day or evening before. There is no evidence of the kind here. It is, however, a question for the jury; and the case was left to the jury accordingly. (v)

If the indictment state that the defendants entered into a certain close with intent, then and there, to kill game, it must be proved that the defendants had the intent to kill game in the particular close named. (w) On an indictment which charged that the prisoners were in the Great Ground with intent then and there to take game, it was proved that they were all in that close at 4 o'clock, A.M., when they were all taking up nets, which were spread against a gate and a gap in the fence; they had dogs with them, and when they had put the nets in a bag, they took up five hares which were lying dead on the ground about seven yards from the nets; it was contended that there was not sufficient evidence to prove that they were in the Great Ground with intent to take game there; and the previous cases were cited. Rolfe, B., 'The cases have certainly gone to that length under this statute, and as the indictment charges an intent then and there to take game, I shall, in deference to those cases, direct the jury that they must be satisfied the prisoners were in the Great Ground with intent then — that is, at that hour — and there that is, in that spot — to take game. For my own part, however, I must say I should have been inclined to hold that the offence was complete if a man were to be in one close and were to take game in the next.' 'It was no matter here where the hares were taken; though they were taken in another close, the nets were spread in the Great Ground, and the offence was complete, though no game was taken there, if they were there with intent to do so.' (x)

A doubt is stated in the marginal note of *R. v. Barham*, (y) whether it is necessary that the defendant should have such an intent in the place in which he is found armed, unless it be so stated in the indictment, and *R. v. Worker* (z) is referred to; but in that case, although the indictment was general, no such question arose. Where it appeared that the prisoners were in Shutt Leasowe, a place named in the indictment, and which adjoined Short Wood, and were apparently going to the wood, Patteson, J., said, 'The intent was evidently to kill game in the wood, into which none of the parties ever got for that purpose; it is true that they are charged with being in Shutt Leasowe, but they had no intention of killing game there; they must be acquitted.' (a)

Description of Locus in Quo. — The indictment must in some way or other particularise the place; for the defendant has a right to know to what specific place the evidence is to be directed; and stating

(v) *R. v. Jones*, 2 Cox, C. C. 185.

(w) *R. v. Barham*, R. & M. C. C. R. 151.
R. v. Capewell, 5 C. & P. 549. *R. v. Gainer*,
 7 C. & P. 231.

(x) *R. v. Turner*, 3 Cox, C. C. 304.

(y) *R. & M.*, C. C. R. 151.

(z) *R. & M.*, C. C. R. 165.

(a) *R. v. Davis*, 8 C. & P. 759. It does not appear whether the indictment had the words 'then and there' in it. In a case like this, in general a jury might find an intention to take game by the prisoners before they got into the wood. See *R. v. Higgs*, *ante*, p. 956.

that in the parish of A. the party entered into a certain close the was held not sufficient under the repealed statute. (b) But it has been held sufficient to allege that the defendants entered certain land in the occupation of a person named, without stating whether the land was enclosed or not. (c)

An indictment alleged that the defendants entered a certain wood called 'The Old Walk,' in the occupation of the Earl of Waldegrave; it appeared that the wood had always been called 'The Long Walk,' and upon a case reserved, the judges held the variance was fatal. (Where an indictment described the land as 'Digmore Plantation and belonging to Sarah Harriett Williams,' and she was a widow generally known as Mrs. Hosier Williams, and Sarah Harriett Hosier Williams, Hosier having been the name of a former husband, but she would be quite as well known by the name of Sarah Harriett Williams, and could not be mistaken for any other person; it was held that the description in the indictment was sufficient. (e)

Where an indictment for night-poaching described the land as 'land of and belonging to J. W. Dod,' Patteson, J., held that it was sufficient, as that meant that the land was in his occupation. (f)

An indictment alleged that the prisoners, 'late of the parish of Foffants, otherwise called Fofants, otherwise called Fovant,' entered 'certain land called Foffants, otherwise called Fofants, otherwise called Fovant;' and it was objected that the indictment was uncertain as to the parish and the wood, as they were both described under these several names; Coleridge, J., held that there was nothing in the objection, as all the names were *idem sonans*. (g)

It would seem now that a variance between the allegation of the occupation of land and the proof of the occupation will if not such as to have misled the prisoners be amended at the trial. (h)

Indictment. — The indictment must allege not only an entry by night, but an arming by night. An indictment alleged that the defendants did by night unlawfully enter divers closes and inclose lands, and were then and there in the said closes and lands, armed with guns for the purpose of then and there taking and destroying game; it was objected that the words 'then and there' did not mean that the defendants were there by night, but only on the day, and at the place aforesaid; and it was held that the indictment was bad. 'If the words "by night" had occurred at the beginning of the sentence they might have governed the whole, or if they had been at the end of the sentence they might have referred to the whole; but here they

(b) *R. v. Ridley*, T. T. 1823. *R. & R.* 515. *R. v. Crick*, 5 C. & P. 508. *Vaughan*, B. *R. v. Capewell*, 5 C. & P. 549. Where the close is described in general terms, it may be prudent to apply for a particular of the close in which the offence is intended to be proved, which it is apprehended the Court would order to be delivered, as it is the usual course in all cases, where an indictment is so general as not to afford the defendant sufficient information. See *ante*, pp. 540, 758.

(c) *R. v. Andrews*, 2 M. & Rob. 37, *Gurney*, B., S. P., *R. v. Morris*, 5 Cox, C. C. 205. A practice has prevailed of naming a certain close in the indictment, which is

needless. See *R. v. Uzzell*, 2 Den. C. C. R. 27; 20 L. J. M. C. 192.

(d) *R. v. Owen*, R. & M., C. C. R. 118 decided upon the 57 Geo. 3, c. 90. The marginal note adds that, 'it is not necessary where the name of the owner or occupier of the close is stated to state the name of the close also.' The case itself, however, contains no such point. C. S. G. As to an amendment at the trial, see *ante*, p. 53.

(e) *R. v. Morris*, 5 Cox, C. C. 205, *Talford*, J.

(f) *R. v. Riley*, 3 C. & K. 116.

(g) *R. v. Andrews*, 1 Cox, C. C. 144.

(h) *R. v. Sutton*, 13 Cox, C. C. 648.

are in the middle of the sentence, and are applied to a particular branch of it, and cannot be extended to that which follows. The two members of the sentence are distinct; the first states the entry into the closes by night, but does not state that the defendants were armed or the intent with which they entered; the second branch states, that they were in the closes armed, for the purpose of destroying game, but does not state that they were there by night. Neither of those branches of the sentence contains all that is requisite to constitute an offence within the statute, and the two being distinct the indictment is bad.' (i)

In an indictment for night-poaching it is sufficient to allege that the prisoners unlawfully entered, and it is not necessary to allege the facts which made the entry unlawful. (j) And in such an indictment it is sufficient to allege an intent to take game without specifying the particular kind of game. (k)

The indictment need not contain any specific allegation that the defendants entered the close between the expiration of the first hour after sunset and the beginning of the last hour before sunrise, the period which by the twelfth section of the statute it is provided shall be considered night. (l)

The indictment may contain counts not only on the ninth section but also on the second for assaulting a gamekeeper authorised to apprehend, for assaulting a gamekeeper in the execution of his duty, and for a common assault, (m) and if there be any doubt as to the number of persons not amounting to three, or the proof of their being out in pursuit of game, it certainly would be prudent to add such counts in all cases where an assault has been committed. Where an indictment, after stating the entry into the land by night, proceeded thus; the defendants 'being then and there by night as aforesaid armed with a gun;' and it was objected that this averment was not sufficient, because 'then' meant only the day and year aforesaid, and not the time of the entry; Parke, B., said, he would leave the defendants to their writ of error, but advised the insertion of the words, 'at the time when they so entered,' in such indictments in future. (n) Where an indictment alleged, that the defendants did enter, and were in certain land, they 'being then and there by night as aforesaid armed with guns, and other offensive weapons,' and it was objected that the indictment did not contain any sufficient allegation that the defendants were armed when they entered the land; it was held that the

(i) *Davies v. R.*, 10 B. & C. 89. The following objections were also taken, but not adverted to by the Court: 1st, that the hour of the night ought to have been stated; 2ndly, that it was not stated that the defendants unlawfully were in the closes for the purpose of destroying game; 3rdly, that it was not stated that the defendants were there together for the purpose of destroying game; and 4thly, that the indictment stated that they entered 'divers closes' without specifying any in particular. But see *Cureton v. R.*, *ante*, p. 950.

(j) *R. v. May*, 5 Cox, C. C. 176, Patten, J.

(k) *Ibid.*

(l) *Riley's case*, 1 Lewin, 149, Parke, B. Pearson's case, *ibid.*, 154, Gurney, B.

(m) *R. v. Finucane*, 5 C. & P. 551, and MS. C. S. G. Parke, B. *R. v. Simpson*, Stafford Spring Assizes, 1830, Holland, B. MS. C. S. G.

(n) *R. v. Wilks*, 7 C. & P. 811. See *Stead v. Poyer*, 1 C. B. 782. It seems to be sufficient to show that the defendants were on the land armed, &c., and that it is not necessary also to allege that they were armed when they entered on the land.

indictment was sufficient, as all the requisites of the statute had been complied with. (o) Where there was one indictment for shooting at a gamekeeper with intent to murder him, and another indictment for night-poaching, both founded on the same transaction, it was held that the prosecutor was not bound to elect which he would proceed upon, as the offences were quite distinct, and one of them could not possibly merge in the other. (p)

Upon an indictment for night-poaching the case was proved, except that it was shown that the land was the freehold of Spode, and in the occupation of a tenant, and it was contended that in order to show that the prisoner was 'unlawfully' there, it must be shown by direct evidence that he had not the permission either of the tenant or landlord; the jury found the prisoner guilty, and unless the particular proof suggested was necessary, there was abundant evidence, not merely that the prisoner and those with him were on the land, but also in their conduct that they were unlawfully there; and upon a case reserved, it was held that the conviction was right. If persons are found at night armed and using violence to keepers, it cannot be necessary to call the tenant of the land or the owner to prove they were not there by permission. (q)

(o) R. v. Kendrick, 7 C. & P. 184, and
MS. C. S. G. Coleridge, J.

(p) R. v. Handley, 5 C. & P. 565,
Parke, B.

(q) R. v. Wood, D. & B. C. C. 1.

APPENDIX.

DECISIONS ON REPEALED STATUTES RELATING TO CONSPIRACY.

Right of Workmen to Agree as to Rate of Wages. — In his charge to the grand jury at the Stafford Special Commission, 1843, Tindal, C. J., said, 'The first observation that arises is that if the workmen of the several collieries and manufactories, who complained that the wages which they received were inadequate to the value of their services, had assembled themselves peaceably together for the purpose of consulting upon and determining the rate of wages or prices which the persons present at the meeting should require for their work, and had entered into an agreement amongst themselves for the purpose of fixing such rate, they would have done no more than the law allowed. A combination for that purpose and to that extent (if indeed it can be called by that name) is no more than is recognised as legal by the 6 Geo. 4, c. 129; by which statute also exactly the same right of combination, to the same extent and no further, is given to the masters when met together, if they are of opinion the rate of wages is too high. In the case supposed—that is, a dispute between the masters and the workmen as to the proper amount of wages to be given—it was probably thought by the legislature that if the workmen on the one part refused to work, or the masters on the other refused to employ, as such a state of things could not continue long, it might fairly be expected that the party must ultimately give way, whose pretensions were not founded in reason and justice,—the masters if they offered too little, the workmen if they demanded too much. But, unfortunately for themselves and others, those who were discontented did not rest here. Not satisfied with the exercise of their own right to withhold their own labour, if they were discontented with the price they received for it, they assumed the power of interfering with the right which others possessed, of exercising their discretion upon the same point; and accordingly you will have numerous cases laid before you in which large bodies of dissatisfied workmen interfered by personal violence and by threats and intimidation, to compel others, who were perfectly willing to continue to labour in their callings at the rate of wages then paid to desist from their work, to leave the mine or manufactory, and against their own will to add themselves to the numbers of the discontented party; than which a more glaring act of tyranny and despotism by one set of men over their fellows cannot be conceived. If there is one right which, beyond all others, the labourer ought to be able to call his own, it is the right of the exertion of his own personal strength and skill, in the full enjoyment of his own free will, altogether unshackled by the control or dictates of his fellow-workmen; yet strange to say, this very right, which the discontented workman claims for himself to the fullest extent, he does, by a blind perversity and unaccountable selfishness, entirely refuse to his fellows who differ in opinion from himself. It is un-

necessary to say, that a course of proceeding so entirely unreasonable in itself, so injurious to society, so detrimental to the interest of trade, and so oppressive against the rights of the poor man, must be a gross and flagrant violation of the law, and must be put down, when the guilt is established, by a proper measure of punishment.' (a)

Right of Masters to Agree as to Rate of Wages.—The defendants were indicted for a conspiracy to impoverish partners in their trade and business as ironfounders, and for a conspiracy to prevent them from taking into their service journeymen and apprentices, &c.; Rolfe, B., told the jury that, 'Those who are to employ labour may meet and say, "We will not give more than such and such a rate, or we will stipulate for such and such number of hours' work; we will make, in short, regulations beneficial to ourselves as employers, and we agree that we will not take any workmen that require more." On the other hand, the workmen may meet and say, "We will not work for less than such and such sums, and if anybody thinks to employ us on low wages we will agree we will not work for them, and we agree to form a fund and support one another until we get them to come to proper terms." (b) That being the law, the market in that, as in all other things, will find its own level, and what the value of that labour is will be found out by there being either a redundancy of hands out of work, or a redundancy of capital seeking for labour; and that is the policy of the law. But if any illegal means be taken, the principle of the common law steps in, and says that if any persons conspire and combine together to effect this illegal object, an object that is of itself illegal, any such conspiracy to effect the illegal object is itself criminal.' And with reference to the expressions used by the defendants, Rolfe, B., said, 'A great deal may be said as to the precise words used; what I think you should consider is not so much the very words, as whether the fair result of them was to intimate to the person to whom they were addressed, that some bodily harm would happen to him if he persevered in his intention of working at the prosecutors', when they only said, "It will be the worse for you" and "You will regret it," and so on. There are no particular words necessary to be used if the fair inference is that which has been taken, that it was to prevent the other party from persevering in the intention of working for the prosecutors, and unquestionably that would bring home the charge of intimidation.' And with respect to persuasion to leave their service, Rolfe, B., said, 'It is doubtless lawful for people to agree among themselves not to work except upon certain terms; that being so, I am not aware of any illegality in their peaceably trying to persuade others to adopt the same view. It is lawful for half a dozen people to agree together and say, "We will not work unless the prosecutors raise our wages." So it is perfectly reasonable to say to a third man, "You had better do that too," if they do not use threats, to deter him from doing it; but it is not necessary to use actual threats, if the language used is such as tends to convey the impression of intimidation.' And the learned Baron afterwards added, 'My opinion is that, if there was no other object than to persuade people that it was their interest not to work except for certain wages, and not to work under certain regulations complied with in a peaceable way, it was not illegal.' (c)

(a) C. & M. 662, note. Parke, B. and Rolfe, B. were present. See *R. v. Bykerdyke*, 1 M. & Rob. 179.

(b) See *R. v. Shepherd*, 11 Cox, C. C. 325; *R. v. Hibbert*, 13 Cox, C. C. 82.

Cleasby, B. This is so now, see ss. 3 & 7 of 38 & 39 Vic. c. 86. *Ante*, pp. 546, 547.

(c) *R. v. Selsby*, 5 Cox, C. C. 495, note. Sp. As. 1847. See sec. 7, *ante*, p. 547.

Workmen Compelling Others to Quit Employment. — On an indictment for a combination by workmen contrary to the 6 Geo. 4, c. 129, it appeared that the defendants were members of a society called the Philanthropic Society of Coopers. The society had an acting member in every cooper's yard. C. Evans, a member of the society, was working in Mr. Turner's yard; but, with his permission, he did four days' work at the steam mills of other masters, where steam machinery was employed for making casks. When this came to the knowledge of the society, they inflicted a fine of £10, payable by instalments, on Evans for working in a yard where steam machinery was employed. Evans refused to pay, and the other men in Mr. Turner's yard then left their work, and refused to return whilst Evans was employed. Evans was, in consequence, thrown out of work. Each man who left Turner's yard on account of Evans was paid 9s. for his loss of time by the committee. The fine was imposed in accordance with the rules of the society. Lord Campbell, C. J., was of opinion that the Philanthropic Society was, according to its rules, a lawful institution; but it could not be permitted that, under the guise of its laudable objects, the members should enter into a combination to injure others. By law every man's labour was his own, and he might make what bargain he liked for his own employment; but the men must not associate themselves to do that which might prejudice another man. The men may take care not to enter into engagements of which they do not approve; but they must not prevent another from doing so. It was clear the defendants unlawfully imposed a fine on Evans, and proceeded by unlawful means to induce him to pay that fine. (d)

Molesting and Obstructing Workmen and Employers. — The first count stated that R. P. and G. H. P. carried on trade as manufacturers of japanned and tin wares, and that divers persons were workmen, and hired and employed by and worked as workmen for the said R. P. and G. H. P. in their said trade, and that the prisoners unlawfully conspired, &c., by unlawfully molesting the workmen so hired and employed by and working for the said R. P. and G. H. P. in their said trade, to force and endeavour to force the said workmen so hired and employed by and working for the said R. P. and G. H. P., in their said trade, to depart from their said hiring, employment and work. The second count was like the first, but stated the means to be by unlawfully using threats to the said workmen. The third was like the preceding, but stated the means to be by unlawfully intimidating the said workmen. The fourth, fifth, and sixth were similarly framed for conspiring to force individual workmen to depart from their hiring by the means stated in the first, second, and third counts respectively. The seventh count, like the first, stated that divers persons were workmen, and were hired and employed by and worked for R. P. and G. H. P. in their said trade, and that the prisoners unlawfully conspired, &c., by unlawfully molesting the said R. P. and G. H. P., to force and endeavour to force the said workmen so hired, &c., to depart from their said hiring, &c. The eighth count was like the seventh, but stated the means to be by unlawfully obstructing the said R. P. and G. H. P., so carrying on their said trade, and the said workmen so hired, &c., by and working for the said R. P. and G. H. P. in their said trade. The ninth count stated that R. P. and G. H. P. carried on trade, &c., and that the prisoners unlawfully conspired, &c., by molesting the said R. P. and G. H. P., to force and endeavour to force them to make an alteration in the mode of carrying on their said trade. The tenth count stated that workmen were hired, &c.,

by R. P. and G. H. P., as in the former counts, and that the prisoners unlawfully conspired by obstructing the said R. P. and G. H. P., and by inducing and persuading the said workmen in the hiring and employment of the said R. P. and G. H. P. to leave their hiring, employment, and work, to force and endeavour to force the said R. P. and G. H. P. to make an alteration in the mode of carrying on their said trade. The eleventh count stated that R. P. and G. H. P. carried on trade, &c., and that divers persons were being hired and employed as workmen for the said R. P. and G. H. P. in their said trade; and that the prisoners unlawfully conspired by molesting and obstructing such workmen as aforesaid as might be willing to be hired and employed by the said R. P. and G. H. P. in their said trade, and who were not then hired and employed by the said R. P. and G. H. P., or by any other person, to prevent and endeavour to prevent the said workmen so willing to be employed, &c., from hiring themselves to, and from accepting work and employment from the said R. P. and G. H. P. in their said trade. The twelfth count was like the eleventh, but stated the means to be by unlawfully using threats and intimidation to such workmen who might be willing, &c. The thirteenth (e) count stated that R. P. and G. H. P. carried on trade, &c., and that divers persons, being artificers, had contracted with the said R. P. and G. H. P. to serve them as artificers in their said trade for certain times and periods, &c., and had entered into the service of the said R. P. and G. H. P. as such manufacturers. And that the prisoners unlawfully conspired, &c., by divers subtle means and devices, to induce and persuade such artificers so having contracted, &c., and so having entered into the service, &c., unlawfully to absent themselves from the said service of the said R. P. and G. H. P., without the consent of either of them, before the respective terms of the same contracts were completed. The fourteenth count stated that W. H., being an artificer, had contracted, &c., for a period specified, and had entered into the service, and that the prisoners conspired, &c., by divers subtle means and devices, and illegal acts and practices, and by intoxicating the said W. H., to induce and persuade the said W. H., so having contracted, &c., and so having entered into the said service, &c., unlawfully to absent himself from the service of the said R. P. and G. H. P., without the consent of either of them before the term of the said contract was completed. The fifteenth count was like the fourteenth, but related to one T. G. The eighteenth count stated that the prisoners, intending to injure and oppress the said R. P. and G. H. P. in their trade as manufacturers, &c., conspired, &c., by divers subtle means and devices, and by intoxicating and thereby rendering senseless the workmen of the said R. P. and G. H. P. in their trade, to convey to a distance and carry away the said workmen, and thereby to prevent the said workmen from continuing to work for the said R. P. and G. H. P. in their said trade. The twentieth count stated that the prisoners conspired by divers subtle means and devices, and by illegal acts and practices, and by molesting and intoxicating the workmen in the employment of the said R. P. and G. H. P., and by inducing the workmen to depart from the said employment and to break their contracts with the said R. P. and G. H. P., to force and compel the said R. P. and G. H. P. to alter, and thereby increase, the amount of wages which the said R. P. and G. H. P. then were in the habit of paying to the workmen in their employment. Each count concluded 'to the great damage of the said R. P. and G. H. P.,' &c.

(e) This and the two following counts were framed with reference to the 4 Geo. 4, c. 34, s. 3, which related to workmen who

unlawfully absent themselves from their service before the end of the term for which they have been engaged.

In arrest of judgment it was urged that the first ten counts were too vague and the words 'molest,' 'threats,' 'intimidating,' and 'obstructing,' were objected to as not necessarily importing anything unlawful. To the eleventh and twelfth counts it was further objected that they ought to have alleged that the prisoners knew of the intended hiring, and that the names of the workmen ought to have been stated. That to follow the words of a statute was only sufficient where the indictment was on the statute, and here the charge was at common law; and that the offences created by the 6 Geo. 4, c. 129, s. 3, depended entirely upon the means used, and if those were not properly described, there was no sufficient charge of conspiracy to violate the statute. To the thirteenth, fourteenth, and fifteenth counts it was objected that they ought to have stated what the contracts were, and that the absence was without lawful excuse. That conspiring merely to 'induce and persuade,' as alleged in the tenth count, was no offence, even if a contract appeared which made it unlawful not to serve. But the Court of Queen's Bench held that the counts were wholly unexceptionable. Lord Campbell, C. J., 'It is objected that some counts do not disclose the nature of the molestation or intimidation by which the conspiracy was to take effect; but this is quite unnecessary. The words of the legislature are used; the terms in question have a meaning stamped upon them by the 6 Geo. 4, c. 129, s. 3, and we must take it that they are used here in that sense. And they are not employed, as describing the substantive offence for which the indictment is preferred; that offence consists in the conspiracy, which is a misdemeanor at common law.' (f)

Combinations of Workmen and of Masters for Mutual Advantage.—In summing up this case to the jury, Erle, J., said, 'The law is clear that workmen have a right to combine for their own protection, and to obtain such wages as they choose to agree to demand. I say nothing at present as to the legality of other persons not workmen combining with them to assist in that purpose. As far as I know, there is no objection, in point of law, to it; and it is not necessary to go into that matter; but I consider the law to be clear so far only as while the purpose of the combination is to obtain a benefit for the parties who combine; a benefit which by law they can claim. I make that remark, because a combination for the purpose of injuring another is a combination of a different nature, directed personally against the party to be injured; and the law allowing them to combine for the purpose of obtaining a lawful benefit to themselves, gives no sanction to combinations, which have for their immediate purpose the hurt of another. The rights of workmen are con-

(f) *R. v. Rowlands*, 17 Q. B. 671. 2 Den. C. C. 364. Sum. Ass. 1851. The other objections were not noticed. The sixteenth count stated that the prisoners conspired unlawfully to intimidate, prejudice, and oppress R. P. and G. H. P. in their trade as manufacturers of japanned and tin wares, and to prevent the workmen of the said R. P. and G. H. P. from continuing to work for them in their said trade. The seventeenth count stated that the prisoners conspired, &c., by divers subtle means and devices, and wicked arts and practices, to injure and oppress the said R. P. and G. H. P. in their trade of manufacturers of tin and japanned wares, and to induce the workmen of the said R. P. and G. H. P. to depart from their hiring, employment, and work with the said R. P. and G. H. P. before the period of their

agreement with them was completed. The nineteenth count stated that the prisoners conspired, &c., unlawfully to intimidate, prejudice, and oppress R. P. and G. H. P. in their trade of manufacturers of japanned and tin wares, and to entice and seduce away the workmen of the said R. P. and G. H. P. from their employment, and thereby to injure and oppress the said R. P. and G. H. P. in their said trade; and Lord Campbell, C. J., said, 'We all agree in thinking that the sixteenth, seventeenth, and nineteenth counts are open to objection, as being too vague. We give no final opinion; but on these counts there will be a rule *nisi* to arrest the judgment, unless a *nolle prosequi* be entered;' which the counsel for the crown consented to enter.

ceded ; but the exercise of free-will and freedom of action within the limits of the law is also secured equally to the masters. The intention of the law is at present to allow either of them to follow the dictates of their own will with respect to their own actions and their own property ; and either, I believe, has a right to study to promote his own advantage or to combine with others to promote their mutual advantage.' Erle, J., then said that in this case there had been a combination to force the prosecutors to agree to a uniform book of prices ; and, after adverting to the different counts, added, 'If you should be of opinion that a combination existed for the purpose of obstructing the prosecutors in carrying on their business, and forcing them to consent to this book of prices, and, in pursuance of that concert, they persuaded the free men, and gave money to the free men, to leave the employ of the prosecutors, the purpose being to obstruct them in their manufacture, and to injure them in their business, and so to force their consent, with no other result to the parties combining than gratifying ill-will, I am of opinion that that would also be a violation of the law, and would warrant a conviction on the counts directed against that form of offence.' It was contended that this language led the jury to suppose that, although the combination were for a legitimate object, yet, if the means to be used would have the effect of obstructing the prosecutors in carrying on their business, it was an indictable conspiracy ; whereas, if the object of the workmen was to enforce their own rights, they were justified in doing so, though the effect were an obstruction of the prosecutors' business. But Erle, J., said that his words had no such meaning, and the Court of Queen's Bench saw no objection to the summing up. (g)

Combinations to Raise Rate of Wages. — And on an indictment containing the same counts as the preceding case at the same assizes, Erle, J., told the jury 'that with respect to the law relating to the combinations of workmen, nothing can be more clearly established in point of law than that workmen are at liberty, while they are perfectly free from engagement, and have the option of entering into employ or not; nothing can be more clear than that they have a right to agree among themselves to say, "We will not go into any employ unless we can get a certain rate of wages." But I think it would be most dangerous if that proposition were carried at all wider than the terms in which I put it; that is to say, where workmen are perfectly free from engagement, having the option whether they will hire themselves or not, each man for himself may say, "I will go into no employ unless I can get a certain rate of wages," and all of them, if they choose, may say, "We will agree with one another that in our trade, as able-bodied workmen, we will not take employ unless the employers agree to give a certain rate of wages." But I think it would be most dangerous indeed if that rule of law, so in favour of workmen protecting their own interests, were at all construed to extend to that which is charged in this indictment; that is to say, to suppose that workmen, who think that a certain rate of wages ought to be obtained, have a right to combine together to induce men, already in the employ of other masters (to leave their service), for the purpose of compelling those masters to raise their wages.' . . . 'I take it for granted that if a manufacturer has got a manufactory, and his capital embarked in it for the purpose of producing articles in that manufactory, if persons conspire together to take away all his workmen, that would necessarily be an obstruction to him; that would necessarily be a molesting of him in his manufactory,' and that would certainly be a conspiracy for an unlawful purpose. (h) 'The workmen

(g) Ibid. p. 686, note (b). The summing up is given at length in 5 Cox, C. C. 460, *et seq.*

(h) R. v. Duffield, 5 Cox, C. C. 404.

have a right to agree that none of those who make the agreement will go into employ unless they are to receive a certain rate of wages; but with respect to their fellow workmen, they have no right at all to agree to molest or intimidate or annoy other workmen in the same line of business, who refuse to enter into the agreement, and who choose to go and work for the employers at a lower rate of wages than that which the parties agree to rely on.' 'Let those without engagements agree to any terms they please, but they have no right to interfere with other workmen, who do not come into the agreement, and who are, of course, at liberty to go to any employers on any terms they choose.' (i)

Threats.—The prosecutor was a builder, and employed a large number of men. In 1859 there had been a strike of workmen in the building trade, and the prosecutor determined not to employ any men who declined to work under a certain declaration. In May, 1860, the prosecutor had some men in his employ who were working under this declaration, and the defendant and two others brought a paper signed by himself and about thirty other workmen, which informed the prosecutor that 'unless the men, who are working under the declaration in his shop, are discharged, and we have a definite answer by dinner-time to that effect, we cease work immediately.' The defendant, in reply to questions put by the prosecutor, said they had no fault to find with him, his foremen or clerks, or with the wages the defendant received; but, being asked what he wanted, he said, 'You must discharge those two men who are working under the declaration, and if you do not we will leave work.' The prosecutor refused to be dictated to, and the defendant and all the men who had signed the paper left his employment; and it was held that the defendant was rightly convicted, under the 6 Geo. 4, c. 129, s. 3, of unlawfully by threats endeavouring to force the prosecutor to limit the description of his workmen. (j)

So where one Longman was a member of the United Boiler Makers and Iron Shipbuilders' Society, and in the employ of Messrs. Kruger; and they had ordered one Norfolk, who was not a club-man, to work on boilers by bending angle iron, and he did so. Longman attended a meeting of the club, summoned 'to stop an encroachment,' and found the

(i) Per Erle, J., *ibid.* See *Hilton v. Eckersley*, 6 E. & B. 47, where there was much discussion as to rights of masters and workmen to combine to protect their interests; and Lord Campbell, C. J., after citing the *dictum* of Grose, J., in *R. v. Mawbey*, 6 T. R. 636, there said, 'I cannot bring myself to believe, without authority much more cogent, that if two workmen, who sincerely believe their wages to be inadequate, should meet and agree that they would not work unless their wages were raised, without designing or contemplating violence, or any illegal means for gaining their object, they would be guilty of a misdemeanor.' See *Hornby v. Close*, 36 L. J. M. C. 43; *Farrar v. Close*, 38 L. J. M. C. 132.

(j) *Walshy v. Anley*, 3 Law T. 666, A. D. 1861. Cockburn, C. J., 'Every workman in the service of an employer is entitled to the full exercise of his discretion as to whether he will continue in that employment, so long as he is not bound by any contract, and to give his employer the alternative of either losing his services, or discharging obnoxious persons with whom he might not choose to work; and more than that, several men, who might consider other

workmen as obnoxious, have a perfect right to put the same alternative to their employer. But if the men go further than that, and seek to coerce the master by the threat of what is likely to operate to his injury, that comes within the meaning of the Act. In the present case, it was not one man who went to the employer, but several, who adopted the same course; not with the view of giving him an opportunity of exercising his discretion, but, by threatening to leave his employ, to compel and coerce him to discharge the obnoxious persons.' Hill, J., 'The word "threat" in the Act must be construed with those which precede and follow. It may be a threat to do an illegal act; and the question is, whether the act threatened to be done is an illegal act. A man has a perfect right to go to an employer, and say all that was said in this case, or several might do it; but if they acted in combination, not honestly and independently, but for the purpose of coercing the master, they are guilty of a conspiracy at common law. The combination, and the attempt to carry it out, were illegal.' See *R. v. Druitt*, 10 Cox, C. C. 592.

encroachment was 'Norfolk's working at the angle iron;' a resolution was passed that the men belonging to the society should not be allowed to work at Messrs. Kruger's if Norfolk was allowed to work at angle iron work. O'Neill, the chairman of the meeting, told Longman and others that, being club-men working at Kruger's yard, they would have to come out if Norfolk was not knocked off angle work. A deputation from the club waited on Messrs. Kruger, but produced no effect. Longman was then summoned to another meeting, at which a report of the deputation was made, and Longman was asked by O'Neill, from the chair, whether he intended to remain an honourable member, and leave the shop (Kruger's), or stay in the shop, and be despised by the club, and have his name sent round all over the country in the report, and be put to all sort of unpleasantness. Longman told O'Neill that if there were anything to undergo, he would bear the consequences. He had further time granted him for consideration, but ultimately refused to leave his employment. It was held, chiefly on the authority of the preceding case, that O'Neill was guilty of having unlawfully, by threats and intimidation, endeavoured to force Longman to depart from his service. What was said would operate most formidably on the mind of a person who felt that he would be deprived of all the benefit he would otherwise obtain from the club, and be dismissed from it, and put to all sorts of unpleasantness. It was difficult to conceive what sort of threat could be intended to come within the meaning of the Act short of personal violence, if this were not such a threat. (k)

The respondent, a master bricklayer, with his men, were employed on a building, and the appellant, Barrow, and another man (O'Hare), were about thirty yards off. They spoke to two of his men who immediately afterwards took away their tools, and ceased to work for respondent. This they were at liberty to do by their agreement. The respondent asked Barrow and O'Hare why the men had been stopped, and they told him, 'He must know it was on account of his apprentices.' At that time the respondent had four apprentices. Two or three weeks afterwards respondent wrote to Barrow, as the Secretary of the United Order of Bricklayers' Association, asking to be informed of the reason that his men were taken away from him, and stating that he had heard that it was because he employed too many apprentices, and that he should like to know what the society required him to do. In reply, a letter was sent in Barrow's handwriting in these terms: 'At a summoned meeting of the United Order of Bricklayers it was proposed, seconded, and carried unanimously, that no society bricklayer will work for Thomas Bowron until such time as he parts with some of his apprentices; namely, he will be allowed two; and when his oldest apprentice arrives to his last year of servitude he will be allowed a third, and until then there will be no society bricklayer work for him; and further, there will be so much expenses to pay as well before any society bricklayer will work for the said Thomas Bowron.' The appellant Wood acted as chairman and Barrow as secretary at the meeting at which the letter was written. Shortly after the meeting a demand of 18*l.* was made by Wood who stated that that sum must be paid before they would allow any men to work for the respondent. Held, that the above facts were not sufficient to sustain the conviction of the appellant under 6 Geo. 4, c. 129, s. 3 (now repealed), for unlawfully, by using certain threats, forcing, or endeavouring to force, the respondent to limit the number of his apprentices. (l)

(k) O'Neill v. Longman, 9 Cox, C. C. 360, A. D. 1863. 4 B. & S. 376. O'Neill v. Kruger, 4 B. & S. 389.

(l) Wood v. Bowron, 10 Cox, C. C. 344, at per Lush, J., 'I am also of the same opinion, that there is no evidence to sustain

By sect. 3 of the 6 Geo. 4. c. 129 (now repealed,) it is enacted that if any person shall, by threats or intimidation, force, or endeavour to force, any manufacturer, or person carrying on any trade or business, to limit the number of his apprentices, or the number or description of his journeymen, workmen, or servants, he shall, being convicted thereof, be imprisoned, &c.

The appellant, secretary of a lodge of the General Union of Carpenters and Joiners, delivered to the respondent, a builder, the following notice:—

‘Mr. WILLIAM KITCH,

‘Sir, — I am requested by the committee of Carpenters and Joiners to give the men in your employ notice to come out on strike against James Jordan, unless he become a member of the above society, not being any way disrespectful to you or him, but being compelled by the Union and laws. This notice will be carried out after the 27th inst., unless settled in accordance with the Society’s laws. I remain, yours most respectfully, THOMAS SKINNER, Secretary.’

Held, that the appellant had thereby brought himself within the operation of the 3rd section as above mentioned. (*m*)

the conviction. After the decisions that have been given upon this statute, it is too late to say that the word “threat” is limited to the declaration of an intention to do acts which have an intimate connection with injury or personal violence to another. The cases that have been decided show that the word must have a wider sense than has been put upon it, namely, a threat by act or words for the purpose of doing some injury to another person; that would come within the meaning of a threat within the Act of Parliament. I apprehend that it is very essential to a “threat,” that it should be made for the purpose of intimidating the person to whom it is addressed. Now, here an agreement was come to not to work for the master until he reduced the number of his apprentices.

Whatever its quality might be at common law, certainly it is no offence against the statute; nevertheless, it is not so used as to constitute a threat. The question, in my mind, is whether it was used for a purpose which could be construed into a threat within the meaning of the statute? When I find the resolution passed was not communicated to the master, except in answer to his inquiry, by way of explanation why these persons had left his employment, and then communicated simply for the purpose of giving that information, it seems to me that it wants the essential element of a threat. Therefore, I am of opinion that the appellants were not rightly convicted.’

(*m*) *Skinner v. Kitch*, 10 Cox, C. C. 493.



ADDENDA

TO

THE FIRST VOLUME.

SOLITARY CONFINEMENT. — The punishment of solitary confinement having fallen into disuetude, the sections relating to it (7 & 8 Geo. 4, c. 28, s. 9, and 1 Vict. c. 90, *see* p. 66; 24 & 25 Vict. c. 96, s. 119, c. 97, s. 75, c. 98, s. 53, c. 99, s. 40, and c. 100, s. 70, *see* p. 83; and 1 Vict. c. 91, s. 2, *see* p. 258) have been repealed by the Statute Law Revision Act, 1893, 56 & 57 Vict. c. 54. The power to give it as an additional punishment contained in many sections of the Consolidation Acts has also been repealed by the same statute.

The Penal Servitude Act, 1891 (*see* p. 79), having provided that in all cases where a sentence of penal servitude may be awarded, a period of not less than three years and not more than five years, or any longer period fixed by the special enactment, may be given, or, in lieu thereof, imprisonment for not more than two years, with or without hard labour; the provisions to this effect in the Coining Act, 24 & 25 Vict. c. 99, and the other Consolidation Acts, have been repealed, as also the words, ‘at the discretion of the Court’ in several sections, by the Statute Law Revision Acts, 1892 and 1893.

P. 18, note *a*. — The 56 & 57 Vict. c. 23, has been repealed and substantially re-enacted by 57 & 58 Vict. c. 21.

Pp. 18, 19. — The 17 & 18 Vict. c. 104, and the 18 & 19 Vict. c. 91, and the 30 & 31 Vict. c. 124, are repealed by the Merchant Shipping Consolidation Act, 1894 (57 & 58 Vict. c. 60), and substantially re-enacted by secs. 684–687. By sec. 689, power is given to a British consular officer to detain any master, seaman, or apprentice employed on any British ship, on complaint that any offence against property or person has been committed by him, at any place, ashore or afloat, out of Her Majesty’s dominions or on the high seas, and may send him in custody to the United Kingdom or to any British possession, in which there is a court capable of taking cognizance of his offence.

P. 154. — *R. v. Lord Mayor of London*, 16 Q. B. D. 772, not 18 Q. B. D. 772.

P. 206. — Where an accused person, summoned before justices in respect of an offence triable summarily, elects, under sec. 17 of the Summary Jurisdiction Act, 1879, to be tried by a jury, the subsequent procedure before justices is the same as that which is applicable to the case of indictable offences, and not that applicable to summary proceedings. The accused person may therefore be committed to take his trial in respect of any indictable offence disclosed by the depositions, and, in cases not falling within the Vexatious Indictments Act, or in which the operation of that Act is limited by 30 & 31 Vict. c. 35, s. 1, counts may be added to the indictment in respect of any indictable offence disclosed by the depositions, although the accused was not summoned before the justices in respect of such offence. *R. v. Brown*, (1895), 1 Q. B. 119.

P. 315. — All false statements wilfully and corruptly made by a witness as to matters which affect his credit are material, and he is liable to be convicted of perjury in respect of them. So where a person charged with selling beer without a licence, falsely swore that, when previously convicted of a similar offence, he had not authorised his solicitor to plead guilty, it was held that such a statement was material, as it affected his character as a witness, and that he was rightly convicted of perjury. *R. v. Baker*, (1895), 1 Q. B. 797. The case was not argued, and is therefore not entirely satisfactory. It would seem, however, that evidence was called on the second charge of selling beer without a licence, which shewed that the defendant *had* authorised his solicitor to plead guilty on the previous occasion, and therefore the defendant's denial that he had done so was material and relevant to the issue as affecting the defendant's credit as a witness. It is difficult to see otherwise how such a statement could be material, as the previous conviction itself could only affect the punishment, and not the second charge.

P. 324. — By the Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41), sec. 15, power is given to receive the unsworn evidence of a child of tender years in any proceeding for certain offences therein named (see Vol. III.), and by subsec. (b) 'Any child whose evidence is received as aforesaid, and who shall wilfully give false evidence, shall be liable to be indicted and tried for such offence, and on conviction thereof may be adjudged such punishment as is provided for by sec. 11 of the Summary Jurisdiction Act, 1879.'

The effect of this section is to give the Court power to order the child, if convicted, either to pay a fine not exceeding £10, or to be imprisoned, with or without hard labour, for not more than three months, or if the child is a boy, and in the opinion of the Court under fourteen years of age, to be whipped with not more than twelve strokes of a birch rod.

P. 444. — The 46 & 47 Vict. c. 41, is repealed by 57 & 58 Vict. c. 60.

P. 455. — By the Corrupt and Illegal Practices Prevention Act, 1895 (58 & 59 Vict. c. 40), sec. 1: 'Any person who, or the directors of any body or association corporate which, before or during any parliamentary election shall, for the purpose of affecting the return of a candidate at such election, make or publish any false statement of fact in relation to the personal character or conduct of such candidate, shall be guilty of an illegal practice within the meaning of the provisions of the Corrupt and Illegal Practices Prevention Act, 1883, and shall be subject to all the penalties for the consequences of committing an illegal practice in the said Act mentioned, and the said Act shall be taken to be amended as if the illegal practice defined by this Act had been contained therein.

Sec. 2. 'No person shall be deemed to be guilty of such illegal practice if he can shew that he had reasonable grounds for believing, and did believe, the statement made by him to be true.

'Any person charged with an offence under this Act, and the husband or wife of such person, as the case may be, shall be competent to give evidence in answer to such charge.'

By the principal Act, 46 & 47 Vict. c. 51, s. 10, an illegal practice is punishable on summary conviction, but an appeal lies, by sec. 54, to Quarter Sessions.

P. 648, note to sec. 5 of 6 & 7 Vict. c. 96. — An indictment charged the defendant with 'unlawfully' publishing a defamatory libel, but omitted to aver that it was published 'maliciously'; the Court (Lord Russell, C. J., Pollock, B., Wills, Charles, and Lawrance, J.J.) held the indictment to be good on the ground that the section merely fixed the punishment to be awarded to an existing common-law offence, and that as in an indictment for the common-law offence an *averment* of malice was unnecessary, the section did not make it so. *R. v. Munslow*, (1895), 1 Q. B. 758; see *R. v. Harvey*, 2 B. & C. 257, *ante*, 643; *Bromage v. Prosser*, 4 B. & C. 247; Lord Russell, C. J., and Charles, J., also thought that if the absence of the word was a defect, it was cured by the verdict.

P. 746. — In order to convict on an indictment under 16 & 17 Vict. c. 119, s. 1, it is unnecessary to prove that persons have physically resorted to the premises; and the offence may be proved by shewing that the house was opened and advertised as a betting house, although no proof is given that any person actually resorted to it. But when the only evidence offered is that persons did resort to the house for the purpose of betting, it is insufficient to shew that letters and telegrams were sent there by persons wishing to bet; but an actual physical resorting must be proved. *R. v. Brown*, (1895), 1 Q. B. 119.

P. 746, add to note (s). — The section does not apply where members of a *bond fide* club make bets with each other in the club. *Downes v. Johnson*, (1895), 2 Q. B. 203.

P. 746, add to note (t). — If a man uses the bar of a public house for the purpose of meeting with persons with whom he intends to bet, he is guilty of an offence under the section, although the actual money is always handed over to him outside the house. *R. v. Worton*, (1895), 1 Q. B. 227.

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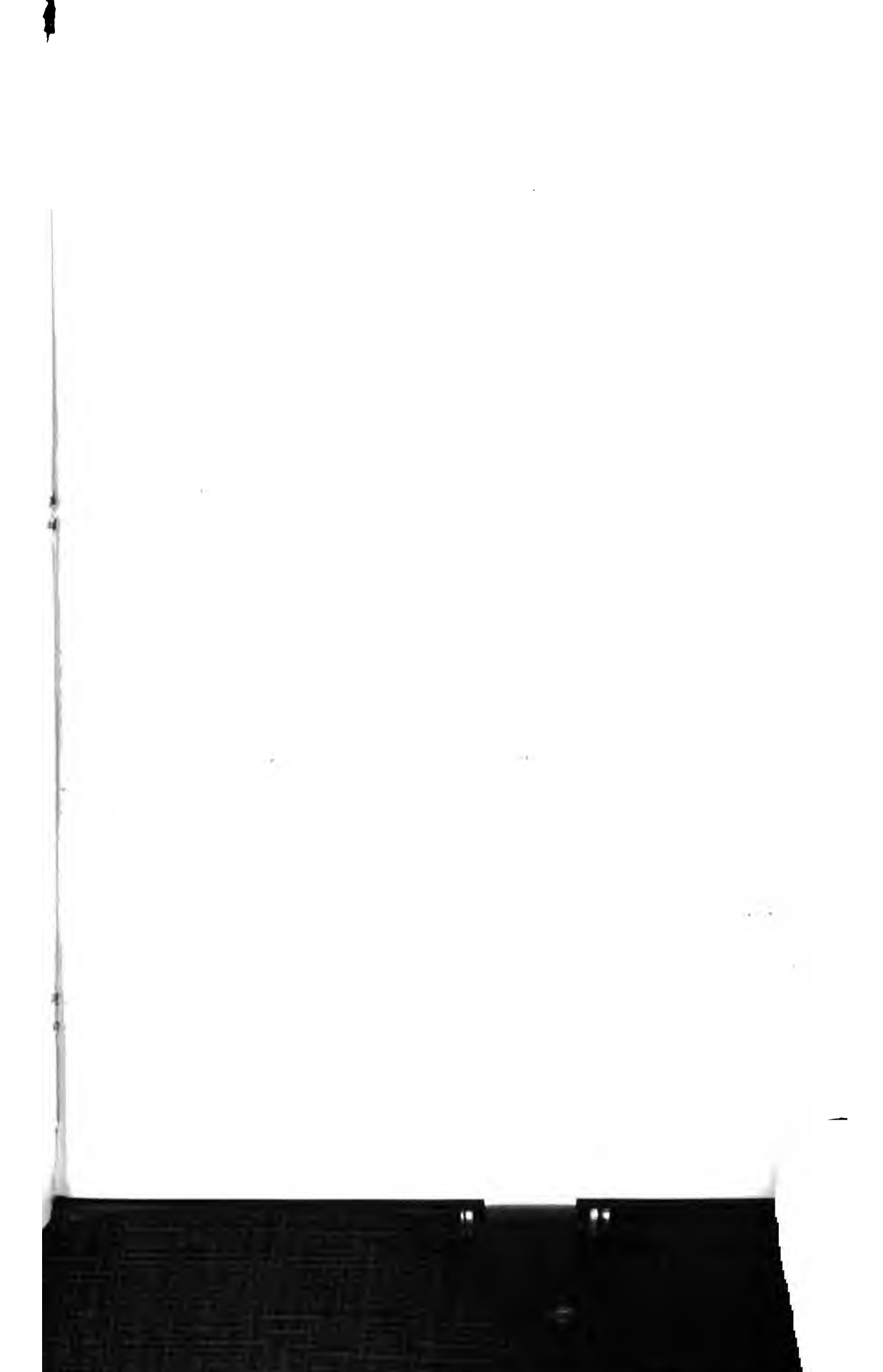
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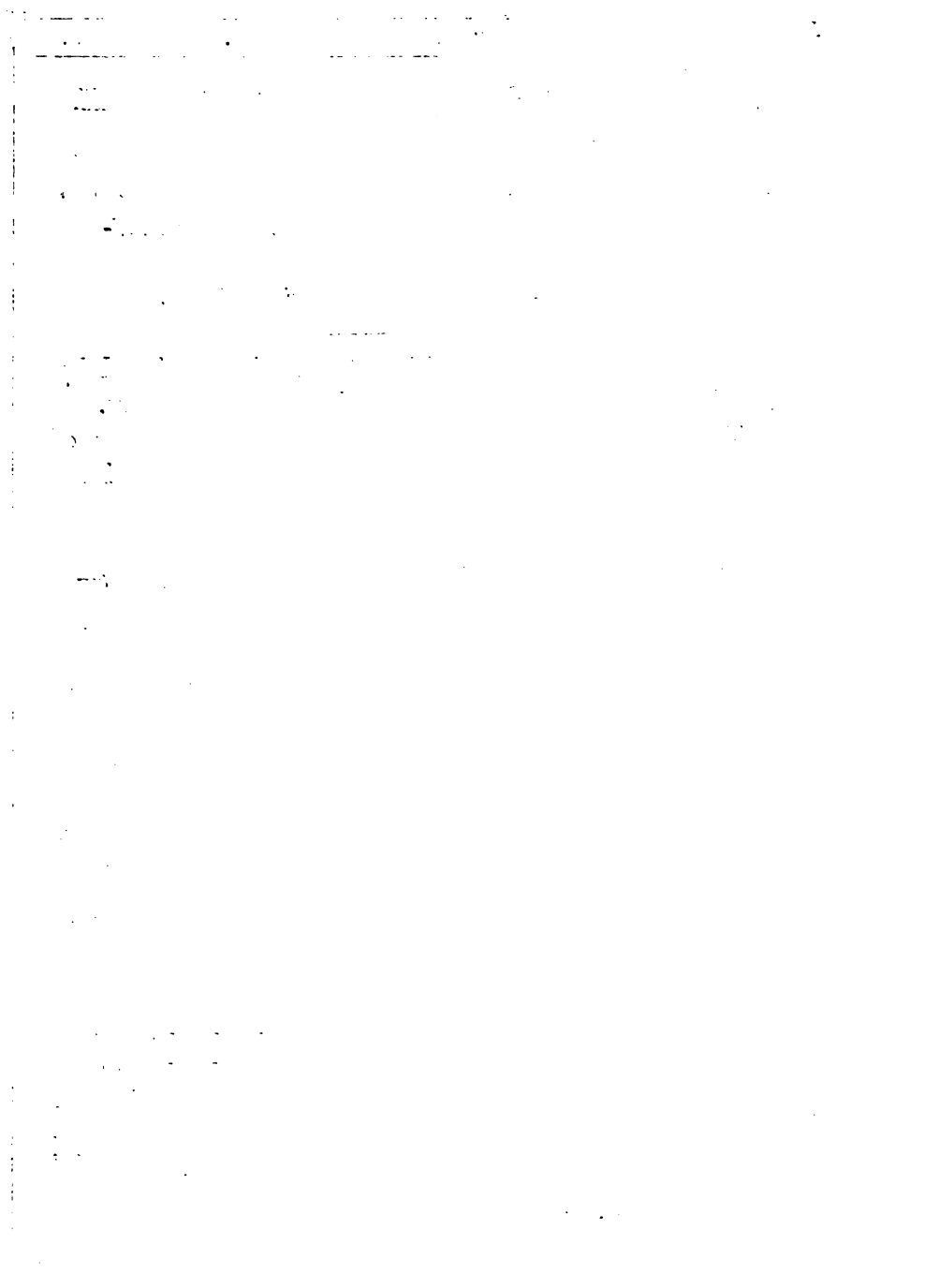
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